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## **The New Right-to-Know Law's Exemption for Pre-Decisional Deliberations**

**By Michael Berry**

Earlier this year, Pennsylvania's General Assembly passed a new Right-to-Know Law that dramatically changes the rules governing the public's access to government records. The biggest change is the new law's express mandate that government records are presumed to be open to the public.

In light of this change, the law carves out more than 30 exceptions setting out what records are not publicly accessible. Many of these exceptions are specific. For example, the law bars access to Social Security numbers, personal telephone numbers and academic transcripts. Others do not appear quite so clear at first blush. One of those exceptions denies access to records of agencies' policy deliberations. Although this new exception appears to present novel issues, it actually reflects an established area of the law, making its meaning and scope more clear.

As leaders throughout Pennsylvania recognized in the recent debate leading up to the new law's passage, transparency is the hallmark of good government, and public scrutiny is the single greatest check on government power. When the people's business is conducted in plain view, officials cannot cut backroom deals, cannot dole out favors to special interests, and cannot waste taxpayers' money on pet projects.

Yet, to be effective and efficient, government cannot operate in a fishbowl. Government officials must have the benefit of candid advice from their staffers without opinions or policies being prematurely disclosed.

Over the past decade, Pennsylvania courts have wrestled with these issues and the concept of a "deliberative process privilege" designed to protect the government's internal deliberations about legal and policy decisions. The Pennsylvania Supreme Court has addressed the privilege on a few occasions, twice in cases involving the old Right-to-Know Law. In each case, the High Court embraced the principles underlying the privilege. Nevertheless, it has never adopted the privilege, in large part because the privilege was unnecessary under the old Right-to-Know Law, which only permitted access to government "decisions." As the Supreme Court noted in its most recent opinion addressing the issue in 2004, *Tribune-Review Publishing Co. v. Department of Community and Economic Development*, any document that would have been subject to the deliberative process privilege was not considered a "public record" under the old law because "any communication made prior to the completion of deliberation . . . cannot be a decisional document."

Now, however, since all government records, not just "decisions," are presumed to be public records, the General Assembly needed to weigh the public's interest in transparent government against officials' need for the free exchange of ideas and opinions in making policy

decisions. To balance these interests, the new Right-to-Know Law includes an exemption that protects the government's deliberative process. The exemption seals from public view:

The internal, pre-decisional deliberations of an agency, its members, employees or officials or pre-decisional deliberations between agency members, employees or officials and members, employees or officials of another agency, including pre-decisional 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 pre-decisional deliberations.

This language mirrors the principles that the Pennsylvania Supreme Court embraced when discussing the deliberative process privilege in the past and also tracks federal precedent applying a similar exemption under the federal Freedom of Information Act (precedent that our Supreme Court has cited favorably in discussing the privilege). Those cases, and the language of the new pre-decisional exemption, establish five principles for determining when a record must be disclosed and when it may be withheld.

First, to be exempt from disclosure, the record must reflect either "internal" communications, i.e., communications that take place among employees inside the same agency, or communications "between" an agency and another agency. Communications with people outside agencies are not covered by this exemption. So, for example, this provision does not shield communications with lobbyists.

Second, as the law makes clear, a record is only exempt if it is "pre-decisional." The exemption extends only to communications that took place before the deliberative process was completed. It does not apply to post-decisional documents – that is, documents created after a decision has been made. Federal courts have held that the government can demonstrate that a document is pre-decisional only if it can pinpoint a specific decision or policy to which the record contributed. If the government cannot identify a specific final decision, the record must be disclosed.

Third, the document must be "deliberative." A document is "deliberative in character," according to the Pennsylvania Supreme Court, only if it was "a direct part of the deliberative process in that it makes recommendations or expresses opinions on legal or policy matters." In other words, as federal courts explain, the record must "be a part of the agency give-and-take . . . by which the decision itself is made." To meet these criteria, the government must identify the deliberative process in which the record was involved and the role the document played in the deliberations.

Courts generally consider a few factors in determining whether a document is deliberative. For example, they look at whether the person who wrote the record has any decision-making authority. Courts also consider the agency's chain of command and which direction in the chain the document is sent. When a document is sent from a subordinate to a superior, it is more likely to be deliberative.

Fourth, purely factual information is not exempt, even if it is considered during the course of deliberations. Facts provided for informational purposes generally do not reveal

deliberative processes and therefore should not be hidden from view. Consequently, courts hold that the analogous exemption in federal law does not apply to factual portions of a deliberative document, unless those facts are inextricably intertwined with deliberative material. The Pennsylvania Supreme Court emphasized this same point in the past, quoting federal law to explain that ““compiled factual material or purely factual material contained in deliberative memoranda and severable from its context would generally be available.”” When deliberative documents contain factual information, the government should redact the deliberative material and disclose the facts. Indeed, the new law provides that the government “shall grant access” to portions of records with publicly accessible information and “may not deny access to the record if the information which is not subject to access is able to be redacted.”

Fifth, and perhaps most obvious, the exemption does not extend to decisional documents. Nothing in the new Right-to-Know Law changes the old law’s requirement that agency “decisions” are publicly available.

The final item to keep in mind is that the new law includes a few exceptions to the deliberation exception, requiring that the government disclose three categories of documents even if the law provides that they normally would be exempt. First, the government must provide access to records presented for deliberations by a quorum of agency members at any meeting subject to the Sunshine Act, unless those records are otherwise exempt from disclosure under the Right-to-Know Law. Next, the law provides that all requests for commonwealth funds shall be disclosed. And, finally, the public has the right to inspect the results of public opinion research.

So, what kinds of documents are covered by the new law’s exemption for government deliberations? Briefing materials, draft policies, and memos offering advice, recommendations and opinions are likely to be exempt. Of course, even when a request is made for these kinds of records, the government bears the burden of proving that the requested record falls within the exemption, and the five principles drawn from existing state and federal law will be used to determine whether the government has met that burden.

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