IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Philadelphia Public School Notebook	:	
v.	:	No. 640 C.D. 2011
School District of Philadelphia, Appellant	:	

PER CURIAM

O R D E R

NOW, August 8, 2012, it is ordered that the above-captioned Memorandum Opinion, filed April 26, 2012, shall be designated OPINION and shall be REPORTED.

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Philadelphia Public School Notebook	:	
v.	:	No. 640 C.D. 2011
School District of Philadelphia,	:	Argued: February 14, 2012
Appellant	:	

BEFORE: HONORABLE BONNIE BRIGANCE LEADBETTER, Judge
HONORABLE RENÉE COHN JUBELIRER, Judge
HONORABLE ROBERT SIMPSON, Judge

OPINION BY
JUDGE COHN JUBELIRER **FILED: April 26, 2012**

The School District of Philadelphia (District) appeals from the March 2, 2011, Order of the Court of Common Pleas of Philadelphia County (trial court) which reversed the Final Determination of the Office of Open Records (OOR) dismissing as moot the Philadelphia Public School Notebook's (Requester) appeal of District's denial of its request, pursuant to the Right to Know Law[1] (RTKL), for

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 The current RTKL repealed the former Right-to-Know Law, Act of June 21, 1957, P.L. 390, as amended, formerly 65 P.S. §§ 66.1-66.4.

the full texts of resolutions presented during a public meeting of the School Reform Commission (SRC) on September 23, 2009 (the "Resolutions"). The trial court held that Requester's appeal from District's denial was not moot and further held that the Resolutions were not exempt as either "drafts" pursuant to Section 708(b)(9) of the RTKL, 65 P.S. § 67.708(b)(9), or as "a record which reflects . . . [t]he internal, predecisional deliberations between agency members" pursuant to Section 708(b)(10)(i)(A) of the RTKL, 65 P.S. §§ 67.708(b)(10)(i)(A). District argues that the trial court's Order should be reversed because: (1) Requester's appeal was moot; (2) the Resolutions were exempt as "drafts" pursuant to Section 708(b)(9); and/or (3) were exempt as records that reflect "internal, predecisional deliberations" pursuant to Section 708(b)(10)(i)(A). We affirm.

The facts of this case are not in dispute. Requester is a non-profit news service that reports on District. In that capacity, Requester attends District's regular public meetings, including those of the SRC. Each month, the SRC holds: (1) a "planning" meeting at which no formal action is taken, but where commissioners review and deliberate on resolutions submitted by District staff in anticipation of taking formal action at a later date; and (2) a "voting" meeting, typically held one to two weeks after the "planning" meeting, at which formal action is taken by the SRC and resolutions are voted upon. (Trial Ct. Op. at 1-2.)

On September 23, 2009, Requester attended an SRC "planning" meeting where the SRC was discussing and reviewing full texts of the Resolutions. However, as a member of the public in attendance at the meeting, Requester

received only summaries of the Resolutions, as opposed to the full texts. (Trial Ct. Op. at 2.)

Requester filed a RTKL request with District on October 7, 2009, seeking "[c]opies of the following full resolutions that were presented to a quorum of the [SRC] at the September 23, 2009 SRC Commission meeting: A-16, A-17, A-18, A-19, B-14, [and] B-15." (Request, October 7, 2009, R.R. at 191a.) District responded that the request required legal review and an answer would not be forthcoming until on or before November 9, 2009. District subsequently reinstated the Resolutions for voting at the SRC's October 21, 2009 "voting" meeting, when all six were duly passed. (Trial Ct. Op. at 2.)

On November 4, 2009, District denied Requester's request pursuant to Sections 708(b)(9) and 708(b)(10)(i)(A), stating that the full texts of the Resolutions were exempt from disclosure as "internal, predecisional deliberations" and as "draft[s]." (First Response, November 4, 2009, at 1-2, R.R. at 173a-74a.) Nevertheless, in its denial District provided Requester with the full texts of the Resolutions, noting that the Resolutions had been passed at the SRC's October 21, 2009 meeting. (First Response, November 4, 2009, at 2, R.R. at 173a-74a.) On November 25, 2009, Requester appealed to the OOR. (Appeal Letter from Requester to OOR, November 25, 2009, R.R. at 157a-58a.)

