COURT OF COMMON PLEAS
CLERMONT COUNTY, OHIO

JAMES SMITH	**:**	
Plaintiff	**:**	**CASE NO. 2011 CVH 01952**
vs.	**:**	**Judge McBride**
PIERCE TOWNSHIP	**:**	**DECISION/ENTRY**
Defendant	**:**	

W. Kenneth Zuk, attorney for the plaintiff James Smith, 3487 St. Annes Turn, Cincinnati, Ohio 45245.

Schroeder, Maundrell, Barbiere & Powers, Lawrence E. Barbiere and J. Michael Morgalis, attorneys for the defendant Pierce Township, 5300 Socialville-Foster Road, Suite 200, Mason, Ohio 45040.

This cause is before the court for consideration of a motion for protective order filed by the defendant Pierce Township.

The court scheduled and held a hearing on the motion on September 24, 2012. At the conclusion of that hearing, the court took the issues raised under advisement.

Upon consideration of the motion, the record of the proceeding, the evidence presented for the court's consideration, the oral and written arguments of counsel, and the applicable law, the court now renders this written decision.

FACTS OF THE CASE

On June 3, 2011, the Board of Trustees of Pierce Township met in special session at 3:30 p.m. and, soon after the meeting commenced, moved to executive session by unanimous vote "for the purpose of discussing personnel matters and to consider dismissal/discipline of a public employee under O.R.C. 121.22(G)(1)."[1] At 7:13 p.m., the trustees left executive session and Trustee Christopher Knoop made an announcement that "Police Chief James Smith was going on sick leave and his retirement would be addressed at a later time."[2]

On June 24th, the Board of Trustees again met in special session and almost immediately went into executive session "under O.R.C. 121.22(G)(1) (3) to consider the dismissal/discipline of a public employee and legal matters with attorneys Elizabeth Mason and Kevin Lantz."[3] No action was taken during that executive session.[4]

On that same day, Smith presented a letter to the Board members which stated in pertinent part as follows:

> "I urge the Board to carefully review applicable law and the Policy and Procedure Manual of the Township with careful scrutiny. It is a dangerous course to select a path to discharge me on the basis that I am an 'at will' employee. I make the foregoing statement as the employee involved and also as a Township resident who has a keen desire to preserve assets of the Township and to prevent dissipation of Township assets on litigation in federal court to demonstrate the real basis for the Board's actions and the actions of others and pursue my rights to recovery to the fullest extent permitted by law."[5]

[1] Motion for Protective Order, Exhibit A.
[2] Id.
[3] Id at Exhibit B.
[4] Id.
[5] Reply Memorandum, Exhibit A.

The Board met again in executive session on July 6th "under O.R.C. 121.22(G)(1) & (3) to consider the dismissal/discipline of a public employee and legal matters[,]" and attorney Elizabeth Mason joined the Board in that executive session as well.[6]

Thereafter, on August 19, 2011, the Board entered executive session along with David Elmer, Pierce Township Administrator, and Mary Lynne Birck, an assistant county prosecutor.[7] The purpose of the meeting was to "enter into Executive Session to discuss personnel matters – discipline/dismissal and legal matters – pending or imminent court action – O.R.C. 121.22(G)(1)(3); and to discuss any other matters before the Board."[8]

After the Board left this executive session, a motion was made and passed "to place Police Chief James Smith on paid administrative leave effective Monday August 22, 2011 and to set a pre-disciplinary hearing for August 25, 2011 at 9am to consider termination of Police Chief Smith's employment with Pierce Township and to set a name-clearing Hearing for Chief Smith to be conducted on the same date as the Pre-Disciplinary Hearing."[9]

On August 25th, the Board convened for the pre-disciplinary hearing and name-clearing hearing for Chief Smith.[10] However, a letter from Smith's attorney Mark Mezibov was read into the record by Mary Lynne Birck stating that neither he nor Smith would be appearing for the hearing and, as a result, the pre-disciplinary hearing/name-

[6] Id. at Exhibit D.
[7] Id. at Exhibit E.
[8] Id.
[9] Id.
[10] Id. at Exhibit G.

