

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Mark Heintzelman,	:	
Petitioner	:	
	:	
v.	:	No. 512 C.D. 2014
	:	Submitted: September 5, 2014
Pennsylvania Department of	:	
Community and Economic	:	
Development,	:	
Respondent	:	

BEFORE: HONORABLE RENÉE COHN JUBELIRER, Judge
HONORABLE ROBERT SIMPSON, Judge
HONORABLE JAMES GARDNER COLINS, Senior Judge

OPINION NOT REPORTED

**MEMORANDUM OPINION
BY JUDGE SIMPSON**

FILED: October 30, 2014

Mark Heintzelman (Requester) petitions for review from the Office of Open Records’ (OOR) final determination that partially denied his appeal from the Pennsylvania Department of Community and Economic Development’s (DCED) denial of his request under the Right-to-Know Law (RTKL).¹ Requester sought information about a grant DCED issued to Point Township (Township). DCED denied access, raising the predecisional deliberative exception in Section 708(b)(10) of the RTKL, 65 P.S. §67.708(b)(10), and the attorney-client privilege. Requester argues OOR erred in upholding DCED’s denial under the predecisional deliberative exception. Requester also contends the records are public under the “crime-fraud”

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

exception to the privilege.² He asks this Court to apply the crime-fraud exception to the RTKL exceptions. Lastly, Requester challenges OOR's denial of his hearing request as a violation of due process. Upon review, we affirm.

I. Background

Requester submitted a request for records related to a grant DCED issued to the Township for construction of low-cost housing units under the federal HOME program,³ and DCED's responsibility to repay the grant based on a ruling of the U.S. Department of Housing and Urban Development (HUD) (Request).⁴

² The crime-fraud exception excludes from the attorney-client privilege communications that are made for purposes of committing crime or fraud. Investigating Grand Jury of Phila. Cnty., 593 A.2d 402 (Pa. 1991). This is so as not to allow abuse of the privilege to further crime. Id.

³ The HOME Investment Partnerships (HOME) program is a federal housing grant program administered through local jurisdictions. See 24 C.F.R. pt. 92. Pursuant to partnership agreements, HOME funds are invested in affordable housing. Such "funds invested in affordable housing are repayable if the housing ceases to qualify as affordable housing." 24 C.F.R. §92.501 (1996). Funds must be used solely for investment in eligible projects that satisfy these regulations; otherwise, they are subject to repayment and recapture. 24 C.F.R. §92.503 (2013).

⁴ Specifically, Requester sought:

- (1) Documents from DCED to [the Township] since HUD ruled that DCED is responsible to pay back grant;
- (2) Documents from [the Township] to DCED since HUD ruled that DCED is responsible to pay back grant;
- (3) Documents from any legal counsel to DCED since HUD ruled that DCED is responsible to pay back grant;
- (4) Documents from DCED to any legal counsel since HUD ruled that DCED is responsible to pay back grant;
- (5) Documents from DCED to [The Yoder Group, hired to build the homes, and recipient of grant funds] since HUD ruled that DCED is responsible to pay back grant;

(Footnote continued on next page...)

DCED denied the Request in part, invoking the attorney-client privilege and the predecisional deliberative exception in Section 708(b)(10) of the RTKL. DCED redacted certain portions of email correspondence among DCED staff, and between DCED staff and legislative staff. Requester appealed to OOR.

In response to the appeal, DCED submitted a position statement explaining the redactions involved communications discussing DCED's resolution of the Township grant repayment. At OOR's direction, DCED also submitted an exemption log verified by its open records officer (Exemption Log) in support of the redactions. Certified Record (C.R.) at Item No. 11. In addition, DCED submitted unredacted copies of all requested records to enable OOR to conduct an *in camera* review. Requester sought an evidentiary hearing, which OOR denied.

Based on its *in camera* review, OOR concluded that all but two of the redacted emails described in the Exemption Log were exempt under the

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(6) Documents from Yoder to DCED since HUD ruled that DCED is responsible to pay back grant;

(7) Documents, correspondence, tapes, memos from the meeting of DCED and Linda Culver, Senator Gordner, [and] Richard Shoch. This would be the meeting that caused DCED to forgive the [Township] Grant;

(8) Any and all documents, and or correspondence from Linda Culver, Senator Gordner to DCED; [and,]

(9) Specificity as to why the DCED will not involve the [Pennsylvania] Attorney General's [O]ffice for collection and prosecution.

Certified Record (C.R.) at Item No. 4.

predecisional deliberative exception. OOR ordered disclosure of three emails as they did not qualify as deliberative or predecisional. OOR did not analyze whether the redactions were also appropriate under the attorney-client privilege or the work-product doctrine. OOR also did not address Requester's argument that the records were exempt from protection under the crime-fraud exception. Contending OOR erred in not considering the crime-fraud exception to the privilege, Requester petitioned for reconsideration. A separate OOR appeals officer denied the petition.

