

P.E.R.C. NO. 98-124

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

TOWNSHIP OF EDISON,

Appellant,

-and-

Docket No. IA-97-88

IAFF, LOCAL 1197,

Respondent.

SYNOPSIS

The Public Employment Relations Commission denies the request of the Township of Edison for special permission to appeal an arbitrator's interlocutory order during interest arbitration proceedings between the Township and IAFF, Local 1197. The arbitrator granted the IAFF's motion and directed the Township to produce budget worksheets prepared by its auditor in connection with the consideration and adoption of the Township budget. The Commission finds that the arbitrator correctly ruled that Local 1197 could have a right to the worksheets even if a member of the public might not be able to obtain them under statutes and case law governing access to public records. The Commission is also satisfied that the arbitrator's order was consistent with administrative and judicial rules concerning the production and admission of evidence. The Commission concludes that there are not sufficient extraordinary circumstances to grant special permission to appeal.

This synopsis is not part of the Commission decision. It has been prepared for the convenience of the reader. It has been neither reviewed nor approved by the Commission.

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Appearances:

For the Appellant, Werner Lesniak, attorneys
(Catherine M. Elston, of counsel)

For the Respondent, Kroll & Heineman, attorneys (Raymond
G. Heineman, of counsel)

DECISION

During interest arbitration proceedings with IAFF, Local 1197, the Township of Edison has requested special permission to appeal an arbitrator's interlocutory order. That order directs it to produce budget worksheets prepared by its auditor in connection with the consideration and adoption of the Township budget.

The parties have filed briefs and exhibits. These facts appear.

At a February 6, 1998 hearing, the Township called its auditor as a fact and expert witness. Although the Township asserts that the auditor's expert opinion as to revenues and expenditures was based on the final and adopted budget, the auditor referred to the budget worksheets during cross-

examination.^{1/} The worksheets compile and analyze budget information from various sources to assist those individuals who are responsible for preparing the municipal budget. Local 1197 asked the Township to provide it with the worksheets, but the Township denied its request. Local 1197 then moved for an order requiring their production.

On February 18, 1998, the arbitrator granted the motion, finding that no evidentiary privilege attached to an auditor's worksheets (Arbitrator's opinion, p. 3). In response to the Township's argument that the worksheets were not public records, he wrote:

The Township suggests that the Union need establish a disclosure right under the Right to Know Law or under the Common Law Right of Access. Those positions are not persuasive. The Union is not in a position of a private citizen or the public, in general, with respect to the documents at issue. These documents are reasonably related to the opinion testimony offered by the Township's own expert witness in an arbitration in which the Township and the Union are both parties. The Township opened the door to the Union's access rights by using the Auditor as fact and expert witness. [Arbitrator's opinion, p. 3]

The Township requests special permission to appeal. It contends that the worksheets are privileged work products; that they are irrelevant; and that they need not be disclosed to the public or to Local 1197 under the Right-to-Know Law or the common law right of access to public records.

^{1/} We have not been provided with a transcript of the hearing.

N.J.A.C. 19:16-5.17 authorizes the Commission to review interim orders of interest arbitrators. We exercise that authority sparingly, in the interests of justice or for good cause shown. Middlesex Cty., P.E.R.C. No. 98-46, 23 NJPER 595 (128293 1997).

We turn first to the Township's position that the worksheets are not relevant to the cross-examination of the auditor. N.J.R.E. 705 states that, upon cross-examination, an expert may be required to disclose the facts and data underlying his or her opinion and case law establishes that an expert is subject to searching cross-examination as to the basis of his or her opinion. See State v. Martini, 131 N.J. 176, 259 (1993). We will assume that the auditor's expert opinion was based on the final budget. However, the arbitrator found that the worksheets are "reasonably related to the process by which the auditor formulated his expert opinion" and the auditor himself referred to those worksheets during cross-examination (Arbitrator's opinion, p. 2). The Township offers no basis to disturb the arbitrator's conclusion and we decline to do so. Cf. Gaido v. Weiser, 227 N.J. Super. 175, 189 (App. Div. 1988), aff'd o.b. 115 N.J. 310 (1989) (scope of cross-examination within trial judge's discretion).

We next consider the Township's claim that cases governing access to public records militate against the release of the worksheets. A public entity may be required to release information because of the Right to Know Act, N.J.S.A. 47:1A-1 et seq., the common law right of access to public records or, in the

case of litigation, the discovery rules pertaining to the proceeding. See Irval Realty Inc. v. Bd. of Pub. Util. Comm'rs, 61 N.J. 366, 372 (1972); accord Grodjesk v. Faghani, 104 N.J. 89, 96 (1986). Thus, the arbitrator correctly ruled that Local 1197 could have a right to the worksheets even if a member of the public might not be able to obtain them under statutes and case law governing access to public records. See, e.g., State v. Loftin, 146 N.J. 295, 390 (1996); Dixon v. Rutgers, 110 N.J. 432, 456-57, 465 (1988).

We are also satisfied that the arbitrator's order was consistent with administrative and judicial rules concerning the production and admission of evidence.

