

[Cite as *White v. Dept. of Rehab. & Corr.*, 2018-Ohio-5012.]

JOHN L. WHITE	Case No. 2018-00762PQ
Requester	Special Master Jeffery W. Clark
v.	<u>REPORT AND RECOMMENDATION</u>
DEPARTMENT OF REHABILITATION AND CORRECTION	
Respondent	

{¶1} On April 25, 2018, requester John White sent a letter to respondent Department of Rehabilitation and Correction (DRC) making 23 public records requests. On May 1, 2018, White filed a complaint pursuant to R.C. 2743.75 alleging denial of access to public records in violation of R.C. 149.43(B). During mediation, DRC provided White with nearly six thousand pages of records, with explanations and legal authority for the few dozen pages which contained redactions. (Young Aff. at ¶ 7-9.) On August 10, 2018, DRC filed a motion to dismiss or in the alternative a motion for summary judgment (Response), in which it advised that all but one of White’s requests had been withdrawn or resolved during mediation. On August 30, 2018, White filed a reply that affirmed he did not dispute DRC had provided all existing records responsive to his requests, other than specific records withheld on the basis of attorney-client or work product privilege. On September 20, 2018, DRC submitted unredacted copies of the withheld records under seal, and filed a sur-reply withdrawing the assertion of work product privilege. On October 23, 2018, DRC filed a supplemental sur-reply.

{¶2} Ohio’s Public Records Act, R.C. 149.43, provides a remedy for production of records under R.C. 2743.75 if the Court of Claims determines that a public office has denied access to public records in violation of R.C. 149.43(B). The policy underlying the Act is that “open government serves the public interest and our democratic system.” *State ex rel. Dann v. Taft*, 109 Ohio St.3d 364, 2006-Ohio-1825, 848 N.E.2d 472, ¶ 20.

“[O]ne of the salutary purposes of the Public Records Law is to ensure accountability of government to those being governed.” *State ex rel. Strothers v. Wertheim*, 80 Ohio St.3d 155, 158, 684 N.E.2d 1239 (1997). Therefore, the Act is construed liberally in favor of broad access, and any doubt is resolved in favor of disclosure of public records. *State ex rel. Glasgow v. Jones*, 119 Ohio St.3d 391, 2008-Ohio-4788, 894 N.E.2d 686, ¶ 13. Claims under R.C. 2743.75 are determined using the standard of clear and convincing evidence. *Hurt v. Liberty Twp.*, 5th Dist. Delaware No. 17CA1050031, 2017-Ohio-7820, ¶ 27-30.

Exception Claimed – Attorney-Client Privilege

{¶3} R.C. 149.43(B)(1) requires a public office to make copies of public records available to any person upon request. However, R.C. 149.43(A)(1) enumerates specific exceptions from the definition of “public record,” including a catch-all exception for “[r]ecords the release of which is prohibited by state or federal law.” R.C. 149.43(A)(1)(v). The common-law attorney-client privilege, which covers records of communications between attorneys and their government clients pertaining to the attorneys’ legal advice, is a state law exception to public records disclosure. *State ex rel. Toledo Blade Co. v. Toledo-Lucas County Port Auth.*, 121 Ohio St.3d 537, 2009-Ohio-1767, 905 N.E.2d 1221, ¶ 22.

The common-law attorney-client privilege is defined in Ohio as follows:

“Under the attorney-client privilege, ‘(1) [w]here legal advice of any kind is sought (2) from a professional legal adviser in his capacity as such, (3) the communications relating to that purpose, (4) made in confidence (5) by the client, (6) are at his instance permanently protected (7) from disclosure by himself or by the legal adviser, (8) unless the protection is waived.’”

(Citations omitted.) *State ex rel. Leslie v. Ohio Housing Fin. Agency*, 105 Ohio St.3d 261, 2005-Ohio-1508, 824 N.E.2d 990, ¶ 21. The attorney-client privilege extends to government agencies (including their administrative personnel) consulting with in-house counsel for legal advice or assistance. *State ex rel. Lanham v. DeWine*, 135 Ohio St.3d 191, 2013-Ohio-199, 985 N.E.2d 467, ¶ 22-30. A communication is not subject to the

privilege merely because it was sent to or from an agency's legal counsel, but must meet all of the other elements of the definition.

