

[Cite as *Bush v. Solid Waste Auth. of Cent. Ohio*, 2017-Ohio-9416.]

BILL M. BUSH	Case No. 2017-00724-PQ
Requester	Special Master Jeffery W. Clark
v.	<u>REPORT AND RECOMMENDATION</u>
SOLID WASTE AUTHORITY OF CENTRAL OHIO	
Respondent	

{¶1} On June 5, 2017, requester Bill M. Bush made a public records request to respondent Solid Waste Authority of Central Ohio (“SWACO”) for

--Any written communications, including but not limited to emails, memos or letters, either to or from, between or among SWACO employees, agents and officials, and/or any other party concerning Kurtz Brothers free dumping of material at the Franklin County Landfill from Jan. 1 2016 through present.

--Any communication to, from or between SWACO and any outside auditing or law enforcement agency concerning Kurtz Brothers since July 1, 2016.

(Complaint, p. 2.) On June 16, 2017, SWACO Managing Counsel Rebecca Egelhoff objected to both requests as overly broad and vague, and stated that SWACO could not reasonably identify the records sought based on the manner in which it organizes and accesses its records. (*Id.* at 3.) However, Egelhoff enclosed with the response a first set of email records that SWACO’s Technology Solutions department had produced from a voluntary key word search based on the requests, along with explanations and legal authority for redactions. Egelhoff indicated that any additional records produced from the search would be delivered on a rolling basis. Egelhoff offered to work with Bush to revise the request, and suggested a phone call after all key word search records had been produced. *Id.* On July 7, 2017, Egelhoff sent Bush a second response, identifying its completed key word search as encompassing all emails:

- to or from any SWACO email account;
- containing the words (1) Kurtz; and, (2) foreign; no charge; or free dumping; and,
- from 1/1/2016 thru 6/5/2017

(*Id.* at 6.). Egelhoff provided an online link to a file containing the remaining documents responsive to the search, and included an explanation with legal authority for redactions made. On July 14, 2017, Bush sent a reply challenging the extent to which the attorney-client privilege had been applied. (*Id.* at 7.) On August 14, 2017, Egelhoff responded that, based on Bush’s reply, SWACO agreed that one of the communications had been mistakenly redacted. She attached a copy of the unredacted communication to her response, and offered to discuss any other communications that Bush felt were improperly redacted. (*Id.* at 9.)

{¶2} On August 25, 2017, Bush filed this action under R.C. 2743.75 alleging denial of access to public records in violation of R.C. 149.43(B) – specifically, “[i]mproper use of attorney-client exemption to redact records.” (*Id.* at 1.) On September 1, 2017, the court referred the case to mediation. On October 10, 2017, SWACO released additional records and portions of records to Bush, along with a privilege log. (Response, Attachment A.)¹ On October 12, 2017, the court was notified that the case was not fully resolved and that mediation was terminated. On October 26, 2017, SWACO submitted exemplary copies of the remaining unredacted records under seal, and filed its response (“Response”).

{¶3} The remedy of production of records is available under R.C. 2743.75 if the court determines that a public office denied an aggrieved person access to public records in violation of R.C. 149.43(B). The policy underlying the Public Records 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

¹ Although useful in this case to the requester and the court, a public office is not required to submit a privilege log to preserve the attorney-client privilege as a public records exception. *State ex rel. Lanham v. DeWine*, 135 Ohio St.3d 191, 2013-Ohio-199, 985 N.E.2d 467, ¶ 24.

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, “[w]e construe the Public Records Act liberally in favor of broad access and resolve any doubt in favor of disclosure of public records.” *State ex rel. Rocker v. Guernsey Cty. Sheriff’s Office*, 126 Ohio St.3d 224, 2010-Ohio-3288, 932 N.E.2d 327, ¶ 6.

{¶4} R.C. 2743.75(F)(1) states that public records claims filed thereunder are to be determined through “the ordinary application of statutory law and case law.” Case law regarding the alternative statutory remedy of mandamus² provides that a relator must establish by “clear and convincing evidence” that they are entitled to relief. *State ex rel. Miller v. Ohio State Hwy. Patrol*, 136 Ohio St.3d 350, 2013-Ohio-3720, 995 N.E.2d 1175, ¶ 14. Therefore, the merits of this claim shall be determined under the standard of clear and convincing evidence, i.e., “that measure or degree of proof which is more than a mere ‘preponderance of the evidence,’ but not to the extent of such certainty as is required ‘beyond a reasonable doubt’ in criminal cases, and which will produce in the mind of the trier of facts a firm belief or conviction as to the facts sought to be established.” *Cross v. Ledford*, 161 Ohio St. 469, 120 N.E.2d 118 (1954), paragraph three of the syllabus. See *Hurt v. Liberty Twp.*, 5th Dist. Delaware No. 17CA1050031, 2017-Ohio-7820, ¶ 27-30.

Attorney-Client Privilege

{¶5} 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 attorney-client privilege, which covers records of communications between attorneys and their government clients pertaining to the

² Formerly R.C. 149.43(C)(1), recodified in 2016 as R.C. 149.43(C)(1)(b), 2016 Sub.S.B. No. 321.

attorneys' legal advice, is a state law prohibiting release of these records." *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. SWACO asserts that all of the remaining redacted communications in this case are protected from disclosure by the common-law attorney-client privilege, 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.