clearing hearing was not held.[11] The Board then entered executive session with legal counsel Elizabeth Mason and Mary Lynne Birck "for the purpose of discussing personnel matters – discipline/dismissal and legal matters – imminent/pending court action – ORC 121.22(G)(1)(3)."[12] After leaving the executive session, a motion was made and passed to terminate the employment of James Smith.[13]

In her affidavit, Elizabeth Mason avers that, in her capacity as an assistant prosecuting attorney for Clermont County, she attended the special meetings and executive sessions on June 24th, July 6th, and August 25th and, during the executive sessions, she "listened to what the Board of Trustees had to say and rendered legal advice to the Board of Trustees."[14] Likewise, Mary Lynne Birck states in her affidavit that she attended the August 19th and August 25th special meetings and executive sessions in her capacity as an assistant prosecuting attorney for Clermont County and that, during the executive sessions, she "listened to what the Board of Trustees had to say and rendered legal advice to the Board of Trustees."[15]

The defendant now seeks a protective order to prohibit "any line of deposition questioning involv[ing] matters discussed in executive session."[16]

LEGAL ANALYSIS

Pursuant to Civ.R. 26(C):

[11] Id.
[12] Id.
[13] Id.
[14] Affidavit of Elizabeth Mason at ¶¶ 3-4.
[15] Affidavit of Mary Lynne Birck at ¶¶ 3-4.
[16] Motion for Protective Order at pg. 1.

> "Upon motion by any party or by the person from whom discovery is sought, and for good cause shown, the court in which the action is pending may make any order that justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, including one or more of the following: (1) that the discovery not be had; (2) that the discovery may be had only on specified terms and conditions, including a designation of the time or place; (3) that the discovery may be had only by a method of discovery other than that selected by the party seeking discovery; (4) that certain matters not be inquired into or that the scope of the discovery be limited to certain matters; (5) that discovery be conducted with no one present except persons designated by the court; (6) that a deposition after being sealed be opened only by order of the court; (7) that a trade secret or other confidential research, development, or commercial information not be disclosed or be disclosed only in a designated way; (8) that the parties simultaneously file specified documents or information enclosed in sealed envelopes to be opened as directed by the court."

The defendant first argues that R.C. 102.03(B) grants a blanket privilege to the board members from having to testify regarding discussions held in executive session. R.C. 102.03(B) states as follows:

> "No present or former public official or employee shall disclose or use, without appropriate authorization, any information acquired by the public official or employee in the course of the public official's or employee's official duties that is confidential because of statutory provisions, or that has been clearly designated to the public official or employee as confidential when that confidential designation is warranted because of the status of the proceedings or the circumstances under which the information was received and preserving its confidentiality is necessary to the proper conduct of government business."

The court first finds this argument that R.C. 102.03(B) grants a privilege to the board members from having to testify regarding discussions held in executive session to be without merit. This statute refers to specific information designated confidential

received by a public official. When discussing R.C. 121.22(G)(5), the exception to the Open Meetings Act which allows a public body to enter into executive session to discuss "[m]atters required to be kept confidential by federal law or regulations or state statutes," one Ohio court noted that said exception applies to "matters that they are *legally bound* to keep from the public, such as records exempted from Ohio's Public Records Act (see R.C. 149.43), sealed records of criminal convictions (see R.C. 2953.35), information concerning an abortion without parental consent (see R.C. 2151.85[F]), results of HIV testing by the director of health (see R.C. 3701.241), and the like."[17] The court finds that the "information acquired by the public official or employee in the course of the public official's or employee's official duties that is confidential because of statutory provisions, or that has been clearly designated to the public official or employee as confidential" discussed in R.C. 102.03(B) applies to examples such as those cited above, not to discussions held in executive session in general. Certainly, discussions and information shared in executive session may fall squarely under R.C. 102.03(B), such as discussion of an employee's private health information. However, applying this statute to make all discussion held in executive session to be "clearly designated as confidential" is too great a stretch.

The court further finds that legislative privilege does not apply. "Legislative privilege * * * is an evidentiary and testimonial privilege that prohibits evidence of legislative acts from being used against legislators in proceedings."[18] However,

[17] *State ex rel. Cincinnati Enquirer v. Hamilton Cty. Bd. of Commrs.* (April 26, 2002), 1st Dist. No. C-010605, 2002-Ohio-2038, at *5.
[18] *U.S. EEOC v. Washington Suburban Sanitary Com'n*, 666 F.Supp.2d 526, 531 (D.Md.2009).

