



The Commonwealth of Massachusetts
William Francis Galvin, Secretary of the Commonwealth
Public Records Division

Rebecca S. Murray
Supervisor of Records

June 30, 2022
SPR22/1383

Janice Thompson, Esq.
Assistant City Solicitor
Law Department
City of Worcester
455 Main Street, Room 301
Worcester, MA 01608

Dear Attorney Thompson:

I have received the petition of Andrew Quemere appealing the response of the City of Worcester (City) a request for public records. G. L. c. 66, § 10A; see also 950 C.M.R. 32.08(1). On March 2, 2022, Mr. Quemere requested “[a]ll emails, letters, memoranda, and other communications related to the planning of the city’s legal strategy” relating to an identified lawsuit.

Previous Appeal

This request was the subject of a previous appeal. See SPR22/0847 Supervisor of Records Determination (April 26, 2022). In my April 26th determination, I ordered the City to provide Mr. Quemere with a response to the request. On June 10, 2022, the City responded. Unsatisfied with the City’s response, Mr. Quemere petitioned this office and this appeal, SPR22/1383, was opened as a result.

The Public Records Law

The Public Records Law strongly favors disclosure by creating a presumption that all governmental records are public records. G. L. c. 66, § 10A(d); 950 C.M.R. 32.03(4). “Public records” is broadly defined to include all documentary materials or data, regardless of physical form or characteristics, made or received by any officer or employee of any agency or municipality of the Commonwealth, unless falling within a statutory exemption. G. L. c. 4, § 7(26).

It is the burden of the records custodian to demonstrate the application of an exemption in order to withhold a requested record. G. L. c. 66, § 10(b)(iv); 950 C.M.R. 32.06(3); see also Dist.

Attorney for the Norfolk Dist. v. Flatley, 419 Mass. 507, 511 (1995) (custodian has the burden of establishing the applicability of an exemption). To meet the specificity requirement a custodian must not only cite an exemption, but must also state why the exemption applies to the withheld or redacted portion of the responsive record.

If there are any fees associated with a response a written, good faith estimate must be provided. G. L. c. 66, § 10(b)(viii); see also 950 C.M.R. 32.07(2). Once fees are paid, a records custodian must provide the responsive records.

Current Appeal

In his appeal, Mr. Quemere states:

[T]he city has invoked attorney-client privilege and attorney work-product privilege. It has not produced any responsive documents and has instead opted to produce a privilege log. This privilege log appears to be inadequate. The log does not specify which privilege applies to each record leaving it unclear as to whether the city is invoking attorney-client privilege, attorney work-product privilege, or both with respect to each record. Furthermore, the log does not explain with enough specificity how either one or both of these privileges applies to each record. Furthermore, the deliberative process related to these records has concluded, therefore the work-product privilege should no longer apply. To the extent that the work-product privilege still applies to any responsive records, the city has not provided enough information to substantiate that all of the materials are entirely opinion work product and contain no non-exempt information. Please order the city to provide an updated privilege log and disclose all non-exempt information.

The City's June 10th Response

In its June 10, 2022 response, the City provided a privilege log and asserted that it was withholding certain communications pursuant to the attorney-client privilege and the attorney work product exemption. The City stated:

Responsive communications are limited to communications to and from attorneys representing the City pertaining to legal strategy related to identified litigation. Attached you will find the privilege log detailing the requested communications. These communications constitute attorney-client privileged communications between a government entity and its legal counsel, the disclosure of which would violate attorney client privilege and the Rules of Professional Conduct. As specified in your request, these communications relate to legal advice pertaining to the litigation. The communications were made in confidence, and no privilege has been waived. In addition to attorney-client privilege, attorney work product privilege is also applicable to many of the communications. These

communications constitute opinion work product, prepared in anticipation of litigation or for trial; these work product communications reflect policy deliberations and the internal decision making process. Attorney work product is protected from disclosure by exemption (d), the deliberative process exemption. The document provided specifies the date of each communication, the sender and recipient(s), and the subject line.