On January 20, 2010, the OOR dismissed Requester's appeal as moot because Requester had received the full texts of the Resolutions sought. (Final Determination at 3, R.R. at 97a.) On February 22, 2010, Requester appealed the OOR's determination to the trial court. After reviewing briefs and hearing oral

argument, the trial court reversed the OOR, concluding that the request was not moot, and the Resolutions were neither exempt as "drafts" under Section 708(b)(9), nor as records that reflect "internal, pre-decisional deliberations" under Section 708(b)(10)(i)(A) of the RTKL. (Trial Court Op. at 1-9.) District now appeals to this Court.[2] The Pennsylvania Newspaper Association (PNA), as amicus curiae, has also filed a brief with this Court in support of Requester's position.

On appeal, District raises three issues: (1) whether Requester's appeal was moot; (2) whether the Resolutions were exempt from disclosure as "drafts" pursuant to Section 708(b)(9) of the RTKL; and (3) whether the Resolutions were exempt from disclosure as records that reflect "internal, predecisional deliberations" pursuant to Section 708(b)(10)(i)(A) of the RTKL.

In support of the first issue, District argues that the RTKL request was moot because there was no longer an actual controversy between the parties once Requester received the Resolutions. District argues that none of the exceptions to the mootness doctrine apply and that the trial court incorrectly focused upon Requester's motivation to obtain the requested documents within a short time frame (i.e., before the voting meeting), rather than the response times permitted by Section 901 of the RTKL, 65 P.S. § 67.901.

[2] Our scope of review from a decision of a trial court in a case under the RTKL is "limited to determining whether the 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." Piasecki v. Department of Transportation, Bureau of Driver Licensing, 6 A.3d 1067, 1070 n.7 (Pa. Cmwlth. 2010).

District further argues that an order of this Court would be merely advisory, citing City of Philadelphia v. Southeastern Pennsylvania Transportation Authority (SEPTA), 937 A.2d 1176, 1177 (Pa. Cmwlth. 2007) (noting that the underlying operational and procedural facts would be different in any future scenario and, therefore, the same event will not recur). District also suggests that the RTKL provides a mechanism for seeking advisory opinions under Section 1310(a)(2) if that is desired. 65 P.S. § 67.1310(a)(2). District further argues that Requester has not presented issues that are so important to the public interest that this Court would be justified in ruling on a moot issue, contending that the public interest exception "is generally confined to a narrow category of cases." Bottomer v. Progressive Casualty Insurance Co., 580 Pa. 114, 120, 859 A.2d 1282, 1285 (2004).

Our Supreme Court has explained that a case is moot if there is no actual case or controversy in existence at all stages of the controversy. Pap's A.M. v. City of Erie, 571 Pa. 375, 389, 812 A.2d 591, 599 (2002). In Mistich v. Pennsylvania Board of Probation and Parole, 863 A.2d 116, 119 (Pa. Cmwlth. 2004), this Court summarized the requirements for an actual case or controversy as follows:

> (1) a legal controversy that is real and not hypothetical, (2) a legal controversy that affects an individual in a concrete manner so as to provide the factual predicate for a reasoned adjudication, and (3) a legal controversy with sufficiently adverse parties so as to sharpen the issues for judicial resolution. A controversy must continue through all stages of judicial proceedings, trial and appellate, and the parties must continue to have a "personal stake in the outcome" of the lawsuit. Courts will not enter judgments or decrees to which no effect can be given.

Mootness problems arise in cases involving litigants who clearly had one or more justiciable matters at the outset of the litigation, but events or changes in the facts or the law occur which allegedly deprive the litigant of the necessary stake in the outcome after the suit is underway. Chruby v. Department of Corrections, 4 A.3d 764, 771 (Pa. Cmwlth. 2010). "Although we generally will not decide moot cases, exceptions are made when (1) the conduct complained of is capable of repetition yet evading review, or (2) involves questions important to the public interest, or (3) will cause one party to suffer some detriment without the Court's decision." Cytemp Specialty Steel Division, Cyclops Corp. v. Pennsylvania Public Utility Commission, 563 A.2d 593, 596 (Pa. Cmwlth. 1989).

Once District provided Requester with the Resolutions, the present case became technically moot; however, this does not end our inquiry if this case falls within any of the exceptions to the mootness doctrine. The first exception to mootness—that the conduct complained of is capable of repetition yet likely to evade judicial review—involves two elements: (1) that the duration of the challenged action is too short to be fully litigated prior to its cessation or expiration; and (2) that there is a reasonable expectation that the same complaining party will be subjected to the same action again. Commonwealth v. Buehl, 462 A.2d 1316, 1319 (Pa. Super. 1983). The first element of the exception is met in this case because of the manner in which District and the SRC conduct their meetings wherein full text resolutions are proposed and considered at a public "planning" meeting, but only summaries are provided to the public and the "voting" meeting follows within only one to two weeks. Thus, the time between the "planning" and "voting" meetings is so short that this issue would be

technically moot before it could be litigated. The second element of the mootness exception is also met because it is reasonable to expect that Requester, whose very purpose is to gather information about District and the SRC proceedings and has argued that he will in fact continue to request the full texts of planning meeting resolutions, will continue to do so.[3] We conclude that this is the type of issue that is capable of repetition yet would continue to evade judicial review; therefore, this matter falls within this exception to the mootness doctrine.[4] See Sierra Club v. Pennsylvania Public Utility Commission, 702 A.2d 1131, 1134 (Pa. Cmwlth. 1997).