"[a]ctions that are administrative or executive in nature are not afforded the protections of legislative immunity."[19]

"The essential factor leading to an application of legislative immunity is whether the action has broad, more general, policy implications or merely 'singles out specifiable individuals.'" [20] "Personnel decisions * * * have been characterized as anything but legislative."[21]

In the present case, the actions of the Board were specific to one individual James Smith and had no application or reach beyond that one individual. Therefore, the court finds that legislative immunity, and the derivative testimonial and evidentiary privilege, does not apply.

The defendant cites to The Restatement (Second) of the Law of Torts, Section 895(B), paragraphs c & d, for the proposition that this type of privilege also extends to administrative actions. The court was unable to locate the paragraph quoted by the defendant in its memorandum in that portion of the comments to the Restatement. The Restatement (Second) of the Law of Torts, Section 895(B) states as follows:

> "(1) A State and its governmental agencies are not subject to suit without the consent of the State.
> (2) Except to the extent that a State declines to give consent to tort liability, it and its governmental agencies are subject to the liability.
> (3) Even when a State is subject to tort liability, it and its governmental agencies are immune to the liability for acts and omissions constituting
> (a) the exercise of a judicial or legislative function, or
> (b) the exercise of an administrative function involving the determination of fundamental governmental policy.

[19] Id. at 532, citing *Supreme Court of Va. V. Consumers Union of U.S.* (1980), 446 U.S. 719, 731-32, 100 S.Ct. 1967.
[20] Id. at 533.
[21] *Irvin v. McGee*, 1993 WL 818806 (D.Mass.1993).

> (4) Consent to suit and repudiation of general tort immunity do not establish liability for an act or omission that is otherwise privileged or is not tortious."

Having read Section 895(B), the court finds that it does not serve to confer an administrative immunity on the Board.

The defendant also argues that the content of the discussions during the executive sessions are protected by the attorney-client privilege.

" 'In Ohio, the attorney-client privilege is governed by statute, R.C. 2317.02(A), and in cases that are not addressed in R.C. 2317.02(A), by common law.' "[22] " 'R.C. 2317.02(A), by its very terms, is a mere testimonial privilege precluding an attorney from testifying about confidential communications. The common-law attorney-client privilege, however, 'reaches far beyond a proscription against testimonial speech. The privilege protects against any dissemination of information obtained in the confidential relationship.' "[23]

At the hearing on this matter, counsel for the plaintiff stated that, if the only persons present during an executive session were the Board members, their legal counsel, and the township administrator, he believed that the attorney-client privilege would apply and he would not seek to inquire further regarding the substance of what was discussed in that session; however, counsel noted that he should be permitted to ask questions to determine whether these were actually the people in attendance at the meetings.

---

[22] *State ex rel. Toledo Blade Co. v. Toledo-Lucas Cty. Port Auth.* (2009), 121 Ohio St.3d 537, 905 N.E.2d 1221, 2009-Ohio-1767, ¶ 24, quoting *State ex rel. Leslie v. Ohio Hous. Fin. Agency*, 105 Ohio St.3d 261, 2005-Ohio-1508, 824 N.E.2d 990, ¶ 18.

[23] Id., quoting *State ex rel. Leslie* at ¶ 26, quoting, *Am. Motors Corp. v. Huffstutler* (1991), 61 Ohio St.3d 343, 348, 575 N.E.2d 116.

There is at least one case where the court in fact found that a village solicitor discussing legal questions with a member of the council was privileged under R.C. 2317.02.[24] However, the court would note that there is some case law, including within the Twelfth District Court of Appeals, which suggests that "[t]he General Assembly, in limiting the circumstances in which such discussion can be held in executive session, has required a partial waiver of the privilege by the client-public body."[25] This statement was made in the context of considering whether general discussion with legal counsel fell under the exception to the Open Meetings Act codified by R.C. 121.22(G)(5), which refers to discussion of matters required to be kept confidential.[26] Therefore, in this district, discussions between the members of a public body and their counsel are only *required* to be confidential if they occur in the context of discussing pending or imminent court action.

However, since counsel for the plaintiff has indicated the intention to respect the attorney-client privilege if only the board members, the administrator, and counsel were present, the court will limit its discussion based on that assertion.