{¶4} All exceptions to public records disclosure are strictly construed against the records custodian, and the public office has the burden to prove that any withheld record falls squarely within the exception. *State ex rel. Cincinnati Enquirer v. Jones-Kelley*, 118 Ohio St.3d 81, 2008-Ohio-1770, 886 N.E.2d 206, paragraph two of the syllabus; *State ex rel. Pietrangelo v. Avon Lake*, 146 Ohio St.3d 292, 2016-Ohio-2974, ¶9. The party asserting attorney-client privilege "bears the burden to show (1) that an attorney-client relationship existed and (2) that confidential communications took place within the context of that relationship." *MA Equip. Leasing I, LLC v. Tilton*, 2012-Ohio-4668, 980 N.E.2d 1072, ¶ 21 (10th Dist.). A public office may withhold only the portion of the record that falls within any claimed exception, and "make available all of the information within the public record that is not exempt." R.C. 149.43(B)(1). When asserting the attorney-client privilege, the public office must redact only the exempt portions of the record, and provide the requester with the nonexempt portions in compliance with this statutory duty. *State ex rel. Anderson v. Vermilion*, 134 Ohio St.3d 120, 2012-Ohio-5320, 980 N.E.2d 975, ¶ 19-24.

Application of Attorney-Client Privilege to the Withheld Records

{¶5} The withheld text is contained in correspondence between DRC Legal Counsel Ashley Parriman and Stephen Young, and DRC employees Mike Davis, Jessica Dennis, Cliff Crooks, Kara Peterson, and Katrina Ransom. (Response at 5; Young Aff. at ¶ 10.) The records were identified as responsive to the request for communications

[w]ith respect to Contract #8-16 drafted by ODRC/APA management personnel, signed by ODRC Director Gary Mohr (signature undated), signed by ODRC Legal Counsel Stephen Young on August 26, 2016, then emailed to John L. White by ODRC Re-Entry Director Michael Davis using the email address JWhite@TheNextStep99.com on September 23, 2016.

(*Id.* at 3.) The redacted versions of the email records properly disclose the header and other information surrounding the message text. In an order of September 5, 2018, the special master directed DRC to file:

2. A sur-reply containing argument and/or affidavits that provide the following information for each document:
 - a. Identify by page, paragraph, line, and word, as appropriate, those specific portions of the document asserted as attorney-client privileged material. Explain how each portion so identified meets the elements of the attorney-client privilege.

The sur-reply did not comply with these terms. DRC stated only that the redacted communications between DRC counsel and employees concerns the subject of the public records request. (Sur-reply at 1-2.) In none of its pleadings does DRC explain how specific text meets the elements of the attorney-client privilege. At most, DRC has made a bare assertion that the redacted text will somehow self-identify as privileged material upon inspection:

This Court's individualized review of the redacted emails and documents will reveal that they consist of confidential information supplied to the attorneys by their clients coupled with legal advice and opinions regarding various proposals about the terms and substance of the memorandum of understanding, based on that confidential information.

(Supplemental Sur-reply at 3.) DRC's only evidence external to the records themselves is the affidavit of Stephen Young, which attests only that he has reviewed the withheld portions and holds the legal opinion that they constitute attorney-client communications. (Young Aff. at ¶ 9-11.) Neither the pleadings nor the affidavit identify what particular withheld information is confidential, or why. Neither the pleadings nor the affidavit identify the nature of any legal issue upon which legal advice was sought or provided by a DRC legal adviser in his/her capacity as such. General assertions will not meet the burden of proving the elements of attorney-client privilege. Rather,

The claim of privilege must be made question-by-question and document-by-document.

Factual showing needed to demonstrate that a communications [sic] is privileged. Conclusory descriptions of documents in a privilege log are insufficient to meet the producing party's burden of establishing that the document was an attorney-client communication. *In re Search Warrant Executed at Law Offices of Stephen Garea*, 1999 U.S. App. LEXIS 3861, 1999 WL 137499, *1-*2 (6th Cir. March 5, 1999). The party asserting privilege “must make a minimal showing that the communication involved legal matters. This showing is not onerous and may be satisfied by as little as a statement in the privilege log explaining the nature of the legal issue for which advice was sought.” *Id.* That showing “must provide the reviewing court with enough information for it to make a determination that the document in question was, in fact, a confidential communication involving legal advice.” 1999 U.S. App. LEXIS 3861, [WL] *2.

