

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Jake Corman, in his official capacity as :  
Senator from the 34th Senatorial :  
District of Pennsylvania and Chair :  
of the Senate Committee on :  
Appropriations; and Robert M. :  
McCord, in his official capacity as :  
Treasurer of the Commonwealth of :  
Pennsylvania, :  
Plaintiffs :

v. :

The National Collegiate Athletic :  
Association, :  
Defendant :

v. :

Pennsylvania State University, :  
Defendant :

No. 1 M.D. 2013

MEMORANDUM AND ORDER

On October 8, 2014, Plaintiffs Senator Jake Corman (Corman) and Treasurer Robert M. McCord (collectively, Plaintiffs) filed a Motion to Compel Defendant the National Collegiate Athletic Association (NCAA) to Attend Depositions and Produce Previously Withheld Documents (Motion) to which the NCAA filed its Opposition on October 16, 2014. On October 22, 2014, Plaintiffs filed a Reply Brief, wherein, “Plaintiffs respectfully request[ed] that the Court . . . conduct an *in camera* review of the purportedly privileged documents[.]” Plaintiffs’ Reply Br. at 7. Thereafter, the NCAA filed an Application to file a Sur-Reply Memorandum. This Court, on October 24, 2014, granted the NCAA’s Application to file a Sur-Reply Memorandum, and ordered the parties to meet and confer in a good

faith attempt to resolve the disputes regarding the production of all documents identified in the NCAA's October 16, 2014 revised privilege log (Privilege Log) and file a joint status report with the Court which identifies the documents in the Privilege Log for which agreement has been reached and those which remain in dispute.

On October 31, 2014, Corman and the NCAA filed a Joint Status Report Regarding Plaintiffs' Motion to Compel (Joint Status Report) which stated therein: "As a result of the meet and confer discussions, the total number of documents in dispute has been reduced by 1,740. The parties, however, are at an impasse over 544<sup>[1]</sup> documents. Those documents are listed in Exhibit A." Joint Status Report at 2. Also on October 31, 2014, the NCAA filed a Statement Regarding the Privileged Documents Still Disputed by Corman (NCAA Statement) explaining that although "its privilege log entries for these documents do not identify an attorney in the 'to' or 'from' line of the top-level email[,] . . . [such] is an insufficient reason to justify the intrusion [of *in camera* review] into the NCAA's privileged communications or justify the significant burden on the Court." NCAA Statement at 2. On November 2, 2014, Corman filed a Response to the NCAA's Supplemental "Statement" Regarding Documents Still In Dispute (Corman Response), wherein he contended that an "*in camera* review is necessary here to clarify various ambiguities in the privilege assertions[.]" Corman Response at 4.

Our Supreme Court has recognized "a particularized need for trial court involvement in determining the appropriate scope of discovery in individualized circumstances." *Cooper v. Schoffstall*, 905 A.2d 482, 492-93 (Pa. 2006). In addition, "[i]n camera review of disputed claims of privilege is often necessary and

---

<sup>1</sup> "Over the weekend of November 1-2, [Corman] engaged in further review of [the] disputed documents, and in turn further reduced the number of documents in dispute to 477." Corman's Response to the NCAA's Supplemental "Statement" Regarding Documents Still In Dispute at 2.

appropriate.” *Berg v. Nationwide Mut. Ins. Co.*, 44 A.3d 1164, 1179 (Pa. Super. 2012). Further, the explanatory comment to Pennsylvania Rule of Civil Procedure No. 4003.3 provides: “[D]iscovery and inspection should be permitted *in camera* where required to weed out protected material.” Pa.R.C.P. No. 4003.3, Explanatory Comment at ¶ 5 (*italics added*).

Moreover, in the context of discovery in civil matters, the Superior Court has consistently held that *in camera* review is a vital means by which to analyze whether a document is covered under a privilege. *See, e.g., T.M. v. Elwyn, Inc.*, 950 A.2d 1050, 1063 (Pa. Super. 2008) (stating that the ‘court may conduct *in camera* review of documents identified [ ] to be subject to a privilege, to better analyze the privilege issues, as needed.’); *Gocial v. Independence Blue Cross*, 827 A.2d 1216, 1223 (Pa. Super. 2003) (concluding that given the record as it existed on appeal, remand was necessary for the trial court to review discovery requests in light of the privileges raised by the plaintiff and that ‘[i]n some instances, *in camera* review may be required.’); *In re Estate of Wood*, 818 A.2d 568, 573 (Pa. Super. 2003) (‘[W]e instruct the trial judge to review the material *in camera* to determine if protection under the work product doctrine is warranted.’); *McGovern v. Hosp[.] Serv[.] Ass[.]n*, 785 A.2d 1012, 1018 (Pa. Super. 2001) (‘While it remains to be seen if indeed the underlying materials fall under the protection of the attorney-client privilege, the trial court at the very least must conduct an *in camera* inspection of the documents to determine this contention.’).

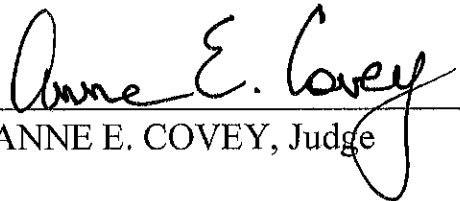
*Office of Open Records v. Ctr. Twp.*, 95 A.3d 354, 367 n.16 (Pa. Cmwlth. 2014).

Based upon our own review of the NCAA’s Privilege Log and the sample disputed documents, and after consideration of the parties’ arguments in their various filings pertaining to the instant Motion, this Court finds that an *in camera* inspection of the remaining disputed documents is “necessary and appropriate” to establish privilege. *Berg*, 44 A.3d at 1179.

AND NOW, this 7th day of November, 2014, Plaintiffs' Motion for an *in camera* review is GRANTED. The Court decrees that the NCAA shall deliver a true and accurate copy, and complete email chain, without any redactions, of the 477 disputed documents identified in Exhibit A of Corman's Response under seal to the Clerk of the Commonwealth Court on or before 12:00 p.m. on November 14, 2014.

The sealed documents shall be accompanied by a cover letter, a flash drive containing the Privilege Log modified to delineate the 477 disputed documents and a separate list of the name and job title of each individual who is identified as sender, recipient or copied on said documents. The cover letter, flash drive and list shall be filed in accordance with this Memorandum and Order, and copies of which shall be served on all other parties.

The Clerk shall deliver the sealed documents to the Honorable Anne E. Covey for *in camera* review. The sealed documents shall not be opened except by the Court.

  
ANNE E. COVEY, Judge

**Certified from the Record**