The court agrees that the attorney-client privilege does not prevent one from being questioned to test whether the privilege actually applies. Significantly, "[t]he party seeking to exclude testimony under the privilege the burden to show (1) that an attorney-client relationship existed and (2) that confidential communications took place within the context of that relationship."[27] Opposing counsel has the right to inquire of the party asserting the privilege as to whether counsel was actually present at the

---

[24] *Village Square Nursing Center, Inc. v. Village of Orwell* (Dec. 31, 1986), 11th Dist. No. 1265, 1986 WL 14948, *5.
[25] *State ex rel. Hardin v. Clermont Cty. Bd. of Elections*, 972 N.E.2d 115, 2012-Ohio-2569, ¶ 77.
[26] Id.
[27] *Flynn v. Univ. Hosp., Inc.*, 172 Ohio App.3d 775, 876 N.E.2d 1300, 2007-Ohio-4468, ¶ 13.

meeting and any other questions which seek to discover if the attorney-client privilege is applicable and has not been waived.

However, there was no counsel present at the June 3, 2011 executive session and, as such, the attorney-client privilege would not apply. This executive session was called pursuant to R.C. 121.22(G)(1), which allows the members of a public body to hold an executive session "[t]o consider the appointment, employment, dismissal, discipline, promotion, demotion, or compensation of a public employee or official, or the investigation of charges or complaints against a public employee, official, licensee, or regulated individual, unless the public employee, official, licensee, or regulated individual requests a public hearing.* * * " This brings the court to the question of whether a more general privilege attaches by virtue of R.C. 121.22(G).

The present case is not a challenge under the Open Meetings Act. Instead, the Board of Trustees in the present case seeks to use the exceptions set forth in R.C. 121.22(G) of the Open Meetings Act to form a privilege against information anticipated to be sought in discovery. Therefore, the question before the court is somewhat novel – are the deliberations and discussions of a public body during executive session exempted from discovery in a civil matter? Or, said alternatively, is there a testimonial privilege bestowed on members of a public body for discussions occurring in proper executive sessions?

Very few Ohio courts have directly addressed this issue. In *Springfield Local School Dist. Bd. Of Edn. v. Ohio Assn. of Public School Employees, Local 530*, 106 Ohio App.3d 855, 667 N.E.2d 458 (Ohio App. 9th Dist., 1995), the Ninth District Court of Appeals was presented with the precise issue of whether a trial court erred in granting a

protective order to a board of education by finding a testimonial privilege for executive session discussions.[28] In that case, the trial court ordered the disclosure of documents relevant to the collective bargaining matter at issue but prohibited the defendants "from deposing Board members on matters pertaining to collective bargaining proposals, negotiations, and strategies with regard to outsourcing of student transportation services."[29] The appellate court discussed as follows:

> "The board cite[d] no Ohio statute or case law that expressly creates an evidentiary privilege for matters discussed in an executive session under any of the exceptions to the open meeting requirement. The absence of a legislative enactment or previous judicial ruling creating such a privilege, however, does not itself foreclose our formulation of such a privilege if justice so requires."[30]

The appellate court then examined the issue under the general test to decide whether a privilege should apply, which is to balance the public's interest in confidentiality against the need for discovery in the efficient administration of justice.[31] The court noted the general interest in protecting the privacy of the collective bargaining process as set forth in R.C. 4117.21 and that R.C. 121.22(G) allows for an executive session for pending collective bargaining negotiations and preparation and review for those negotiations.[32] Furthermore, the court stated that "[t]he provision of the Sunshine law that does not require minutes to be made of executive session discussions precludes public access to records of discussions concerning negotiations, after the fact[,]" but also noted that this does "not necessarily protect against disclosure in the

---

[28] *Springfield Local School Dist. Bd. Of Edn. v. Ohio Assn. of Public School Employees, Local 530*, 106 Ohio App.3d 855, 868, 667 N.E.2d 458 (Ohio App. 9th Dist., 1995).
[29] Id.
[30] Id.
[31] Id. at 869.
[32] Id.

course of litigation upon a proper discovery request, if the information is otherwise discoverable."[33] The appellate court found that it was within the trial court's authority to weigh the factors and decide what information was privileged and found that the court erred "in fashioning an order that vested counsel for the board with the ultimate authority to decide which information was protected from disclosure."[34]

Conversely, the United States District Court for the Southern District of Ohio found that, because the executive session at issue was properly convened under R.C. 121.22(G)(2), "the contents of those sessions remain confidential" and the court issued a protective order prohibiting the plaintiffs in that case from inquiring into the discussions and events of the executive session.[35] The court cited to R.C. 102.03(B) when discussing whether such discussions are confidential, which this court did not find persuasive for the reasons discussed above.

