STATE OF DELAWARE

PUBLIC EMPLOYMENT RELATIONS BOARD

AMERICAN FEDERATION OF STATE, COUNTY AND MUNICIPAL EMPLOYEES, AFL-CIO, COUNCIL 81, LOCALS 320 AND 1102,	:	
Charging Parties,	:	**ULP No. 10-08-761**
v.	:	**Decision on Motion for Judgment on the Pleadings**
CITY OF WILMINGTON, DELAWARE,	:	
Respondent.	:	

BACKGROUND

The City of Wilmington, Delaware, ("City") is a public employer within the meaning of 19 Del.C. §1302(p) of the Employment Relations Act, 19 Del. C. Chapter 13 ("PERA" or "Act").

The American Federation of State, County & Municipal Employees, AFL-CIO, Council 81, through its affiliated Locals 320 and 1102 ("AFSCME"), is an employee organization within the meaning of §1302(i), of the Act and the exclusive bargaining representative of two bargaining units of City employees, within the meaning of §1302(j), of the Act.

The City and AFSCME Local 320 are parties to a collective bargaining agreement with a term of January 1, 2007 through December 30, 2009. The City and AFSCME Local 1102 are parties to a collective bargaining agreement with a term of July 1, 2007 through June 30, 2010. Notice was provided by AFSCME to the City requesting to initiate negotiations for the terms of a successor collective bargaining agreement for each

unit.

On or about August 19, 2010, AFSCME filed an unfair labor practice charge alleging conduct by the City in violation of 19 Del.C. §§1307(a)(5), (a)(6), (a)(7) and (a)(8)[1]. Specifically, the Charge alleged AFSCME requested the City provide "the report regarding classification and compensation that is applicable to members of the bargaining unit" ("JAQ Report") and information identifying the scope and cost of the City's outside labor counsel during the most recent ten (10) year period. AFSCME asserted it needed this information to assist in contract administration and to properly represent bargaining unit members.

On or about September 3, 2010, the City filed its Answer, admitting to the relevant facts and denying the material allegations contained in the Charge. The City denied that its refusal to produce the information violates its statutory duty to bargain in good faith.

Under New Matter included in its Answer, the City countercharged AFSCME had acted in violation of its duty to negotiate in good faith and of 19 *Del.C.* §1307(b)(2)[2] by "attempting to subvert the spirit of 19 *Del.C.*§1307(a)(8) by trying to obtain records

[1] §1307 (a) It is an unfair labor practice for a public employer or its designated representative to do any of the following:

(5) Refuse to bargain collectively in good faith with an employee representative which is the exclusive representative of employees in an appropriate unit, except with respect to a discretionary subject.

(6) Refuse or fail to comply with any provision of this chapter or with rules and regulations established by the Board pursuant to its responsibility to regulate the conduct of collective bargaining under this chapter.

(7) Refuse to reduce an agreement, reached as a result of collective bargaining, to writing and sign the resulting contract.

(8) Refuse to disclose any public record as defined by Chapter 100 of Title 29.

[2] §1307 (b) It is an unfair labor practice for a public employee or an employee organization or its designated representative to do any of the following:

(2) Refuse to bargain collectively in good faith the public employer or its designated representative if the employee organization is an exclusive representative.

under FOIA which are exempt under 29 *Del.C.* §10002(g)(8)."[3] The City further alleged AFSCME acted in violation of its duty to negotiate in good faith and of 19 *Del.C.* §1307(b)(2) by "attempting to obtain materials exempt from FOIA, through the pretext that they want to use the information to administer the CBA's. In truth, the Petitioners intend to use the information for negotiations."

On or about September 8, 2010, AFSCME filed its Response to New Matter denying the allegations set forth in the City's Countercharge.

Additionally, on or about September 9, AFSCME also filed a Motion for Judgment on the Pleadings, alleging "there are no material issues of fact, and the law applicable to the unfair labor practice is clear and well settled in Delaware." Charging Party appended a legal memorandum to its motion and requested an expedited hearing.

On September 15, a Probable Cause Determination was issued by the Public Employment Relations Board, finding the pleadings are sufficient to establish probable cause to believe that an unfair labor practice, as alleged, may have occurred.

The City responded to AFSCME's Motion for Judgment on the Pleadings on or about October 8, 2010. The City filed a Countermotion for Judgment on the Pleading and also attached a legal memorandum to its motion.