Williams v. Duke Energy Corp., S.D.Ohio No. 1:08-CV-00046, 2014 U.S. Dist. LEXIS 109835, *14-15 (August 8, 2014). See *Williamson v. Recovery Ltd. P’ship*, S.D.Ohio No. 2:06-CV-292, 2016 U.S. Dist. LEXIS 125640, *8-10 (September 15, 2016) (proponent made only conclusory statements, rather than an actual showing, that the attorney-client privilege applied to the subpoenaed documents).¹ In the absence of detailed supporting evidence and argument from DRC, the court is left to review the withheld documents for any material that self-evidently meets the definition of attorney-client (A-C) privileged material.

{¶6} On review *in camera*, I find that the withheld text occurs in emails to which one or more of DRC’s legal counsel is a correspondent. In all but one instance, the text does not contain language identifying a legal issue, or request or deliver legal advice. The nature of the text falls into the general categories of: proposed terms of the MOU, timing regarding terms, practical implementation, staffing/drafting/distribution assignments, meetings/collaboration held or planned, possible *future* legal guidance, document formatting, update/status request, and notice of forwarding. A number of facts and issues in the text are referenced as already known by The Next Step (requester’s

¹ There is no material difference between Ohio’s attorney-client privilege and the federal attorney-client privilege. *Guy v. United Healthcare Corp.*, 154 F.R.D. 172, 177 (S.D.Ohio 1993), fn.3; *Inhalation Plastics, Inc. v. Medex Cardio-Pulmonary, Inc.*, S.D.Ohio No. 2:07-CV-116, 2012 U.S. Dist. LEXIS 121830 (August 28, 2012).

organization). There is no self-evident showing that the communications constitute requests for or delivery of legal advice. Instead, the redacted contents appear to be operational, technical, policy, administrative, and clerical in nature. Without external evidence to the contrary, the emails themselves reflect only the participation of legal staff in policy, negotiation, or other business decisions that do not directly involve their professional services. See *Williams v. Duke Energy* at *15-16. Communications with a lawyer primarily for business purposes are not privileged. *Id.* at *8. The outlining of facts, such as whether a meeting occurred, does not constitute privileged attorney-client communication. *McFarland v. West Congregation of Jehovah's Witnesses, Lorain, OH, Inc.*, 2016-Ohio-5462, 60 N.E.3d 39, ¶ 70 (9th Dist.). Only one email contains content that self-identifies as attorney-client communication.

{¶7} The following table references the pagination provided in respondent's Exhibits B and C² that corresponds to the unredacted versions submitted under seal:

Exh/Pg/Date/MilTime	Nature of Content (not A-C privileged, unless indicated)
B/700/5-13-16/14:56	Request to confirm; OCSS data impact; timing
B/771/2-9-16/11:31	Drafting assignment, timing, document to be attached
B/771/2-9-16/09:20	Names staff working on request
B/773/2-8-16/13:01	Q – IT contact for WOTC
B/773/2-1-16/09:56	Forwards Q, guess as to answer; offer to assist; admin process
B/774/1-21-16/14:06	Admin assignment; data access issues; meeting timing, anticipate future need for legal guidance
B/821/6-17-16/19:52	Admin approval; document formatting
B/822/6-16-16/09:53	Forwards attachment; offer to assist
B/822/6-15-16/14:09	Status inquiry

² The paper versions of respondent's Exhibits A, B, and C are only intermittently paginated, and the numbers used by requester are offset in some instances from those used by respondent by -2. The electronic versions of the documents are numbered in the page field of the Adobe Acrobat application. Because the electronic version of Exhibit C starts with a one-page affidavit, the correct page numbers are found at page field +1. A second version of Exhibit C was filed on Nov. 20, 2018 numbered pages 1-355.

