THE SCHOOL DISTRICT OF PHILADELPHIA
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THE SCHOOL DISTRICT OF PHILADELPHIA	:	COURT OF COMMON PLEAS
	:	PHILADELPHIA COUNTY
	:	TRIAL DIVISION - CIVIL
Appellant	:	
	:	MAY TERM, 2013
v.	:	
	:	No. 1003
HELEN GYM	:	
Parents United for Public Education	:	
	:	
Appellee	:	

BRIEF OF APPELLANT
THE SCHOOL DISTRICT OF PHILADELPHIA

Appellant The School District of Philadelphia ("appellant" or "the School District") submits this Brief in support of its appeal from the Final Determination of an Appeals Officer of the Pennsylvania Office of Open Records ("OOR"), granting the appeal filed by Helen Gym, on behalf of Parents United for Public Education ("the requester") and directing the School District to produce responsive records within 30 days.

I. STATEMENT OF FACTS AND PROCEDURAL HISTORY

On December 19, 2012, Helen Gym, on behalf of Parents United for Public Education ("Requester"), submitted a request to the School District, pursuant to the Right-to-Know Law ("RTKL"), for "the record or records containing the list of schools identified by the Boston Consulting Group as their top candidates for school closure as well as their criteria for choosing the recommended schools." After obtaining an extension of time, the School District, on January 24, 2013, partially granted the request by providing "the criteria used by executive management to identify schools that would be considered candidates for school closure," but denied the remainder of the request, invoking the exemptions in Sections 708(b)(9) & (10) of the RTKL, protecting the disclosure of records that are considered drafts and those that reflect internal, predecisional deliberations of the School District.

On February 14, 2013, the Requester appealed the partial denial to OOR, docketed as No. AP-2013-0267, asserting that the exemptions were not applicable and that the record requested was a public record. In response to an invitation from OOR to both parties, the School District provided a position statement along with the Affidavit of Michael A. Davis, General Counsel, of the School District. The requester submitted a position statement. On March 19, 2013, the School District provided another submission, indicating that the requested documents were prepared by Boston Consulting Group ("BCG"), while BCG as a consultant for the School District was under contract with the William Penn Foundation.

In response to the request of the Appeals Officer, the School District, on April 19, 2013, provided the Affidavit of Thomas E. Knudsen, Chief Recovery Officer and Acting Superintendent of the School District, as to whether William Penn Foundation had access to the withheld records.

OOR made its Final Determination on April 12, 2013, granting the appeal and requiring the School District to provide the records within 30 days. On May 13, 2013, the School District appealed the Final Determination to this Court, pursuant to section 1302 of the Right-to-Know Law, 65 P.S. §67.1302. OOR submitted the certified record of the agency proceedings to the Prothonotary, which record was docketed on August 30, 2013.

II. STATEMENT OF ISSUES

A. Whether OOR erred in holding that the School District did not meet its burden of proof that the predecisional, deliberative document was kept internal to the School District and, as such, was exempt from public disclosure?

Suggested Answer: Yes

B. Whether the Court should exercise a full *de novo* review over the determination of the Appeals Officer, allowing for expansion of the record and a hearing, if necessary?

Suggested Answer: Yes.

III. ARGUMENT

A. Proper Standard and Scope of Review

"Standard of review" and "scope of review,' although distinct, are not concepts that are considered in isolation from one another." *Bowling v. Office of Open Records*, ___A.3d ___, 2013 WL 4436219, at * 19 (Pa. Aug. 20, 2013). "Scope of review" refers to the confines within which a reviewing court must conduct its examination, "or to the matters (or 'what') the [reviewing] court is permitted to examine." *Samuel-Bassett v. Kia Motors America. Inc*., 613 Pa. 371, 407, 34 A.3d 1, 21 (2011), *cert, denied*, 133 S. Ct. 51 (U.S. 2012). "Standard of review" concerns the manner in which (or "how") that examination is to be conducted. *Holt v. 2011 Legislative Reapportionment Commission*. 38 A.3d 711, 728 (2012); *In re City of Scranton*

Request for Approval of Increase in Earned Income Tax on Non-Residents, 2012 WL 6630597, at *14 (Lackawanna. Co. 2012).

In affirming a decision of the Commonwealth Court, the Supreme Court recently held that "…under the RTKL, the Chapter 13 courts[1] are the ultimate finders of fact and that they are to conduct full de novo reviews of appeals from decisions made by the RTKL appeals officers, allowing for the adoption of the appeals officer's findings and legal conclusions when appropriate." *Bowling* * at 19. The Court, in the majority opinion by Mr. Justice McCaffrey, went on to hold "…that Chapter 13 courts exercise a full *de novo* standard of review over determinations made by the appeals officers. Accordingly, it would follow that the scope of review must also be 'broad' or plenary; indeed, as the Chapter 13 courts serve as fact-finders, it would also follow that these courts must be able to expand the record – or direct that it be expanded by the mechanism of remand to the appeals officer – as needed to fulfill their statutory function." *Id* at *21.