AFSCME filed a Reply memorandum on October 20, 2010.

This decision on Motion results from the legal record thus created by the parties.

FACTS

The facts as set forth in the pleadings are documented by exhibits attached to the pleadings. Those facts include:

On or about September 29, 2009, Phillip S. Williams, Sr., ASFCME Staff

[3] 29 *Del.C.* §10002(g)(8): …any records involving labor negotiations or collective bargaining.

Representative sent a letter to the City's Director of Human Resources, which stated:

> In accordance with Article XXV, Section 25.2 of the Collective Bargaining Agreement between Council 81, AFSCME AFL-CIO, its affiliated Local No. 320 and the City of Wilmington, I am hereby notifying you of the Union's desire to commence negotiations on the terms and conditions of a successor agreement. I will serve as the Union's chief negotiator and offer December 3rd, 8th, 9th or 10th as possible dates for the parties to meet and commence these negotiations. *Exhibit 1 to the City's Answer to the Unfair Labor Practice Charge.*

By letter dated April 16, 2010, the President of AFSCME Local Union 1102 advised the City of Wilmington "… of the intent of Union Local 1102 to modify the current CBA with the City of Wilmington and start negotiations on the same." *Exhibit 1 to the City's Answer to the Unfair Labor Practice Charge.*

On or about May 28, 2010, AFSCME Council 81 Staff Representatives issued a letter to the Mayor of the City of Wilmington, which stated:

> On behalf of AFSCME, Council 81 and Local Union 1102 and 320 we are requesting information regarding the following:
>
> 1. The report regarding classification and compensation that is applicable to members of our bargaining units. The report is commonly referred to as the JAQ report. This information has been previously requested but not produced.
> 2. Regarding all solicitations or bid request for outside counsel to perform *[sic]* to represent or advise the City during contract negotiations with the Union, the scope of work to be performed, the bids submitted, the documents announcing the winner of the bid, the copy of the contract entered into by the City with the selected bidder, and the invoices by outside counsel who performed work in regards to all prior contract negotiations.
>
> We believe the City has a duty to provide this information to the public under FOIA. In addition, the City has a duty to provide this information much like any other financial information under the Delaware Public Employment Relations Act. The information requested will be used by the Union in its efforts to keep current so that it can properly administer the collective bargaining agreement, help avoid or resolve any grievances, and to properly represent the members of our bargaining units. Failure to provide the information in a timely manner will be viewed by the Union as an effort to evade the City *[sic]* responsibility and we will seek enforcement by filing a unfair labor practice under 19 Del.C. 1307(a).

> Your cooperation and prompt response would be appreciated. *Exhibit 1 to the Unfair Labor Practice Charge.*

The City responded to AFSCME's request for information with a letter from its Assistant City Solicitor, dated June 14, 2010:

> This letter is the formal response to Council 81's Freedom of Information Act (FOIA) request. You have requested a report commonly referred to as the JAQ report and information pertaining to outside counsel retained by the City for labor negotiations. Your request is respectfully denied pursuant to 29 Del.C. § 10002(g)(8). The information you have requested relates to a labor negotiations and for that reason is exempt from public records.
>
> Additionally, a FOIA request may not be used as a tool to gain leverage against a government entity in adversarial proceedings (such as labor negotiations). Rather FOIA's intended purpose is to allow members of the general public in their capacity as citizens and tax payers to gain information about government entities. Clearly, a FOIA request that has the purpose of leveraging the union's bargaining position in labor negotiations does not meet the letter or spirit of FOIA.
>
> Please feel free to contact me if you have any other questions as to the City's position on this matter. *Exhibit 2 to the Unfair Labor Practice Charge.*

On or about June 30, 2010, AFSCME formally requested assistance from the State Department of Justice to secure the requested documents. The request stated:

> I am the attorney for AFSCME Council 81 and in that capacity I am writing for your assistance in securing certain documents from the City of Wilmington ("City") under the Freedom of Information Act ("FOIA"). Council 81 and its Local Unions 320 and 1102 (collectively "Union") are the exclusive collective bargaining agents for a certain group of people employed by the City. As you are aware, the City is a public employer under 19 *Del.C.* Chapter 13. The City is also subject to 29 *Del.C.* §10005, FOIA.
>
> On May 28, 2010, the Union sent a written request (see copy of May 28, 2010 letter enclosed) to the City for the following:
>
> 1. The report regarding classification and compensation that is applicable to members of our bargaining units. The report is commonly referred to as the JAQ report. This information has been previously requested but not produced.
> 2. Regarding all solicitations or bid request for outside counsel to perform *[sic]* to represent or advise the City during contract negotiations with the Union, the scope of work to be performed,