B/823/5-17-16/14:49	Assignment to draft; data issues; timing, offer to assist
B/824/3-15-16/10:37	Technical; formatting
B/824/3-15-16/10:26	Refers recipient to other documents for data
B/825/3-14-16/18:52	Status inquiry; reminder of staff assignment
B/825/2-9-16/11:31	Drafting assignment, timing, document to be attached
B/826/2-9-16/09:20	Names staff working on request
B/828/2-8-16/13:01	Q – IT contact for WOTC
B/828/2-1-16/09:56	Forwards Q, guess as to answer; offer to assist; admin process
B/829/1-21-16/14:06	Admin assignment; data access issues; meeting timing, anticipate future need for legal guidance
B/834/unk/unk	OCSS data for TNS/WS: data fields, structure, location, timing
B/838/unk/unk	MOU: data fields to be extracted and transferred
C/36/2-15-18/16:22 C/36/2-14-18/12:17	Factual statement of MOU provision, not legal interpretation Status recap; fact meeting held; notes requested MOU changes; invites admin policy decision; request for admin/clerical document info. The third and fifth paragraphs in this email, which begin with the words “Regarding” and “I,” constitute A-C legal opinion.
C/37/2-14-18/10:10 C/37/2-13-18/17:41	Admin description of MOU Intention to review; staffing proposal; possible meeting; request for info on document
C/38/2-13-18/15:39	Forwards email and attachments. Summarizes verbal contact
C/40/2-15-18/15:44	Forwarding acronym
C/182/2-14-18/10:10 C/182/2-13-18/17:41	Admin description of MOU Intention to review; staffing proposal; possible meeting; request for info on document
C/183/2-13-18/15:39	Forwards email and attachments. Summarizes verbal contact
C/198/6-6-16/18:330 C/198/6-6-16/13:56	Non-specific deference; clerical/admin document instructions Forwarding of attachment

C/199/6-6-16/13:56	Non-specific reference to drafting and administrative approval; invitation to comment; clerical question
C/199/6-6-16/12:48	Non-specific request for comment/approval
C/199/6-6-16/12:09	Request to modify document to reflect admin plans
<i>For the following records, see Nov. 20, 2018 filing of Exh. C numbered pages 1-355:</i>	
C/49/2-15-18/16:22	Factual statement of MOU provision, not legal interpretation
C/50-51/2-14-18/ 12:17	Status recap; fact meeting held; notes requested MOU changes; invites admin policy decision; request for admin/clerical document info. The third and fifth paragraphs in this email, which begin with the words “Regarding” and “I,” constitute A-C legal opinion.
C/51/2-14-18/10:10	Admin description of MOU
C/52-53/2-13-18/ 17:41	Intention to review; staffing proposal; possible meeting; request for info on document
C/53/2-13-18/15:39	Forwards email and attachments. Summarizes verbal contact
C/57/2-15-18/15:44	Forwarding acronym
C/66/??/??	No difference between redacted and unredacted copies
C/197/??/??	No difference between redacted and unredacted copies
C/328/6-6-16/18:330	Non-specific deference; clerical/admin document instructions
C/328/6-6-16/13:56	Forwarding of attachment
C/330/6-6-16/13:56	Non-specific reference to drafting and administrative approval; invitation to comment; clerical question
C/330/6-6-16/12:48	Non-specific request for comment/approval
C/331/6-6-16/12:09	Request to modify document to reflect admin plans

{¶8} Other than the portions identified above, I find that DRC has failed to meet its burden to prove by clear and convincing evidence that any other material meets all

the factors of common-law attorney client privilege. DRC has not identified specific legal issues raised in this contract-drafting correspondence, and has submitted no evidence that the communications disclose either legal advice, or facts communicated for the purpose of securing legal advice.

Premature Filing

{¶9} While I find that requester's claim is meritorious, by prematurely filing this claim five business days after his transmission of twenty-three separate public records requests, requester did not permit the public office a reasonable period of time to respond. *State ex rel. Shaughnessy v. Cleveland*, 149 Ohio St.3d 612, 2016-Ohio-8447; *State ex rel. Davis v. Metzger*, 5th Dist. Licking No. 11-CA-130, 2014-Ohio-4555, ¶ 6-9, *aff'd* 145 Ohio St.3d 405, 2016-Ohio-1026, ¶ 11. The court can sanction this conduct through the assessment of court costs.

Conclusion

{¶10} Upon consideration of the pleadings and attachments, I recommend that the court grant requester's claim for relief for partial production of the withheld records as detailed above, and deny the remaining claims. Because the claim was filed prematurely, and the vast majority of requests were either withdrawn or satisfied within a reasonable period of time, I recommend that costs be assessed to requester.

{¶11} *Pursuant to R.C. 2743.75(F)(2), either party may file a written objection with the clerk of the Court of Claims of Ohio within seven (7) business days after receiving this report and recommendation. Any objection shall be specific and state with particularity all grounds for the objection. A party shall not assign as error on appeal the court's adoption of any factual findings or legal conclusions in this report and recommendation unless a timely objection was filed thereto. R.C. 2743.75(G)(1).*

JEFFERY W. CLARK
Special Master