Requester appealed OOR's final determination to this Court.⁵

II. Discussion

Requester argues OOR erred in upholding DCED's denial under the predecisional deliberative exception. He also criticizes OOR for not analyzing the other denial grounds, namely the attorney-client privilege. In addition, Requester asserts the crime-fraud exception applicable to attorney-client privileged records should be extended to apply to the RTKL exceptions in Section 708(b), 65 P.S. §67.708(b), to ensure fraud is not shielded from public view. Requester contends that, through the Request, he attempted to obtain government records showing mismanagement of the federal grant funds, and a violation of the federal grant program.⁶

⁵ In a RTKL appeal involving a Commonwealth agency, this Court "has the discretion to rely upon the record created below or to create its own." Dental Benefit Providers, Inc. v. Eiseman, 86 A.3d 932, 936 (Pa. Cmwlth. 2014) (en banc) (citing Bowling v. Office of Open Records, 990 A.2d 813 (Pa. Cmwlth. 2010) (en banc), aff'd, 75 A.3d 453 (Pa. 2013)).

⁶ Requester sought similar records from HUD through the Freedom of Information Act, (FOIA), 5 U.S.C. §552, asserting they reveal mismanagement of over \$300,000 of federal funds for ineligible housing. HUD responded that the records are part of an on-going law enforcement **(Footnote continued on next page...)**

Although Requester argues OOR's final determination is not based on substantial evidence, he did not request this Court to undertake the role of fact-finder here. Accordingly, we serve in our appellate capacity.

Under the RTKL, records in the possession of an agency are presumed to be public unless they are: (1) exempted by Section 708 of the RTKL; (2) protected by privilege; or, (3) exempted "under any other Federal or State law or regulation or judicial order or decree." Section 305 of the RTKL, 65 P.S. §67.305. A Commonwealth agency like DCED bears the burden of proving a record is exempt from disclosure. Dep't of Pub. Welfare v. Eiseman, 85 A.3d 1117 (Pa. Cmwlth. 2014) (*en banc*). An agency, rather than a requester, bears the burden of substantiating its denial on appeal to OOR. Sherry v. Radnor Twp. Sch. Dist., 20 A.3d 515 (Pa. Cmwlth. 2011).

A. Predecisional Deliberative Exception

Pursuant to Section 708(a) of the RTKL, an agency bears the burden of proving a RTKL exception by a preponderance of the evidence. 65 P.S. §67.708(a). Here, DCED submitted the Exemption Log and the unredacted records for OOR's *in camera* review in order to support its assertion of the predecisional deliberative exception in Section 708(b)(10)(i) of the RTKL, 65 P.S. §67.708(b)(10)(i).

Section 708(b)(10)(i)(A) exempts from disclosure:

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investigation, and exempt from disclosure under FOIA, 5 U.S.C. §552(b)(7)(A). Reproduced Record at 4a.

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(b)(10)(i)(A) (emphasis added).

To establish this exception, an 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.” Carey v. Dep’t of Corr., 61 A.3d 367 (Pa. Cmwlth. 2013). “Only information that constitutes ‘confidential deliberations of law or policymaking, reflecting opinions, recommendations or advice’ is protected as ‘deliberative.’” Id. at 378 (quoting In re Interbranch Comm’n on Juvenile Justice, 988 A.2d 1269, 1277-78 (Pa. 2010) (quotation omitted)). Records satisfy the “internal” element when they are maintained internal to one agency or among governmental agencies. Id.

OOR determined the records were protected under the predecisional deliberative exception here. We note the descriptions of records in the Exemption

Log are conclusory and inadequate to allow proper appellate review.⁷ However, given Requester's concessions, we discern no error in the result below.

Significantly, Requester concedes DCED's redactions "contain deliberations concerning a direct grant violation and a failure by DCED to recapture federal funds." Pet'r's Br. at 16 (emphasis added). He also recognizes the communications "are most likely between DCED officials regarding the discovery of the crime of grant fraud and how to respond." Id. Thus, Requester acknowledges the redactions are most likely internal, and involve deliberations before making a decision as to how to respond to alleged grant fraud.

Essentially, Requester does not dispute that the redactions meet the three elements required to establish the predecisional deliberative exception. Moreover, in directing disclosure of two log entries based on its *in camera* review, OOR reasoned this exception applies to protect deliberations that consider issues and options before making a decision. OOR thus concluded the emails corresponding to the log entries were deliberative and predecisional.⁸ As a result,

⁷ For example, DCED states the same ground for redacting emails in Log Item 13714, for which OOR directed disclosure, and Log Item 13713, which OOR protected, as follows: "Redacted data reflects predecisional deliberations of DCED staff and attorney[-]client communications. No waiver of the attorney[-]client privilege made. Data contains attorney work product." C.R. at Item No. 11.