> the bids submitted, the documents announcing the winner of the bid, the copy of the contract entered into by the City with the selected bidder, and the invoices by outside counsel who performed work in regards to all prior contract negotiations.
>
> On June 9, 2010, the Union was informed that the request was forwarded to the City Solicitor's office. On June 14, 20010, the City, by and through its Assistant Solicitor, responded to the Union's letter refusing to provide the requested documents. As support for the denial, the City asserted the exemption under 29 *Del.C.* §10002(g)(8). However, collective bargaining is not currently under way.
>
> We believe that the City has a duty to provide this information to the public under FOIA. In addition, the City has a duty to provide this information much like any other financial information under the Delaware Public Employment Relations Act. The information requested will be used by the Union in its efforts to keep current so that it can properly administer the collective bargaining agreement, help avoid or resolve any grievances, and to properly represent the members of the bargaining units. Failure to provide the information in a timely manner will be viewed by the Union as an effort to evade the City's responsibility, and we will seek enforcement by filing an unfair labor practice under 19 *Del.C.* §1307(a). *Exhibit 3 to the Unfair Labor Practice Charge.*

On or about August 9, 2010, the Department of Justice issued a letter opinion in response to AFSCME's request, which stated in relevant part:

> Discussion
>
> 1. The request for the "JAQ" report.
>
> This request directly raised the relationship between PERA and FOIA: the former requiring a public employer to disclose public records to the unions, the latter excluding from the definition of public record any document "involving" collective bargaining. If a record is involved in collective bargaining, it is not a public record, pursuant to 29 *Del.C.* §10002(g)(8), and therefore failure to produce it is not an unfair labor practice, pursuant to 19 *Del.C.* §1307(a)(8). If the exception to FOIA is read expansively, any record that a union requests of a public employer in connection with the collective bargaining process is unobtainable. Yet the employer's duty to provide information to the union is central to meaningful collective bargaining. 1 *The Developing Labor Law* 929 (John E. Higgins, Jr., ed., 2006). "The duty to bargain collectively … includes a duty to provide relevant information needed by a labor union for the proper performance of its duties as the employees' bargaining representative." *Detroit Edison Co. v. NLRB* 40 US 301, 303 (1979). The General Assembly's clear intent in making failure to produce

public records an unfair labor practice was to require public employers to produce to unions all information needed for effective collective bargaining.

We cannot simply ignore the plain language of either one of the statutes in apparent conflict, but are required to reconcile them. *Chase Alexa, LLC v. Kent County Levy Court*, 991 A.2d 1148, 1152 (Del. 2010). Yet, it is not the statutory role of the Attorney General's office to determine the parties' relationships under collective bargaining. It is our role only to give an opinion as to what FOIA means, whereas the General Assembly designated PERB to resolve labor law issues. It is the express purpose of PERA and PERB to,

> promote harmonious and cooperative relationships between public employers and their employees and to protect the public assuring the orderly and uninterrupted operations and functions of the public employer. These policies are best effectuated by: …
>
> (3) Empowering the Public Employment Relations Board to assist in resolving disputes between public employers and public employees and to administer this chapter.

19 *Del.C.* §1301; *see also* 19 *Del.C.* §1307 (unfair labor practices) and 1308 (disposition of complaints).

In our opinion FOIA is coextensive with the duty under PERA to provide information. Therefore, §10002(g)(8) excludes from the definition of public records only records that could be excluded from the duty to provide information in collective bargaining. That is a question of labor law to be determined by PERB. Indeed, we have no procedure for the necessary fact-finding, whereas PERB, which is comprised of individuals who are "knowledgeable in the area of labor relations," can subpoena witnesses and records and hold hearings. 14 *Del.C.* §4006. Moreover, should we attempt to make a factual finding in this case, we would be creating a parallel body of decisions to the PERB, which is not conducive to orderly labor relations, and which would encourage forum shopping…

Conclusion

We conclude … because of the desirability of there being a consistent body of Delaware labor law, we defer to PERB to determine whether the JAQ report must be disclosed, pursuant to PERA. *Exhibit 4 to the Unfair Labor Practice Charge.*