We now turn to District's appeal on the merits. District first argues that the Resolutions are not "records" as that term is defined in Section 102 of the RTKL, 65 P.S. § 67.102, because the Resolutions do not actually "document a transaction or activity" of District. District contents that the texts were only staff-prepared "drafts" that remained subject to being changed or withdrawn, and were not

[3] District contends that there is no reasonable expectation that Requester will be subject to the same action again, arguing that it is highly unlikely that District will again withdraw proposed resolutions after considering them at a "planning" meeting. Thus, District argues, any new RTKL request would not necessarily present the same challenge or recurrence of the present issue because the "underlying operational and procedural facts" would necessarily be different, as in City of Philadelphia, 937 A.2d at 1181. However, unlike City of Philadelphia, wherein SEPTA adopted a different fare plan during the pendency of the litigation, here, the legal issue is not dependent upon any particular underlying facts, but will recur each time only summaries of resolutions are made available to the public at planning meetings and the full texts are voted upon at voting meetings one to two weeks later, which is the normal course of business of the SRC as determined by the trial court. (Trial Court Op. at 2.)

[4] Because we conclude that this case falls within the exception for a case that is capable of repetition yet will continue to evade judicial review, we neither reach whether this case falls within any other exception to mootness nor do we need to address District's remaining arguments with respect to the mootness issue.

necessarily to be placed on a future agenda for a "voting" meeting. District contends that a document produced by District staff does not become a "record" under the RTKL just because it was presented to the SRC. District contends that the Resolutions only *potentially* "document a transaction or activity of an agency" that would occur only *if* and when the District would act upon the Resolutions.

The RTKL provides that "[a] local agency shall provide *public records* in accordance with this act." Section 302(a) of the RTKL, 65 P.S. § 67.302(a) (emphasis added). Thus, we must first consider whether the Resolutions are "records" and if so, whether they are "public records" under the RTKL. "**Record**" is defined under the RTKL 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.

65 P.S. § 67.102. This Court has examined this definition, stating:

> This definition contains two parts. First, the information must "document a transaction or activity of the agency." Recently, this Court, in [Allegheny County Department of Administrative Services v. A] Second Chance[, Inc., 13 A.3d 1025 (Pa. Cmwlth. 2011)], interpreted "documents" to mean "proves, supports [or] evidences." Second Chance, 13 A.3d at 1034–35, [Office of the Governor v.] Bari, 20 A.3d [634,] 641 [(Pa. Cmwlth. 2011)]. Second, the information must be "created, received, or retained" in connection with the activity of the agency.

Barkeyville Borough v. Stearns, 35 A.3d 91, 95 (Pa. Cmwlth. 2012).

Under the first part of the definition, the Resolutions at issue here, "evidence" an "activity" of District– the activity is the discussion by the SRC of the Resolutions at the public meeting, and answering questions the public may raise about them. Under the second part of the definition, the Resolutions were "created" by District staff in preparation for the SRC's public "planning meeting" and, therefore, the Resolutions were "created" in connection with the SRC's planned activity to take place at a public meeting. As a result, the Resolutions meet the definition of "record" found in Section 102 of the RTKL since the Resolutions evidence the SRC's activity during the public planning meeting and were created in connection with that activity.

Having concluded that the Resolutions requested are "records" of the District, we now consider whether they are "public records" under the RTKL. Section 102 of the RTKL defines a "**public record**" as:

> A record, including a financial record, of a Commonwealth or local agency that: (1) is not exempt under [S]ection 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. Section 305(a) of the RTKL provides:

> (a) **General rule.—**A record in the possession of a Commonwealth agency or local agency shall be presumed to be a public record. The presumption shall not apply if: (1) the record is exempt under [S]ection 708; (2) the record is protected by a privilege; or (3) the record is exempt from disclosure under any other Federal or State law or regulation or judicial order or decree.