N.J.A.C. 19:16-5.7(d) permits an interest arbitrator to require the production of such documents as the arbitrator deems material to a just determination of the issues. See also R. 4:10-2(a) (parties may obtain discovery regarding any matter not privileged, which is relevant to the subject matter of a pending action); N.J.R.E. 402 and N.J.A.C. 1:1-15.1 (except as otherwise provided in the New Jersey Rules of Evidence, all relevant evidence is admissible).^{2/}

^{2/} While interest arbitrators are not bound by all of the technicalities of the New Jersey Rules of Evidence, Fox v. Morris Cty., 266 N.J. Super. 501, 515 n.7 (App. Div. 1993), certif. denied, 137 N.J. 311 (1994), evidence and discovery rules provide guidance for an arbitration proceeding. The parties and the arbitrator viewed this dispute within the framework of these rules.

While the Township maintains that the worksheets are "privileged work product," it cites no basis for such a privilege. The work product privilege, which is closely allied to the attorney-client privilege, protects materials and mental impressions obtained by an attorney in preparation for trial. Hickman v. Taylor, 329 U.S. 495, 510-11 (1947); R. 4:10-2(c). There is no suggestion that the worksheets were prepared at counsel's request in preparation for trial.

The Township also asserts that the worksheets are privileged under N.J.R.E. 515, preventing disclosure of "official information of this State" if prohibited by statute or if disclosure is found to be harmful to the public interest. It asserts that disclosure would be harmful because the worksheets "contain analysis and evaluations about priorities and needs that ultimately resulted in the passage of the final budget." It relies on Home News v. Bd. of Ed., 286 N.J. Super. 380 (App. Div. 1996), which held that a newspaper was not entitled to a school board's preliminary budget workbook under common-law principles of public access to public records.

Preliminarily, it is not clear that "official information of this State" refers to information maintained by a municipality. See North Jersey Newspapers v. Passaic Cty., 127 N.J. 9, 17 (1992) (certain communications "at the state level" protected by predecessor rule); see also Biunno, Current N.J.

Rules of Evidence, Comment 1 to N.J.R.E. 515 (Gann) (rule contains no definition of "official information"; precise definition open to question). Assuming, however, that N.J.R.E. 515 could apply, we conclude that the Township has not demonstrated that disclosure would be harmful to the public interest or would outweigh Local 1197's need for the documents to cross-examine the auditor, especially since the auditor referred to the worksheets during cross-examination. See McCain v. College Hosp., 99 N.J. 346, 353 (1985) (Evid. R. 34, predecessor to N.J.R.E. 515, required balancing of litigant's interest in obtaining records against government's interest in confidentiality); see also Keddie v. Rutgers, 148 N.J. 36, 50 (1997) (similar balancing test used in assessing common-law right of access to public records) and Rutgers, the State Univ., P.E.R.C. No. 96-88, 22 NJPER 247 (¶27130 1996) (in assessing employer's right to union documents concerning grievance and unfair practice charge, Commission evaluated employer's ability to defend itself in unfair practice case against potential interference in union's internal affairs).

The arbitrator found that the worksheets were related to the auditor's formulation of his expert opinion. He concluded that Local 1197 was entitled to their production in connection with its cross-examination of the auditor. This specific, hearing-related need for the documents outweighs the Township's interest in not disclosing the worksheets, an interest which we

find to be less compelling than that of the school board in Home News. Because the auditor's worksheets relate to an adopted budget, disclosure of preliminary analyses of priorities and needs would not present an incomplete picture of the Township's financial situation or prematurely raise concerns or expectations about final budget decisions. Cf. Home News, 286 N.J. Super. at 388 (stating that preliminary budget figures should not be "bruted about in public" prior to budget adoption); Shuttleworth v. City of Camden, 258 N.J. Super. 573, 585 (App. Div. 1992), certif. denied, 133 N.J. 429 (1993) (State interest in maintaining confidentiality of internal investigative records is reduced once investigation is completed; disclosure ordered). Further, the Township has not made any particularized arguments as to why the worksheets should remain confidential. Cf. Home News, 286 N.J. Super. at 386 (school board asserted that budget workbook included information, required by federal law to be kept confidential, concerning special education pupils).

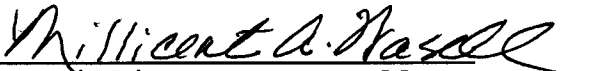
In declining this request for special permission to appeal, we need not decide whether disclosure of municipal budget worksheets would be required in all circumstances.

For all these reasons, we conclude that there are not sufficient extraordinary circumstances to grant special permission to appeal. See Middlesex Cty. (no basis for granting special permission to appeal).

ORDER

The request for special permission to appeal the arbitrator's interlocutory order is denied.

BY ORDER OF THE COMMISSION


Millicent A. Wasell
Chair

Chair Wasell, Commissioners Boose, Buchanan, Finn, Klagholz, Ricci and Wenzler voted in favor of this decision. None opposed.

DATED: March 26, 1998
Trenton, New Jersey
ISSUED: March 27, 1998