

CONFIDENTIAL ATTORNEY-CLIENT WORK PRODUCT

To: Laura Reinertsen, Borough Clerk
From: Scott D. Salmon, Esq., Special Counsel
Date: May 17, 2022
Re: Legal Opinion Pursuant to Resolution 22-101

Pursuant to my appointment as Special Counsel to the Borough of Red Bank (the “Borough”), I was tasked with providing a report “opining as to whether the Borough should commission an independent investigation of the facts and circumstances regarding potential interference with the Borough’s sanitation contract bid during the summer of 2020 and/or the subsequent release of confidential information related thereto in August 2020.” See Res. 22-101. In preparing this report, I have reviewed all documents made available to me by the Borough Attorney, Greg Cannon, and interviewed Councilman Edward Zipprich. I have also reviewed all applicable laws, regulations, and rules, most notably, the Local Public Contracts Law, N.J.S.A. 40A:11-1, et seq. (“LCPL”), and the Local Government Ethics Law, N.J.S.A. 40A:9-22.1, et seq. (“LGEL”).

1. Factual Findings

As part of this investigation, I have determined the following facts to be true:

- On May 13, 2020, the Borough passed Resolution No. 20-129, which authorized the Borough Administrator to issue a Request for Proposals (the “First RFP”) related to “Solid Waste Collection and Disposal Services.”
- The First RFP was issued on June 11, 2020.
- On July 14, 2020, Zipprich sent an e-mail to the then-Borough Administrator, Zaid Shehady, requesting a copy of the First RFP, as well as the RFP that had been issued prior to the last bid award approximately five years prior.
- Zipprich thereafter had a conversation with Tommy DeLisa of DeLisa Demolition, Inc., the operator of the then-current bid award. DeLisa raised several concerns to Zipprich about the First RFP and the obligations it put upon a successful applicant. DeLisa indicated that he believed it was geared more towards larger programs/municipalities and contained requirements that were too onerous. DeLisa indicated that he did not want to bring these concerns directly to Shehady out of a concern that it would bias Shehady against him, so Zipprich offered to relay the concerns to Shehady on DeLisa’s behalf.
- Following Zipprich’s conversation with DeLisa, Zipprich sent Shehady an e-mail on July 17, 2020, that contained a list of suggested revisions to the First RFP that, he believed, would make it more likely to receive favorable responses from potential bidders.

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- Shehady immediately responded to Zipprich to allay his concerns. Shehady also immediately forwarded Zipprich's e-mail, and his response, to Cannon. In his forwarding e-mail, Shehady stated, "Greg, FYI below. Just for the record, because of my experience with [Zipprich], I would not be surprised if [Zipprich] tries to sabotage this bid."
- On July 20, 2020, Shehady responded to the e-mail he had sent Cannon days before and stated, "Greg, I just learned that, as suspected there is some behind-the-scenes meddling. Apparently, [Zipprich] is relaying complaints from Tommy Delisa [*sic*] that either he has heard from him directly or through Maria Rotolo."
- Notably, Shehady also sent this e-mail by blind copy to Councilmembers Kate Triggiano, Hazim Yassin, Kathleen Horgan, Pasquale Menna, and Erik Yngstrom. He did not include Zipprich or Councilman Michael Ballard in the distribution list.
- DeLisa thereafter sent comments to Shehady—as well as a request to meet—via e-mail on August 4, 2020, regarding the feasibility of the requested services contained in the RFP.
- That day, Shehady forwarded these DeLisa's comments to the Borough Council, Cannon, and Borough Clerk Pamela Borghi. Shehady stated that DeLisa's comments were "suspiciously and curiously" similar to those raised by another councilmember, i.e., Zipprich. Shehady further stated in the e-mail that he believed that "there is an effort to sabotage this bid process," and requested a discussion during Executive Session.
- Notably, Shehady did not, at any point, identify any specifics of how Zipprich's conduct affected the bid process, much less how it may have "sabotaged" the process.
- The following day, on August 5, 2020, John Ward, a reporter with RedBankGreen, sent Shehady an e-mail that attached Zipprich's July 14 and July 17 e-mails, Shehady's July 17, 20, and August 4 e-mails, and DeLisa's August 4 e-mail. Ward asked Shehady to authenticate the documents. Shehady stated that they were authentic but was unable to verify whether there had been any modifications to the documents.
- Shehady further noted that some of the contents "may be confidential," but stated his belief that if they were requested under the Open Public Records Act, N.J.S.A. 47:1A-1, et seq. ("OPRA"), he did not believe they would be exempt from disclosure.
- Ward subsequently published an article related to the leak of the documents, stating that some of them, i.e. the August 4, 2020, e-mails, were "less than 12 hours old" and that he had received them the previous night, i.e., August 4, "from an anonymous sender using an encrypted e-mail service." See John T. Ward, Red Bank: 'Sabotage' of Trash Bid Alleged, REDBANKGREEN, tinyurl.com/y67zuqcr (last visited May 16, 2022).
- The First RFP called for sealed proposals from bidders on or before August 11, 2020. No responses were ever received.

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- As the Borough had not received any responses and was therefore unable to award the RFP, the Borough passed Resolution No. 20-214, which authorized a second RFP (the “Second RFP”) to be sent out related to “Solid Waste Collection and Disposal Services.”
- The Second RFP was issued on September 16, 2020.
- The Second RFP called for sealed proposals from bidders on or before November 17, 2020. Two responses were received, including one from DeLisa and one from Republic Services of NJ, LLC, d/b/a Marpal Disposal (“Marpal”).
- As stated in the proposed bid specifications, the determination was to be awarded to the lowest responsible bidder in the aggregate, i.e., using a quantitative measure that solely considers the overall cost proposal, as opposed to a qualitative bid that is more subjective.
- As such, the Borough chose to award the bid to DeLisa, which offered a proposal that will save the Borough approximately \$600,000 as compared to the Marpal proposal.