The Department of Justice's letter opinion determined "the records of expenditures for outside counsel must be promptly produced, subject to the exemptions

for attorney-client or other privileged information."[4]

By correspondence dated August 10, 2010, AFSCME's counsel clarified the request for information in a letter to the Assistant City Solicitor:

> … As you are aware, the first item in the August 9, 2010 letter was a request for "the report regarding classification and compensation that is applicable to members of our bargaining units. The report is commonly referred to as the JAQ report. This information has been previously requested but not produced. The Deputy Attorney General has deferred to the PERB for its opinion on whether the City is required to produce the JAQ. I am renewing the Union's request for a copy of the report. As my next step is to file an unfair labor practice to compel production of the Study, I would make yet another request for voluntary production sparing the parties the cost in time, people and expense.
>
> Your prompt response would be appreciated. If I do not receive a positive response to these requests by the close of business on Tuesday, August 17, 2010, then I will file an unfair labor practice on behalf of Local Unions 320, 1102A and 1102B. *Exhibit 5 to the Unfair Labor Practice Charge*

The City's Assistant Solicitor responded in a letter dated August 16, 2010:

> … The opinion rendered by the Attorney General implies the above materials[5] are public records under 29 Del.C. §10002(g)(8). It relates to "public business." Therefore, I have advised the City's negotiations' team to avoid any discussion related to this material because that would be directly in conflict with 29 Del.C. §10002(g)(8), which is the exemption of public records related to labor negotiations or collective bargaining. These documents were provided as public records, not as leverage to be used in collective bargaining.
>
> As for the JAQ report, it is not the type of financial information the City is required to provide for labor negotiations pursuant to the Public Employment Relations Act. Therefore, we will not provide you with the report. *Exhibit 6 to the Unfair Labor Practice Charge.*

In its Answer to the Unfair Labor Practice Charge, the City described the Job Analysis Questionnaire ("JAQ") as,

> … a group of confidential reports based on a survey conducted by an outside vendor commissioned by the City for negotiation purposes.

[4] The issue of production of records concerning expenditures for outside counsel is not in issue in the instant unfair labor practice charge and will not be further referenced in this decision.

[5] "The above materials" references the records of the City's expenditures for outside legal counsel.

> These reports include a 2006 Salary and Pay Policy Finding and Recommendations, a Classification Report and a Detailed Custom Market Data Report. Only the 2006 Salary and Pay Policy Finding and Recommendation report was finalized. The rest remained in draft form.

POSITIONS OF THE PARTIES

AFSCME: The City has a clear duty under the PERA to provide information to the exclusive bargaining representative(s) of its employees that is necessary and relevant to the performance of the union's representational responsibilities. This obligation arises under the employer's statutory duty to bargain in good faith. The City is required to respond in good faith, with reasonable promptness and without undue delay to the union's request for information.

AFSCME asserts its request for the JAQ is, on its face, objectively relevant and necessary data in connection with its statutory representational responsibilities. If the request for information meets the 'objectively relevant and necessary data' standard, then the City's refusal to provide the information (in whole or in part) is a breach of its duty to bargain in good faith and a *per se* unfair labor practice.

AFSCME argues the JAQ is obviously relevant and that the City's defense of its refusal to provide it is patently without good faith. The City's actions are designed to force the Union to spend unnecessary time and resources to secure necessary information and to chill the faith bargaining unit employees have in the union to protect their rights under the PERA.

City: The documents the unions have requested are not public records under FOIA definitions and the City is, therefore, exempt from a §1307(a)(8) violation. Section 1307(a)(8) prohibits a public employer from refusing to disclose any public record, as

defined by FOIA. The legislature carefully defined a "public record" to specifically exclude "any records involving negotiations or collective bargaining." 29 Del.C. §10002(g)(8).

The City argues public policy dictates that neither side in labor negotiations should be placed in a disadvantageous position. It asserts the exclusion of records involving collective bargaining from "public records" was crafted to prevent unions from gaining an unfair advantage by obtaining through FOIA records the employer had created to assist it in negotiations. It asserts the JAQ study the unions seek was conducted in order to assist the City in collective bargaining and is "exactly what the legislature intended to be exempt from FOIA under 29 Del.C. §10002(g)(8).

The City relies upon the National Labor Relation Board's ("NLRB") decision in *Boise Cascade Corporation*[6] and the D.C. District Court's decision in *National Treasury Employees Union*[7] to support its position. It argues the unions' reliance on PERB's decision in *AFSCME v. DSU*[8] is misplaced because neither party alleged the requested information was related to labor negotiations and the employer did not assert a 29 Del.C. §10002(g)(8) defense to having to produce the documents.