Section 1302(a) of the RTKL addresses the manner in which the common pleas court must consider a petition for review involving a "local agency,"[2] and states that the decision of the court "shall contain findings of fact and conclusions of law based upon the evidence as a whole" and "shall clearly and concisely explain the rationale for the decision." 65 P.S. §

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[1] Chapter 13 courts include the Commonwealth Court – in petitions for review when the matter arises from a Commonwealth agency – and the court of common pleas when the matter arises from a determination made by a local agency. Id. at 7.

[2] Section 102 of the RTKL defines a "local agency" as, inter alia, "[a]ny political subdivision, intermediate unit, charter school, cyber charter school or public trade or vocational school," 65 P.S. § 67.102, and a school district is deemed a "local agency" under the RTKL. *See Easton Area School District v. Baxter*, 35 A.3d 1259 (Pa. Commw. Ct. 2012). Section 302(a) of the RTKL states that "A local agency shall provide public records in accordance with this act." 65 P.S. § 67.302(a).

67.1302(a). In *Bowling*, the Supreme Court of Pennsylvania clarified the appropriate standard of review under 65 P.S. § 67.1302, concluding that the common pleas courts "are the ultimate finders of fact and that they are to conduct full de novo reviews of appeals from decisions made by the RTKL appeals officers, allowing for the adoption of the appeal officer's factual findings and legal conclusions when appropriate." *Bowling*, supra, at * 18.

Section 1303(b) states that the record on appeal before a common pleas court "shall consist of the request, the agency's response, the appeal filed under section 1101, the hearing transcript, if any, and the final written determination of the appeals officer." 65 P.S. § 67.1303(b). However, Section 1303(b) does not restrict the scope of the record on appeal, and to the contrary, simply describes the record to be certified by the OOR to the reviewing court. Therefore, the "scope of review" is likewise broad or plenary, and permits trial courts "to expand the record" to fulfill their statutory function as fact-finders and thereby consider matters beyond the record that is certified by the OOR. *Bowling*, *supra*, at *20-21. Consequently, the "standard of review is de novo and [the] scope of review is broad or plenary when [a court] hears appeals from determinations made by appeals officers under the RTKL." *Id*. at* 21.

B. Applicable Law

Under the RTKL, records in the possession of a local agency, such as a school district, are presumed to be public records and must be made available to a requester unless they fall within specific, statutory exceptions. 65 P.S. §§ 67.305, 67.701(a). A document may be exempt from disclosure if it protected by a privilege, or is exempt from disclosure under any other federal or state law or regulation, or judicial order or decree. 65 P.S. §§ 67.305(a)(3) & (b)(3). Documents may be exempt from public disclosure under one or more of the 30 exceptions listed in Section 708(b) of the RTKL, 65 P.S. §§ 67.708(b). Where the public agency asserts that the

record or records requested are exempt from public access under one of the exceptions listed in Section 708(b), the agency has the burden of proving by a preponderance of evidence that the exception asserted applies. 65 P.S. § 67.708(a).

Section 708(b)(10) of the RTKL exempts from public access "A record that reflects… The internal, predecisional deliberations of an agency, its 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). Section 708(b)(9) of the RTKL also exempts from public access "The draft of a bill, resolution, regulation, statement of policy, management directive, ordinance or amendment thereto prepare by or for an agency."

Testimonial affidavits found to be relevant and credible may provide sufficient evidence in support of a claimed exemption. *Michak v. Department of Public Welfare*, 56 A.3d 925, 929 (Pa. Commw. Ct. 2012) (credited affidavits supported Department's assertion that the documents requested were not previously released to the public and did fall within the noncriminal investigation exception); *Sherry v. Radnor Township School District*, 20 A.3d 515, 520–521 (Pa. Commw. Ct. 2011) (OOR did not err in relying upon affidavits in rendering its final determination); *Moore v. OOR*, 992 A.2d 907, 909 (Pa. Commw. Ct. 2010). The RTKL provides that an appeals officer "may admit into evidence testimony, evidence and documents that the appeals officer believes to be reasonably probative and relevant to an issue in dispute. The appeals officer may limit the nature and extent of evidence found to be cumulative. 65 P.S. § 67.1102(a)(2); *see also, Office of the Governor v. Scolforo*, 65 A.3d 1095 (Pa. Commw. Ct. 2013) ("In deciding whether this redacted information qualifies for protection under an

exception, the OOR should have considered the averments of the Affidavit…" which the Governor's Office submitted in support of the redactions from the Governor's calendars).

