1. Introduction


(a) Pennsylvania Supreme Court in its decision of April 29, 2021, described the case as a matter of first impression

(b) This decision makes use of consultants in the context of ordinary agency business a lot more complicated

(c) Supreme Court held that records exchanged with consultants do not fall within the deliberative process privilege

(d) In other words, records that would otherwise fall within the privilege if exchanged or created by an agency’s “members, employees or officials” lose their protection when exchanged with an outside consultant

(e) The court held that such communications are not sufficiently “internal”

3. The deliberative process privilege protects an agency’s deliberations while the decision-making process is underway

(a) 65 P.S. §67.708(b)(10)(i)(A) protects “‘internal, predecisional deliberations of an agency, its members, employees or officials . . .’” (emphasis by the court)

(b) Suppose an agency wants assistance in preparing a new policy and retains outside consulting services

(c) Or suppose the Department of Revenue is considering a new Lottery game with outside consultants

(d) Or suppose that PennDOT hires an engineering firm to plan a bridge replacement

(e) The examples are endless

(f) Written documentation of and electronic communications with individuals who are not members, employees or officials (i.e. individuals I am terming “consultants”) destroy the privilege

4. Previous to *Chester Water* the conventional wisdom was that the records exchanged with consultants were protected
(a) The general belief prior to the *Chester Water* decision was that the records exchanged with consultants were sufficiently internal and of necessity encompassed within the agency's deliberative process privilege.


(c) The justification for this belief rested on an principal/agent theory (e.g. the “consultant corollary” espoused by certain federal courts interpreting the FOIA).

(d) The conventional belief is no longer viable.

5. Background of *Chester Water* decision

(a) City is in Act 47 financial recovery, administered by DCED.

(b) Dispute arose between the City of Chester and its Water Authority.

(c) City was considering a sale, and the Authority was (and is) disinclined.

   (i) Sale of infrastructure, privatization, and the like are considered potential pathways to financial recovery.

   (ii) It’s worked for Harrisburg and Scranton to a reasonable degree.

(d) DCED engaged consultants.

(e) Authority requested DCED records, including those of consultants under RTK.

(f) DCED argued that the deliberative process privilege was crucial to the frank exchange of ideas and opinion and therefore benefits the public.

(g) This position was sustained in the OOR and on appeal the Commonwealth Court.

6. And of course the Supreme Court reversed

(a) The majority opinion was authored by Justice Saylor, joined by Justices Todd, Donohue and Mundy; Justice Dougherty concurred, and Justice Wecht and Chief Justice Baer dissented.

(b) The DCED private consultants apparently had prepared reports, memos and similar materials for DCED, which the Supreme Court categorized as “records exchanged between a Commonwealth agency and private consultants.”
(c) The Court could have looked at policy issues regarding the way state and local governments use consultants

(d) The reasons why the privilege exists for an agency’s members, employees or officials apply with equal force when a governmental entity relies on consultants for expertise that the entity may not have in-house

(e) And there was every reason to look at the requirement that the records be “internal” broadly and liberally

   (i) The communications weren’t shared with third parties

(f) But we have a plain language court: “internal” means “internal”

(g) Notwithstanding that this issue could not have been given any thought by the General Assembly, and that the courts are frequently asked to “fill in the gaps” in legislation and apply common sense, for good or ill we have a plain language court

   (i) It might have been helpful to present expert testimony on the importance of preserving confidentiality during deliberations and on the difficulty a restrictive view of what is “internal” would have on governmental operations, but it appears that the matter was presented as a legal issue only, and perhaps such testimony wouldn’t have made any difference anyway

(h) The dissent by Justice Wecht argued (unsuccessfully of course) that concluding language in the 65 P.S. § 67.708(b)(10)(i)(A) protecting “other documents used in the predecisional deliberations” could be recognized as an extension of the deliberative process exemption

   (i) The majority concluded that this issue was not presented by the parties and would be left “for another day” (note 5 of the majority decision)

7. What are the options for dealing with Chester Water?

   (a) Governmental agencies may opt to embrace the Chester Water decision and operate in an “open book” manner

   (b) Agencies may choose to communicate without creating certain RTK records

      (i) Agencies may direct the consultants to provide information orally

   (c) Consultants may opt to retain documentation without providing documents to the governmental clients
Such records could be producible to the extent the consultants were performing a governmental function under 506(d) of the RTKL, 65 P.S. §67.506(d)(1) or if required by contract.

Agencies may wish to explore the potential that there is a “research-memos-documents rubric of Section 708(b)(10)(i)(A) [that] might serve as an exception to the statute’s specified focus on matters internal to the agency” (see note 5 of the majority decision, responding to the dissenting opinion of Justice Wecht).

In certain circumstances, attorneys may be able to support confidentiality as attorney-client communications or as work product (but note that these privileges are somewhat narrow).

Private parties providing governmental services in current contracts with state and local agencies need to contemplate what documentation has been provided with the expectation of confidentiality, and to discuss with their local and state clients how to address confidentiality issues during deliberative processes.

Private parties will also need to consider with their governmental consulting clients whether and if so how to protect communications during periods of deliberation.

Other private parties, including communications media, citizens, and competitors, seeking documents and information during deliberations have a new tool with which to examine the on-going workings of state and local governmental agencies.

In any event, all of these “workarounds” create inefficiencies and expense.

Conclusion: Chester Water requires that state and local government reconsider how they will interact with consultants they retain.


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