Common law attorney-client privilege

The Supreme Judicial Court confirmed the existence of a common law attorney-client privilege with respect to government matters in the Commonwealth of Massachusetts. Suffolk, 449 Mass. 444 (2007). The Court has found that the Supervisor of Records may make “a decision . . . delineating what documents among . . . requested reports are privileged or exempted from the public records act.” Hull Municipal Lighting Plant v. Massachusetts Municipal Wholesale Electric Co., 414 Mass. 609 (1993).

A records custodian claiming the attorney-client privilege under the Public Records Law has the burden of not only proving the existence of an attorney-client relationship, but also (1) that the communications were received from a client during the course of the client’s search for legal advice from the attorney in his or her capacity as such; (2) that the communications were made in confidence; and (3) that the privilege as to these communications has not been waived. See Suffolk Constr. Co. v. Div. of Capital Asset Mgmt., 449 Mass. 444, 450 n.9 (2007); see also Hanover Ins. Co. v. Rapo & Jepsen Ins. Servs., 449 Mass. 609, 619 (2007) (stating that the party seeking the attorney-client privilege has the burden to show the privilege applies). Records custodians seeking to invoke the common law attorney-client privilege “are required to produce detailed indices to support their claims of privilege.” Suffolk, 449 Mass. at 460.

Pursuant to the Public Records Law, in assessing whether a records custodian has properly withheld records based on the claim of attorney-client privilege the Supervisor of Records “shall require, as part of the decision making process, that the agency or municipality provide a detailed description of the record, including the names of the author and recipients, the date, the substance of such record, and the grounds upon which the attorney-client privilege is being claimed.” G. L. c. 66, § 10A(a).

Work product doctrine

Exemption (d)

Exemption (d) allows the withholding of:

inter-agency or intra-agency memoranda or letters relating to policy positions being developed by the agency; but this subclause shall not apply to reasonably completed factual studies or reports on which the development of such policy positions has been or may be based

G. L. c. 4, § 7(26)(d).

Exemption (d) is intended to avoid premature release of materials that could taint the deliberative process if disclosed. Its application is limited to recommendations on legal and policy matters found within an ongoing deliberative process. See Babets v. Sec'y of the Exec. Office of Human Servs., 403 Mass. 230, 237 n.8 (1988). Factual reports which are reasonably complete and inferences which can be drawn from factual investigations, even if labeled as opinions or conclusions, are not exempt as deliberative or policy making materials. G. L. c. 4, § 7(26)(d); see also Env'tl. Protection Agency v. Mink, 410 U.S. 73, 89 (1973) (purely factual matters used in the development of government policy are subject to disclosure).

The Supreme Judicial Court (SJC) opined on the status of attorney work product under Exemption (d) in DaRosa v. City of New Bedford, 471 Mass. 446 (2015). In DaRosa, the SJC concluded that "opinion" work product that was prepared in anticipation of litigation or for trial by or for a party or its representative falls within the scope of Exemption (d). Id. at 448. It also concluded that "fact" work product under Mass. R. Civ. P. 26(b)(3) that was prepared in anticipation of litigation or trial falls within the scope of Exemption (d) where it is not a reasonably completed study or report or, if it is reasonably completed, where it is interwoven with opinions or analysis leading to opinions. Id.

Based upon a conversation between a Public Records Division staff attorney and a City representative, it is my understanding that all the listed emails fall within the attorney-client privilege. As such, the City may withhold the responsive records pursuant to the attorney-client privilege. Consequently, it is unnecessary to opine on the City's work product doctrine claim.

Conclusion

Accordingly, I will now consider this administrative appeal closed.

Sincerely,

A handwritten signature in black ink that reads "Rebecca Murray". The signature is written in a cursive, flowing style.

Rebecca S. Murray
Supervisor of Records

cc: Andrew Quemere