In the case at bar, all but one of the executive sessions involved the consideration of the dismissal and discipline of James Smith during which at least one attorney for the Board was present. The minutes of the June 24th and July 6th meetings indicate the discussion was also to involve "legal matters" and cite to R.C. 121.22(G)(3). The minutes of the August meetings specifically note "pending or imminent court action." The June 3rd meeting minutes indicate that the board was entering executive session pursuant to R.C. 121.22(G)(1) to discuss the dismissal and/or discipline of a public employee.

The court reiterates that the present case does not involve a challenge to the board's executive sessions under the Open Meetings Act, which is a distinct claim that

[33] Id.
[34] Id. at 870.
[35] *University Estates, Inc. v. City of Athens, Ohio*, 2011 WL 796789 (S.D.Ohio, 2011), *2-3.

raises a whole host of legal issues. Instead, the board itself has injected the Open Meetings issue into this case by arguing that its members are afforded a testimonial privilege that protects them from testifying as to the discussions had in executive sessions. There have been no depositions taken at the present time and no specific questions before the court for review. To approach this prospectively and in such a general manner creates some difficulty for the court in fashioning a proper resolution.

The court finds that it agrees with the analysis set forth above in the *Springfield Local School Dist.* case that there is no absolute testimonial privilege conferred to members of a public body under R.C. 121.22(G) and that, instead, a court must weigh the competing interests at issue in each case and circumstance.

Once the Board of Trustees received the June 24th letter from James Smith, the court finds that it is a fair assumption under the analysis set forth in *State ex rel. Hardin v. Clermont Cty. Bd. of Elections*, 972 N.E.2d 115, 2012-Ohio-2569, that legal action involving the Board was imminent, as that letter threatens legal action in federal court should the Board pursue a certain course.[36] It is unclear whether the Board received this letter before or after the June 24th meeting and therefore, it is unclear whether R.C. 121.22(G)(3) would apply to that session.

The June 3rd executive session was convened pursuant to R.C. 121.22(G)(1), which allows the members of the public body to discuss in private matters of disciplining or dismissing a public employee. Inherent in this exception to the Open Meetings Act is a recognition that there is a need for confidentiality in discussions amongst board members regarding issues involving public employees that may include sensitive information that could lead to the dismissal or disciplining of that employee. Trustees

[36] *State ex rel. Hardin*, supra, at ¶¶ 72-74.

should have the right to freely and openly talk about the allegations and other information before it without being concerned about discussing matters in the public forum that could be very private to the employee or others involved. Conversely, the plaintiff in the case at bar also has an interest in the discovery of some information regarding the topics of discussion in this session, as they may go to the heart of the present case.

The court finds that the plaintiff may inquire generally into the topics discussed in the executive sessions, but not as to the substance of those discussions. The court finds that such an inquiry does negate the purpose of any privilege occurring as a result of R.C. 121.22(G) and gives proper consideration to the competing interests at bar. If further issues arise during the depositions as to the extent of the permissible inquiry, the party being deposed may claim a privilege and the parties can bring that matter before the court for consideration at a later time.

CONCLUSION

The motion for protective order is granted to prohibit the plaintiff from inquiring as to the substance of the discussions held in executive session. However, the protective order does not prevent the plaintiff from asking the trustees about which topics were discussed during the relevant executive sessions. Furthermore, the protective order

does not prevent the plaintiff from asking questions which seek to test the applicability of any privilege.

IT IS SO ORDERED.

DATED:_____ _____
Judge Jerry R. McBride

CERTIFICATE OF SERVICE

The undersigned certifies that copies of the within Decision/Entry were sent via Facsimile/E-Mail/Regular U.S. Mail this 15th day of October 2012 to all counsel of record and unrepresented parties.

_____
Administrative Assistant to Judge McBride