65 P.S. § 67.305(a). Thus, under the RTKL, a "record" in the possession of District, the local agency, is *presumed* to be a "public record" unless it is exempt under Section 708,[5] "from disclosure under any other Federal or State law or regulation or judicial order or decree" or protected by a privilege.[6] Id. Section 708(b)(9) provides the following exemption from disclosure under the RTKL:

> (9) The **draft** of a bill, **resolution**, regulation, statement of policy, management directive, ordinance or amendment thereto prepared by or for an agency. (Emphasis added.)

65 P.S. § 67.708(b)(9).

District argues that, pursuant to Section 708(b)(9) of the RTKL, the Resolutions were exempt from disclosure as "draft[s] of . . . resolution[s] . . . prepared by or for an agency." 65 P.S. § 67.708(b)(9). District points out that the

---

[5] Section 708 of the RTKL provides, in relevant part:

> **(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(a)(1).

[6] As this Court has explained, the RTKL is significantly different from the prior version (See Former Section 1 of the RTKL, formerly 66 P.S. § 66.1), that narrowly defined the term "public record" in that "[u]nder the current [l]aw. . . any record, including financial records of a Commonwealth or local agency, is a public record to the extent the record" is not exempt from disclosure under: the exceptions of Section 708 of the RTKL; Federal or State law, regulation, or judicial order or decree; any privilege. Bowling v. Office of Open Records, 990 A.2d 813, 823 (Pa. Cmwlth. 2010), *petition for allowance of appeal granted in part*, 609 Pa. 265, 15 A.3d 427 (2011).

RTKL does not define the term "draft" and points to the Merriam-Webster definition of "draft" as a "preliminary version" of a writing. (District's Br. at 20 (citing http://www.merriam-webster.com/dictionary/draft).). District notes that the nature of the Resolutions as "drafts" is underscored in this case by the fact that the staff not only could, but actually did, withdraw the Resolutions before the SRC voting meeting.

In reviewing whether the Resolutions were exempt as "drafts" within Section 708(b)(9) of the RTKL, we note the presumption "[t]hat the General Assembly does not intend a result that is absurd . . . or unreasonable." Section 1922 of the Statutory Construction Act of 1972, 1 Pa.C.S. § 1922. Here, *District* itself placed the Resolutions onto the SRC's meeting agenda for discussion and consideration at a *public* meeting at which the public was permitted to question the SRC commissioners about the Resolutions, but provided the public with only *summaries* of the Resolutions, not full texts. Under these circumstances, it would be an absurd and unreasonable result if the Resolutions remained exempt from disclosure under the guise of being preliminary "drafts." District's own actions, vis-à-vis the Resolutions, belie such a characterization. Once the District placed the Resolutions onto the agenda of the SRC's public meeting for anticipated public discussion and consideration, the Resolutions crossed the threshold from being "drafts" that were prepared *internally* by staff to a document that was under consideration at a public meeting in its current state, despite remaining subject to modification based upon the public discussions and review during that public meeting. In these circumstances, District's providing of summaries, as opposed to

the Resolutions, potentially obfuscated public awareness and understanding of what the SRC was actually discussing and considering at its public planning meeting. Moreover, District has neither presented any valid argument about why the Resolutions should be exempt in this context in which District unveiled them for open and public discussion at the SRC's public meeting, nor has it provided any meaningful explanation for why it provided the public in attendance with merely a summary as opposed to the Resolutions. We agree with the trial court's analysis:

> Most official documents go through some process of revision, and some documents- such as statutes- will always be susceptible of change or amendment. At some point, however, any draft of an official document crosses a threshold and is no longer intended for "further or additional writing," even though there is still some possibility that the document will still be changed or appended. Here, the threshold is the point at which a resolution is proposed to the SRC at a "planning" meeting. It is at this point that the District, who is the originator of the Resolutions, intends for the SRC to act on them. While the SRC may still alter the text of the Resolutions before they are voted upon, the District has, by proposing them, indicated that it is satisfied with the form of the [R]resolutions as drafted. Additionally, under the District's argument, all documents hypothetically susceptible to alteration or emendation would be categorically exempt under the RTKL. Many kinds of documents, including minutes of meetings or reports, can be changed or amended at any time. The Legislature clearly did not intend all these types of documents to be shielded from public view. For these reasons, the District's claim must fail. The Resolutions are not drafts under the RTKL.

(Trial Court Op. at 7) (citation omitted). The Resolutions at issue in this case were no longer "drafts" within Section 708(b)(9) of the RTKL once District presented them publicly for discussion among commissioners in a public venue where they were subject to questions from the public at the SRC's public "planning" meeting.