The City argues the unions have presented no evidence that the requested information will have any impact on administering the collective bargaining agreements. It asserts it is clear that the unions have requested the JAQ report "for leverage in negotiations". To compel the City to provide the JAQ report to the unions would require PERB to ignore the legislature's intent to protect records pertaining to collective

[6] *Boise Cascade Corporation and the United Paperworkers International Union, Local 900*, 279 NLRB 422 (NLRB 1986).

[7] *National Treasury Employees Union, et al. v. United States Department of the Treasury, Internal Revenue Service*, 487 F.Supp. 1321 (D.C. 1980).

[8] *American Federation of State, County and Municipal Employees (AFL-CIO) Council 81 and Locals 1007, 1267 & 2888 v. Delaware State University*, ULP 10-04-739, VII PERB 4693 (PERB 2010)

bargaining and would have a chilling effect on negotiations. The City argues,

> … Delaware public employers would be reluctant to gather any materials or data to assist them in labor negotiations knowing they could be forced to hand it over to the unions. It would place public employers at a severe disadvantage, a situation the legislature wanted to avoid when it passed the exemption under Section 10002(g)(8).

The City concludes the unions' FOIA request is contrary to law and should be denied. It requests PERB deny AFSCME's Motion for Judgment on the Pleadings and grant the City's Motion for Judgment on the Pleadings.

DISCUSSION

Summary Judgment (or judgment on the pleadings) is appropriate when the pleadings do not establish a genuine issue as to any material fact and where the moving party is entitled to judgment as a matter of law. In considering the parties' Motions, the pleadings with attached documents, legal arguments of the parties, and applicable case law were considered.

AFSCME's request for information on May 28, 2010, was premised on both the Delaware Freedom of Information Act ("FOIA", 29 Del.C. Chapter 100) and the Public Employment Relations Act ("PERA", 19 Del.C. Chapter 13). Failure to disclose a public record as defined by FOIA constitutes a violation of 19 Del.C. §1307(a)(8). PERB has held that a public employer has the duty to provide requested information which is necessary for the exclusive bargaining representative to fulfill its statutory representational responsibilities and that failure to do so constitutes a violation of 19 Del.C. §1307(a)(5).[9] *Bd. of Education of Colonial School District v. Colonial Education*

[9] "Delaware law extends to State, county and municipal employees many of the same rights to organize and bargain collectively that the LMRA affords to employees in the private sector. 19 Del.C. s 1301, et seq. In cases where the problems raised under Delaware's labor law are similar to those that arise under the LMRA, Delaware could be expected to consider and, in all likelihood, follow federal law." *Cofrancesco v.*

Association, DSEA/NEA, Del.Chan., CA 14383, II PERB 1343 (1996), *affirmed Colonial Education Assn. v. Bd. of Education*, Del.Supr., Case 129, 1996, 152 LRRM 2575, III PERB 1519 (1996), (citing *Brandywine Affiliate, NCCEA/DSEA/NEA, v. Brandywine School District*, Del.PERB, ULP 85-06-005, I PERB 131, 149 (1986)); *AAUP v. DSU*, Del. PERB., Decision on Remand, ULP 95-10-159, III PERB 2177 (2001); *Delaware Correctional Officers Association v. Delaware Department of Correction*, ULP No. 00-07-286, III PERB 2209, 2214 (2001).

The duty to provide information is well-settled under PERB case law. The information required to be provided under the PERA is broader than that covered by FOIA. The City's reliance on the D.C. District Court's 1980 decision in *National Treasury Employees Union* is misplaced. That case dealt exclusively with the right of the union under the federal FOIA[10] to a Handbook prepared by IRS management. The Handbook, titled "Multi-District Collective Bargaining Contract Administration Materials", was organized by articles of the collective bargaining agreement and included the contractual language, IRS regulations applicable to that article, decisions by arbitrators and courts relating to the article, bargaining history and IRS interpretation of the article. The Court found the Handbook was not subject to disclosure because it was not an administrative staff manual which affects members of the public within the meaning of the federal FOIA. The case did not raise an issue as to whether the union had an independent right to any or all of the materials under the applicable collective bargaining law.