2. Legal Conclusions and Suggested Corrective Action(s)

2.1. Propriety of Councilman Zipprich’s Conduct

In my professional opinion, Zipprich’s conduct was not unlawful, nor did it violate any ethical responsibility that he holds in his elected position. Nor, in fact, does it open the Borough up to any allegation regarding the propriety in awarding the bid to DeLisa Demolition, Inc.

I come to this conclusion based upon the following reasons:

- There is nothing in either the LPCL or LGEL that prohibits Zipprich from discussing an RFP with a potential bidder. That is especially the case when the potential bidder has yet to make a bid, and in this case, does not make a bid at all on that particular RFP.
- At most, Zipprich’s alleged conduct consists of conveying concerns and questions by a potential bidder. There is no law, regulation, or rule that prohibits him from doing so. Zipprich is not alleged to have provided the potential bidder with any confidential information nor provided it with any benefit. Nor is he alleged to have interfered with any other potential bidder by preventing them from bidding at all. Therefore, it is unclear how he could have “meddled” or “sabotaged” the bidding process.
- Zipprich is only alleged to have spoken to DeLisa during the bidding process for the First RFP. However, no responses were received, and the RFP was reissued. Zipprich is not alleged to have acted improperly during the pendency of the Second RFP, which is the RFP that was actually awarded to DeLisa.
- The RFPs at issue here were quantitative bids under N.J.S.A. 40A:11-4, rather than qualitative, and there is no evidence that Zipprich interfered with the free and fair awarding of the bid. There is no indication that Zipprich’s conduct affected the actual award itself. Indeed, when DeLisa was ultimately awarded the bid, it won by presenting

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a more economical proposal than its competitor. Moreover, DeLisa's proposal was granted by a unanimous vote of the Borough Council by a vote of 6-0.

Based on Zipprich's alleged conduct, it does not appear to me to have been possible for Zipprich to have violated either the LPCL or LGEL, which are the two relevant statutes here. There is no legal precedent to suggest that his conduct was, or could have been, unlawful or unethical. As such, it is my professional opinion that no further investigation is required, and any further expenditure of funds to pursue this matter would be an inefficient use of resources.

2.2. Leak of Privileged E-Mails to RedBankGreen

As a threshold matter, the August 4, 2020, e-mail from Shehady to Cannon, with multiple members of the Borough Council included by blind copy,¹ were protected by the attorney-client privilege and therefore exempt under OPRA. See N.J.S.A. 47:1A-9, GRC Exemption No. 7.

Communications between an attorney and their client are widely understood to be privileged when such communications are made in the course of their relationship and in professional confidence. See N.J.R.E. 504(3). That privilege is permanent unless it is either waived by the client or falls within one of the few, limited exceptions (i.e., if legal advice is sought or obtained in aid of the commission of a crime or fraud or if it is knowingly made within the hearing of some person whose presence nullifies the privilege). Id. **As it relates to a government entity, that entity itself is the client, rather than any member, employee, or agent.** See R.P.C. 1.13(a)(emphasis added).

As the Borough is, in this instance, the client, only the Borough, through formal action of its governing body, may waive the attorney-client privilege. See Advisory Committee on Professional Ethics Opinion 327 (Apr. 8, 1976); see also Restatement (Third) of Law Governing Lawyers § 74 cmt. e (Am. Law Inst. 2000). Any other attempted waiver by an individual member of the governing body, an employee of the Borough, or an agent on their behalf, is inappropriate. Id.

Since the attorney-client privilege is ordinarily waived when a confidential communication is revealed to a third party, O'Boyle v. Borough of Longport, 218 N.J. 168, 176 (2014), the leak of the relevant privileged e-mails to RedBankGreen constitutes an inappropriate and unauthorized waiver of the attorney-client privilege without formal authorization by the Borough Council. No such formal (or even informal) authorization was given in this instance.

Normally, an inappropriate and unauthorized waiver of the attorney-client privilege is worth further investigation to determine its source. It should not be simply ignored or dismissed. If individuals believe that they can waive the privilege without repercussion, there is little incentive for anyone to maintain it. And since the purpose of the attorney-client privilege is "to encourage

1. As previously noted, Councilmen Zipprich and Ballard were not included on the e-mail. Since the contents of the e-mail was about Zipprich, it is understandable why he was not included, but it is unclear why Ballard was not. The Borough Administrator serves at the pleasure of all members of the Borough Council equally and should therefore serve them equally. See Borough Code Sec. 90-27.

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clients to make full disclosure to their attorneys,” it is vital to maintain that privilege unless properly waived. Paff v. Div. of Law, 412 N.J. Super. 140, 154 (App. Div. 2010).

However, in this instance, not only has a significant amount of time passed since the initial disclosure, nearly two years, but more importantly, the sender of the e-mail is no longer employed by the Borough and two recipients are no longer elected representatives of the Borough. Any investigation will therefore be incomplete without the ability to interview all parties involved.²

Given these realities, it is my professional opinion that the most reasonable corrective action would be to update all Borough policies and procedures, including any Employee Handbook (to the extent not already included), to provide further guidance on the Borough’s attorney-client privilege with its legal representatives, as well as disciplinary procedures should it be violated. Moreover, all elected representatives should be given training on this subject to ensure that there is no intentional or inadvertent disclosure and therefore waiver of the privilege.

If you have any additional questions, please feel free to contact my office at your convenience.

2. There is evidence to suggest that the e-mails were leaked by Shehady, who, as stated, is no longer employed by the Borough. However, such a conclusion is beyond the scope of this report and would require additional investigation that is likely impossible at this point in time for the reasons stated.