District's actions are not reconcilable with the definition of a "draft" exempt under the RTKL because District included the Resolutions on the SRC's public agenda for the *public* planning meeting at which *public* discussion, comment, and questioning was expected. To conclude otherwise, in this context, undermines the very reason for holding the public meeting.

We next address District's argument that if the Resolutions were not exempt as "drafts" within Section 708(b)(9) of the RTKL, then the exemption for records that reflect "internal, predecisional deliberations," pursuant to Section 708(b)(10)(i)(A) of the RTKL, is applicable.

Section 708(b)(10)(i)(A) of the RTKL exempts from disclosure by a local agency:

> (i) 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, including predecisional deliberations relating to a budget recommendation, legislative proposal, legislative amendment, contemplated or proposed policy or course of action or any research, memos or other documents used in the predecisional deliberations.

65 P.S. §67.708(10)(i)(A) (emphasis added). An exception to the Section 708(10)(i)(A) "internal, predecisional deliberation" exemption is provided in Section 708(b)(10)(ii):

> (ii) Subparagraph (i)(A) shall apply to agencies subject to 65 Pa.C.S. Ch. 7 (relating to open meetings) in a manner consistent with 65 Pa.C.S. Ch. 7. A record which is not otherwise exempt

> from access under this act and which is presented to a quorum for deliberation in accordance with 65 Pa.C.S. Ch. 7 shall be a public record.

65 P.S. §67.708(b)(10)(ii).

District concedes that the predecisional deliberation exception applies *only if* this Court determines that: (1) the Resolutions proposed constituted records that reflected predecisional deliberations; *and* (2) the Resolutions proposed were not presented to a quorum for deliberation in accordance with the Sunshine Act.[7] District points out that the OOR has concluded that policy recommendations that were not yet implemented were "predecisional deliberations" and, as such, the Resolutions should also be characterized as records reflecting predecisional deliberations that are exempt from disclosure. District also contends that the Resolutions were not presented to a quorum for deliberation in accordance with the Sunshine Act, but were provided to the SRC as part of the predecisional, deliberative process and that "deliberation" under the Sunshine Act, defined as "[t]he discussion of agency business held for the purpose of making a decision," would occur later, not at the planning meeting. Section 703 of the Sunshine Act, 65 Pa.C.S. § 703. District maintains that no formal action is taken at planning meetings where only predecisional deliberations occur and no votes are recorded; therefore, the Resolutions qualified as records reflecting predecisional deliberations that were not presented to a quorum for deliberation in accordance with the Sunshine Act and District argues that the trial court should be reversed.

[7] 65 Pa.C.S. §§ 701-716.

In this case, review of the record reveals that, even if the Resolutions reflected predecisional deliberations, they were no longer "*internal"* deliberations once they were presented to the SRC for public consideration and comment at its public planning meeting. District itself placed the Resolutions onto the public meeting agenda and thereby caused them no longer to be "internal" to the agency, but open for public discussion at the SRC's public planning meeting. See Kaplin v Lower Merion Township, 19 A.3d 1209, 1216 (Pa. Cmwlth. 2011) (Section 708(b)(10)(i) "provides that the exemption covers '[t]he *internal*, predecisional deliberations of an agency. . . .'" (emphasis added)), petition for allowance of appeal denied, ___ Pa. ___, 29 A.3d 798 (2011). The trial court is correct that "[t]he SRC's bifurcated meeting structure is not a totem by which it can ward off the influence of the RTKL."[8] (Trial Court Op. at 9.) Therefore, the Resolutions do not fall within the exemption for "internal, predecisional deliberations" under Section 708(b)(10)(i)(A) of the RTKL. As such, it is not relevant to this issue whether the Resolutions were presented to a quorum for deliberation in accordance with the Sunshine Act.

For the foregoing reasons, we conclude that the Resolutions were not exempt from disclosure under Sections 708(b)(9) and 708(b)(10)(i)(A) of the RTKL. The Order of the trial court is affirmed.

RENÉE COHN JUBELIRER, Judge

[8] The SRC can and does hold meetings that are only "informational" that may or may not be open to the public and are called "briefing sessions." (District Meetings Policy 006:2a, R.R. at 119a.)

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Philadelphia Public School Notebook	:	
v.	:	No. 640 C.D. 2011
School District of Philadelphia, Appellant	:	

O R D E R

NOW, April 26, 2012, the Order of the Court of Common Pleas of Philadelphia County in the above-captioned matter is hereby **AFFIRMED.**

RENÉE COHN JUBELIRER, Judge