The Public Employment Relations Act requires that if not otherwise privileged, the employer has a duty to provide information that "includes access to relevant

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City of Wilmington, 419 F.Supp. 109 (D.C.Del. 1976).

[10] 5 U.S.C. §552(A)(2)(C).

information necessary for the bargaining representative to intelligently determine facts, assess its position and decide what course of action, if any, to pursue." *NCCEA/DSEA/NEA v. Brandywine School District*, Del. PERB, 131, 149 (1986).

The good-faith standard for furnishing information in response to the request of the certified exclusive bargaining representative was succinctly restated in the NLRB's 2007 decision in *Otay River*,[11]

> … The general rule is that an employer is obligated to provide the employees' statutory bargaining representative with information in its possession relevant to collective bargaining. *Detroit Edison Co. v. NLRB*, 440 US 301 (1979); *NLRB v. Acme Industrial Co.*, 385 US 432 (1967); *NLRB v. Truitt Mfg., Co.*, 351 US 149 (1956); *Curtiss-Wright Corp. v. NLRB*, 347 F2d 61 (3d Cir. 1965); *Fafnir Bearing Co.*, 146 NLRB 1582 (1964), enfd. 363 F2d 716 (2d Cir. 1968). Furthermore, the Board in *Sheraton Hartford Hotel*, 289 NLRB 463, 463-464 (1988) said 8(a)(5)[12] obligates an employer to provide a union with the requested information if there is a probability that the information would be relevant to the union in fulfilling its statutory duties as bargaining representative. When the requested information concerns wages, rates, job descriptions, and other information pertaining to employees within the bargaining unit, the information is presumptively relevant. *Postal Service*, 332 NLRB 635 (2000).
>
> Moreover, information that is "potentially relevant and will be of use to the union in fulfilling its responsibilities as the employees' exclusive bargaining representative" must be produced. *Acme Industrial.*, supra at. 435-436; *Conrock Co.*, 263 NLRB 1293, 1294 (1982). The requested information need not be dispositive of the issue for which it is sought but need only have some bearing on it. Information pertaining to employees within the bargaining unit is presumptively relevant. *Sheraton Hartford*, supra., and *Postal Service*, supra.

Good faith bargaining requires parties have adequate information concerning the issues about which they are negotiating. The U.S. Supreme Court held in *Truitt Manufacturing*:

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[11] *Otay River Construction and Building Materials, Construction, Industrial, Professional and Technical Teamsters Union, Local 36*, 351 NLRB 69, 183 LRRM 1248 (2007).

[12] 8(a)(5) requires an employer to bargain in good faith under the LMRA and essentially parallels §1307(a)(5) of the PERA.

> Good faith bargaining necessarily requires that claims made by either bargainer should be honest claims. This is true about an asserted inability to pay an increase in wages. If such an argument is important enough to present in the give and take of bargaining, it is important enough to require some sort of proof of its accuracy. And it would certainly not be farfetched for a trier of fact to reach the conclusion that bargaining lacks good faith when an employer mechanically repeats a claim of inability to pay without making the slightest effort to substantiate the claim. *Truitt Mfg.,* Supra. p. 152.

The duty to provide information during the course of collective bargaining is reciprocal, applying to both the employer and the exclusive bargaining representative. Most of the information sought during the course of good faith negotiations which is necessary for effective bargaining will flow from the employer to the union, because of the relative positions of the parties. The open, honest and good-faith exchange of information is a cornerstone of effective collective bargaining that is protected by the PERA. *AFSCME v. DSU,* Supra p. 4705.

The City relies upon the NLRB's decision in *Boise Cascade* to support its position that information which is accumulated and prepared for purposes of developing bargaining strategies is not subject to disclosure. The NLRB held in that case:

> … A proper bargaining relationship between the parties mandates the [employer] be able to confidentially evaluate possible interpretations of the existing labor agreement and that it be able to plan in confidence a strategy for altering or changing its maintenance improvement program. I recognize that complete disclosure might help an arbitrator to reach a more just result, but at the same time it might well have a tendency to frustrate the overall purpose of collective bargaining between the parties. On this particular point, a balancing of the parties' interests must be weighed in favor of [the employer] being allowed to withhold from the Union its historical overview of negotiations with the Union and its future negotiating strategy. Accordingly, any portion of the [employer's] maintenance improvement report that relates to a historical overview of negotiations or of [employer's] negotiating strategy is information that it need not supply. *Boise Cascade,* supra. @432