C. The Internal, Predecisional Deliberative Exception Applies

The School District submitted the Affidavit of Michael A. Davis, General Counsel of the School District, signed subject to the penalties of 18 Pa.C.S.A. § 4904 relating to unsworn falsification to authorities, that BCG served as a consultant to the School District, first under contract directly with the School District and then pursuant to a contract with William Penn Foundation, as a grantor.

The Affidavit states in pertinent part, that:

> 8. …the services of the Consultant [Boston Consulting Group, Inc.] were donated to the School District by the William Penn Foundation and other grantors…. All of Consultant's services relevant hereto were donated to the School District either through a direct monetary grant or as in-kind contributions of services to the School District.
>
> 9. At all times relevant hereto, the School District remained the sole owner of all work product and materials generated and prepared by the Consultant and for the benefit of the School District.
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> 10. At all times relevant hereto, representatives of Boston Consulting Group, Inc. served as the School District's consultants, selected by the School District and remained under the direct supervision and control of the School District. Specifically, the activities of the Consultant relevant hereto were undertaken at the request of and under the supervision of agency officials and employees.

The Affidavit of Mr. Davis is detailed and non-conclusionary about the role of BCG as consultant and the role of William Penn Foundation in funding the second and third phases of the work for the agency. It is - and remains - undisputed that the records at issue were before a decision soon to come and were deliberative in nature.

The supplemental Affidavit of Mr. Knudsen, who was the Chief Recovery Officer and Acting Superintendent of the School District at the time the services were rendered by BCG,

submitted in response to the inquiry from the Appeals Officer whether William Penn Foundation had access to the records, stated, in paragraph 15:

> 15. To the best of my knowledge, information and belief, the "list of schools identified by the Boston Consulting Group as their top candidates for school closure as well as their criteria for choosing their recommended schools" and which forms the basis of this appeal under Pennsylvania's Right-to-Know Law was never a specific topic of conversation or exchange between representatives of The William Penn Foundation and me, School District staff or consultants employed by BCG.

As the OOR held in *Marshall v. Neshaminy School District*, OOR Dkt. AP 2010-0015, the records must be internal to the agency, meaning prepared by or on behalf of the agency in order to qualify for this exception. The recommendations prepared by BCG were on behalf of the School District. Even assuming, arguendo, that the records may have been shared with William Penn Foundation, the records were still internal to the School District. William Penn Foundation's role was that of a grantor who funded the second phase of BCG's consultant services. As grantor, the philanthropic entity had the right - and indeed an affirmative duty - to know that BCG's services were rendered and to review the work product prior to issuing payment to the consultant. While the School District appreciates and makes every attempt to facilitate the underlying purpose the RTKL, the OOR erred by ordering disclosure of records because the records may not have been kept "internal." Certainly, public agencies must be allowed to engage stakeholders and members of the philanthropic community without fear that sensitive and otherwise predecisional deliberative records would be subject to disclosure. In this case, records were not shared with other citizens, advocacy groups or for-or non-profit organizations and denied to the Requester. Rather, some of the records may have been shared with a "grantor" although Mr. Knudsen could not recall a specific instance of such disclosure. The three-prong test utilized by the OOR is merely a guide and should not be used by appeals

officers to unilaterally order disclosure of records because the factual nuisances of a matter do not fit precisely into their definition. In addition, the burden of proof is "preponderance of the evidence" and the School District was not required to offer "absolute" proof – or proof beyond a reasonable doubt - that the documents were not disclosed to a grantor, as suggested by the appeals officer.

At the very least, the Court should, pursuant to the Supreme Court's ruling in *Bowling*, allow the record to be supplemented with additional evidence, such as affidavits or testimony on behalf of the William Penn Foundation or BCG, to prove that the records of deliberations regarding school closures were kept "internal" to the School District.

IV. CONCLUSION

The requester concedes that the records ordered to be produced are predecisional and deliberative, therefore, the factual issue for the Court to determine is whether the records are internal to the School District. The School District has met its burden of proof that the requested documents were "internal" to the School District. The Appeals Officer of OOR erred in holding that the School District did not meet its burden of proof that the documents were internal to the School District even, assuming that they were shared with the grantor who funded the consulting services for the School District. The list of recommended school closings withheld by the School District has been properly shown by a preponderance of the evidence to be exempt from public access under the "internal, predecisional deliberation" exception. The appeal of the School District should be granted and the Final Determination of the OOR should be reversed.

In the alternative, the Court of Common Pleas, in its role as fact-finder, should, on motion, supplement the record to accept additional evidence from the School District, at or prior to a hearing.

s/Miles H. Shore
Miles H. Shore

Date: October 7, 2013

Attorney for Appellant

CERTIFICATE OF SERVICE

I hereby certify that the attached Brief of Appellant is being filed electronically on October 7, 2013 and is available for viewing and downloading from the Electronic Filing System and that the attorney listed below has consented to electronic service:

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s/Miles H. Shore
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