⁸ In reaching its determination, OOR did not explain how the redactions qualified for protection under the exception. Instead, it protected the emails based on its *in camera* review. This appeal highlights the difficulty in discerning the proper application of exemptions in RTKL appeals when an appeals officer bases his or her decision on *in camera* review. We anticipate greater frequency of *in camera* review being conducted by OOR in light of our decision in Office of Open Records v. Center Township, 95 A.3d 354 (Pa. Cmwlth. 2014) (en banc). A remand to OOR to submit a reasoned decision in support of its conclusion may have been necessary under **(Footnote continued on next page...)**

this Court discerns no basis upon which to reverse OOR's determination that DCED established the factual prerequisites for the predecisional deliberative exception.

B. Crime-Fraud Exception

Alternatively, regardless of their protected status as predecisional deliberative records, Requester urges this Court to extend the crime-fraud exception from the privilege realm to the RTKL exceptions. Requester contends the information at issue here is necessary to hold public officials accountable for their actions. Specifically, he "submits that the DCED and the OOR are aware of a direct federal violation occurring and if those log items relate to the federal violation, then said crime-fraud exception should be applicable under the RTKL." Pet'r's Br. at 17 (emphasis added).

The crime-fraud exception excludes from privilege those communications made for the purpose of committing a crime or fraud. Investigating Grand Jury of Phila. Cnty., 593 A.2d 402 (Pa. 1991). Its purpose is to preclude the attorney-client privilege from being used as a means of shielding criminal activity from disclosure. Id.; see also In re Dauphin Cnty. Fourth Investigating Grand Jury, 19 A.3d 491 (Pa. 2011). From our research, despite

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other circumstances. Here, however, Requester's representations to this Court showed he agreed the redactions satisfied the three elements required for the predecisional deliberative exception. Therefore, to assist this Court in serving in our appellate capacity, when records are reviewed *in camera* below, we respectfully remind fact-finders (OOR, appeals officers, or courts of common pleas) to include more robust analysis in support of their determinations.

requests for expanding its application, the exception has not been applied outside the privilege context. See, e.g., Castellani v. Scranton Times, 956 A.2d 937 (Pa. 2008) (declining to extend the crime-fraud exception to the Shield Law, 42 Pa. C.S. §5942, reasoning the exception should not apply when the public is the beneficiary of the protection). In addition, Requester cites no authority for extending the crime-fraud exception beyond the privilege to other statutory grounds for non-disclosure.

Moreover, this Court notes Requester makes this bald assertion charging fraud without reference to any supporting evidence. The record includes correspondence from HUD to DCED dated September 19, 2013, advising the project, for which \$381,256.86 was drawn from grant funds, did not comply with regulations, such that the funds must be repaid. See Reproduced Record at 1a-2a. A violation of federal regulations, and investigation into same, does not equate to commission of a crime or fraud, which requires knowledge or intent. See Commonwealth v. Lurie, 569 A.2d 329 (Pa. 1990); Commonwealth v. Koczwara, 155 A.2d 825, 827 (Pa. 1959) (distinguishing between “true crimes” requiring imprisonment to protect the public, and violations of “regulatory provisions in fields which are essentially non-criminal,” involving lighter penalties).

In the event this Court were to entertain application of the crime-fraud exception to the statutory exceptions under the RTKL, it would need to be based on more than mere supposition. We express no opinion as to whether the crime-fraud exception may apply to the RTKL exceptions when there is evidence that a crime or fraud occurs under their shield.

C. Hearing Request

Lastly, Requester argues OOR violated his constitutional due process rights by denying his request for a hearing. This Court holds that a requester has no “right” to a hearing before an appeals officer. Office of Open Records v. Center Twp., 95 A.3d 354 (Pa. Cmwlth. 2014) (en banc). Rather, this Court emphasizes that an appeals officer’s decision to not hold a hearing is “discretionary and **not appealable.**” Giurintano v. Dep’t of Gen. Servs., 20 A.3d 613, 617 (Pa. Cmwlth. 2011) (emphasis in original) (construing Section 1102(a)(2) of the RTKL, 65 P.S. §67.1102(a)(2)); see also Center Twp. Therefore, Requester’s argument fails.

III. Conclusion

As Requester does not dispute the three elements for the predecisional deliberative exception are met, and OOR upheld DCED’s denial on that ground, OOR’s final determination is affirmed. We decline Requester’s invitation to create a crime-fraud exception to the statutory exceptions in Section 708(b) of the RTKL on this record. Further, we hold OOR did not violate Requester’s due process rights by denying his hearing request.

ROBERT SIMPSON, Judge