> … any portion of the management feasibility study regarding the maintenance improvement program that qualifies as a legal opinion was and is protected from disclosure by the attorney-client privilege

> as it applies to corporations. Those portions of the maintenance improvement program that were privileged from disclosure are strictly limited to those portions of the feasibility study that related directly to advice from counsel to the corporate client. In this regard, the privilege extends to any portion or portions of the feasibility study or report that constitute the mental impressions, conclusions, opinions, or legal theories of corporate counsel. Those portions of the survey or report that [employer] was privileged to withhold must have been those that constituted legal opinion as distinguished from preexisting documents, writings, surveys or feasibility studies. *Boise Cascade*, Supra. p. 433

The NLRB ultimately ordered the Employer to provide to the Union, "all surveys used to formulate the maintenance improvement program and all studies of job definitions, as well as all maintenance improvement reports, less the following portions of any of the surveys or reports that (a) constitute a historical overview of prior negotiations or that reflect [the employer's] current negotiating strategy on the maintenance improvement program; (b) outline how [the employer's] supervisors would carry out their assigned task of implementing the maintenance improvement program; and (c) constitute a legal opinion from corporate counsel to [the employer's] high-level managers; (2) all projected cost savings; (3) all efficiency calculations; and (4) to the extent that any such report or summary exists, any breakdown comparing maintenance efficiency and cost at the Rumford mill with other of the [the employer's] papermaking installations. *Boise Cascade*, Supra. p. 434.

The question in each information case is whether or not under the particular circumstances the statutory obligation to bargain in good faith has been met. *Truitt*, Supra. p. 153. A public employer must respond in good faith to a request from the exclusive representative of a bargaining unit of its employees for information that, on its face, objectively appears to be relevant to collective bargaining.

At this point in these proceedings, the record does not establish either what is contained in the JAQ report (or what AFSCME believes is contained in the report) or

how that information is relevant and necessary to the performance of the union's representational responsibilities. These factors are not established simply by repeatedly asserting that they are "clearly met, on their face."

Unlike the situation involving these parties in the recently issued decision in ULP 10-12-781[13], the charge does not specify the purpose for which the JAQ report is requested. There is no allegation that there is a pending or potential allegation of violation of either collective bargaining agreement nor is there specific reference to the need for this information for negotiations. AFSCME has also not established that the City has taken any action based on the JAQ, nor has it established that the City has either taken a position in bargaining or rejected an offer made by the union based on information contained in the JAQ reports.

At best, the record includes only a general description of the JAQ report which the City described in a footnote in its Answer to the Charge as:

> The JAQ is a group of confidential reports based on a survey conducted by an outside vendor commissioned by the City for negotiation purposes. These reports included a 2006 Salary and Pay Policy Finding and Recommendations, a Classification Report and a Detailed Custom Market Data Report. Only the 2006 Salary and Pay Policy Finding and Recommendations report was finalized. The rest remained in draft form.

A request for information must be made in good faith and the response to that request must also be made in good faith. The union has the initial burden to establish the relevance of the requested information. Although "the burden is not exceptionally heavy", there must be some proffer as to relevance. *Boise Cascade,* supra. Once the presumption of relevance is established, the burden shifts to the employer to respond in good faith in a reasonable and prompt manner. *Tower Books*, 273 NLRB 671 (1984).

[13] *AFSCME Council 81, Locals 320 & 1102 v. City of Wilmington,* ULP 10-12-781, VII PERB 4849 (Decision on the Pleadings, 2011).

The parties remain under a good faith obligation to attempt to resolve any issues concerning the scope of the request and/or method of production.

In this case, the record is insufficient at this point to establish the relevance of the requested report to AFSCME's representational responsibilities.

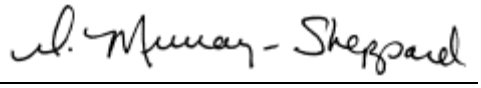
DETERMINATION

For the reasons stated above, AFSCME's Motion for Judgment on the Pleadings and the City's Counter-Motion for Judgment on the Pleadings are denied as the record is insufficient at this time to render a decision as to whether an unfair labor practice has been committed.

A hearing will be scheduled forthwith in order that a record may be established on which a decision can be rendered on the Charge and Counter Charge.

IT IS SO ORDERED.

DATE: February 9, 2011



DEBORAH L. MURRAY-SHEPPARD
Executive Director
Del. Public Employment Relations Bd.