The Board Report

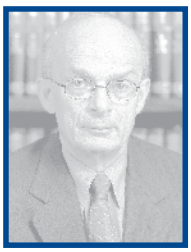
A Board Member's Practical Guide to the Issues Facing School Boards Today

GUIDANCE FROM THE OFFICE OF OPEN RECORDS

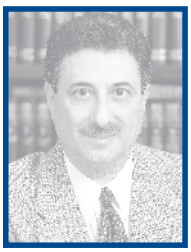
Since the new Right-to-Know Law (RTKL) took effect on January 1, 2009, the State Office of Open Records (OOR) has rendered almost 150 final determinations, 14 of which have been appealed to Court. The decisions are specific as to the record requested and the exception raised by the public entity and do not address whether other exceptions or statutory provisions apply. With this in mind, of the decisions rendered, there are several that have general application to School Districts. For example, OOR has held that audiotapes taken by the public entity to aide in the preparation of Meeting minutes are records open to the public which must be provided if requested. In addition, OOR has issued several Final Determinations which require e-mails among elected officials, whether by personal e-mail or District e-mail, to be provided if the e-mails are specifically identified in the request. Also, the seven decisions involving Signature Information Solutions, three of which are on appeal, have held that documentation involving tax billing/payment histories on requested parcels are open to the public, if in the control of the taxing body, as opposed to a tax collector which is specifically excluded from application of the RTKL by the Local Tax Collection Act. For additional information on final determinations which may be of interest to your District, please visit our website at www.mbm-law.net for more information. If you have any specific questions as to the application of the RTKL to a request which you received, any of our attorneys on the Education Law Team can respond to your inquiries.

MAIELLO BRUNGO & MAIELLO, LLP EDUCATION LAW TEAM

As an ongoing service to School Districts in Western Pennsylvania, the Education Law Practice Group of Maiello Brungo & Maiello, LLP is available to respond to your questions, comments or concerns. You may contact any member of our Education Law Team at 412.242.4400 or at the below e-mail addresses.



Alfred C. Maiello
Senior Managing Partner
acm@mbm-law.net



Michael L. Brungo
Partner
mlb@mbm-law.net

David Raves
Principal
dr@mbm-law.net

Falco A. Muscante
Associate
fam@mbm-law.net

R. Russell Lucas, Jr.
Associate
rrl@mbm-law.net

Donald A. Walsh
Associate
daw@mbm-law.net

Jennifer L. Cerce
Associate
jlc@mbm-law.net

Beth Fischman
Associate
bf@mbm-law.net

NO LONGER A CONFLICT OF INTEREST

For almost two decades, a School Director's participation in negotiations with a bargaining unit which includes the Director's spouse has not been permitted by the 1990 Ethics Commission *Van Rensler* Opinion. In *Van Rensler*, the Commission held that Directors could vote on the final agreement, but the Ethics Act prevented the participation of Directors in negotiations if the Director's spouse was a member of the bargaining unit. The Commission noted that the negotiation process would then be free of that Director's influence and the potential for the use of confidential information would be minimized, if not eliminated. The affected School Director was permitted to vote on the resulting contract based upon the conflict of interest class/subclass exception which requires that the spouse must be a member of a class consisting of the general public or a true subclass consisting of more than one member and the spouse must be affected to the same degree as the other members of the class/subclass. However, the December 2008 *Davison/Fox* opinions of the Commission, have overruled *Van Rensler*. The Commission now has determined that there is no basis in the Ethics Act for distinguishing between voting and participating in negotiations when the class/subclass exclusion is applicable. In other words, a Director can participate in negotiations and vote on the final contracts. However, the Commission stressed caution. Although the class/subclass exception might initially apply to permit a Director to participate in negotiations, the Director must remain vigilant and recognize developments during the negotiation process which would render the class/subclass exception no longer applicable. At that point, the Director would be required to abstain from further participation in the negotiations. Therefore, while the current Commission rulings permit a Director to both participate in negotiations and vote on contracts, even though the Director's spouse is a member of the Union, such participation may still draw the Director into an impermissible conflict of interest.

SUPERINTENDENT'S CORNER

TO DRILL OR NOT TO DRILL: THE LURE OF A REVENUE WINDFALL IS NOT WITHOUT ITS PITFALLS

The natural gas drilling boom in Pennsylvania, spurred by Marcellus Shale, has resulted in an army of professional Landmen fanning out across Western Pennsylvania whose objective is to have as many property owners sign their standard Oil and Gas Lease Agreement as possible with minimal variations in the rates which they pay or the terms which they offer. They may represent that they only plan to drill a shallow well, not a Marcellus Shale well, and yet, the lease terms limit a property owner's rights to separately negotiate with a Marcellus Shale driller. Rather, the Marcellus Shale driller must then deal directly with the gas company who now "owns" the oil and gas rights to your property, at least during the lease term. This could result in the loss of the more lucrative per acre signing bonus and royalties that Marcellus Shale drilling companies are willing to pay. Therefore, if your District is approached by an oil and gas Landman, caution should be exercised in negotiating the best possible lease for your District.

All Oil and Gas Lease terms are negotiable. A Landman may attempt to convince you that its lease terms fulfill the requirements of Pennsylvania law. While this may be true in a minimal sense, it does not prevent the District, as a landowner, from negotiating terms more favorable. An example is the 1/8 (12.5%) royalty contained in most standard Agreements. While it is true that Pennsylvania law only requires a 1/8 minimum royalty for the landowner on the oil or gas produced, usually excepting any gas used for "house gas" by the landowner, this royalty amount is negotiable. More favorable terms can be negotiated than are otherwise provided by state law. Also, Standard Lease Agreements usually define drilling rights to include a wide variety of activity beyond simply drilling a gas well. This may include construction and placement of buildings and a variety of related equipment, as well as the placement of pipelines, not only for a gas well drilled on District property, but also for pipelines for wells on adjacent properties. Standard Lease terms generally give the property owner no ability to deny placement of any of these structures and/or pipelines in any location throughout the entire property. When considering the heavy equipment, required facilities and millions of gallons of water needed for a Marcellus Shale well, it is important that placement of these types of structures be in areas which will not interfere with school operations and future development possibilities, especially when a producing gas well could exist for decades.

The above only reflects some of the concerns in negotiating an Oil and Gas Lease Agreement. Please visit our website at www.mbm-law.net for a more detailed list of areas of concern. Clearly, while School Districts may stand to gain a significant new source of revenue from signing bonuses, royalty and gas usage for their facilities, there are hidden pitfalls in entering into Oil and Gas leases which should be resolved through negotiations.