{¶6} A party asserting the attorney-client privilege bears the burden of showing the applicability of the privilege. *MA Equip. Leasing I, LLC v. Tilton*, 2012-Ohio-4668, 980 N.E.2d 1072 ¶ 21 (10th Dist.); see *State ex rel. Pietrangelo v. Avon Lake*, 146 Ohio St.3d 292, 2016-Ohio-2974, ¶ 9. An in-camera inspection of withheld records may be necessary, *State ex rel. Lanham v. DeWine*, 135 Ohio St.3d 191, 2013-Ohio-199, 985 N.E.2d 467, ¶ 21-23, and has been conducted here. The attorney-client privilege extends to government agencies (including their administrative personnel) consulting with in-house counsel for legal advice or assistance. *Id.* at ¶ 22-30. The rank of employees providing information is irrelevant if information is consciously communicated to legal counsel for the purpose of providing legal advice. See *Upjohn Co. v. United States*, 449 U.S. 383, 101 S.Ct. 677, 66 L.Ed.2d 584 (1981).

{¶7} SWACO has contracted with multiple parties, including Kurtz Brothers, to compost yard waste generated in SWACO's district. (Egelhoff Aff., ¶ 2-5.) While no lawsuit is presently filed, a legal dispute exists between SWACO and Kurtz Brothers as to the volume of the latter's delivery of "foreign material" to SWACO's landfill for disposal without paying tipping fees. *Id.* SWACO asserts that the material redacted from its response to Bush's public records request are communications related to this

dispute, made in confidence, as exchanges of relevant facts and legal advice between SWACO employees and Managing Counsel Rebecca Egelhoff in her capacity as a legal advisor to SWACO. (*Id.* at ¶¶ 1, 11-19.)

{¶8} Bush claims that SWACO has invoked the common law attorney-client exception for portions of communications to which it does not apply. He asserts that agency communication may not be withheld simply because the lawyer was copied on emails written by a non-attorney. Referencing email where counsel was only cc'd, he states that it seems doubtful SWACO employees were seeking “group legal advice in email chains involving numerous mid-level managers.” (Complaint at 7, 10.) Bush additionally argues that “[t]he mere fact that a lawyer is provided a copy of a public record does not defrock it of its status as subject to release under * * * the Public Records Act.” (*Id.* at 7.) Bush asserts that the documents he received before filing his complaint had “heavy and extensive redactions.”

{¶9} First, a public record that preexists a particular request for legal advice would not become cloaked with the attorney-client privilege merely because it was delivered to the attorney from whom advice is sought. *In re Story*, 159 Ohio St. 144, 111 N.E.2d 385 (1953); *Nageotte v. Boston Mills Brandywine Ski Resort*, 9th Dist. Summit No. 26563, 2012-Ohio-6102, ¶ 11-12. The original of such a document would remain a public record where and for so long as it was maintained as such, until disposed of under the office’s records retention schedule. *See Toledo Blade Co. v. Toledo-Lucas County Port Auth.*, 121 Ohio St.3d 537, 2009-Ohio-1767, 905 N.E.2d 1221, ¶¶ 7, 12-13. However, all of the records now before the court were communications with counsel created after the Kurtz Brothers matter became the subject of correspondence for legal advice. None involve the provision of “a copy of a public record” to counsel.

{¶10} As for the extensive redactions Bush described in his complaint, during the pendency of this action SWACO provided copies of responsive records with fewer redactions (having either reconsidered or released the claim to privilege), so that the

remaining withheld material is limited to sixteen redactions in nine documents. (Response at 4; Egelhoff Aff. at ¶ 9-10.) Although a copy of the transmittal disk is not filed with the court, SWACO asserts that on October 10, 2017, it provided Bush with updated records conforming to its privilege log. (Response, at 4-5, fn. 15; Exhibit A, p. 1; Egelhoff Aff. at ¶ 10.) In providing the October 10, 2017 disk, and what it describes as later additional releases (Response at 5; Egelhoff Aff. *Id.*), SWACO has thus expressly waived attorney-client privilege for all responsive records in this case other than those identified at Response p. 9-11, Egelhoff Aff. at ¶ 11-19, and duplicates identified in Response Exhibit A. The redactions affected by this decision in the 1,526 pages of responsive records include those instances identified in the privilege log where any of the sixteen redactions occur within other email chains. SWACO has filed unredacted copies of the exemplary nine documents containing sixteen redacted portions, under seal.

{¶11} On review of the unredacted records submitted under seal, and with the context provided in the affidavit of Rebecca Egelhoff, I find that all of the withheld portions constitute communications between employees of the client agency and its attorney made for the purpose of securing legal advice, with one exception. The portion of Bates Page No. 581 that is an email sent on May 24, 2017 at 10:40 AM. merely requests a meeting, and discloses neither facts communicated for the purpose of securing legal advice, nor legal advice. “The mere fact that a meeting occurred, or did not occur, does not constitute a ‘communication’ for purposes of the attorney-client privilege.” *McFarland v. West Congregation of Jehovah’s Witnesses, Lorain, OH, Inc.*, 2016-Ohio-5462, 60 N.E.3d 39, ¶ 70 (9th Dist.) *citing State v. Mitchell*, 9th Dist. Summit No. 17029, 1995 Ohio App. LEXIS 5071, *23, 1995 WL 678624, *9 (November 15, 1995). This portion of the withheld material does not fall under the common law attorney-client privilege.

{¶12} Requester argues that the attorney-client privilege cannot apply to Bates Page Nos. 829-831 because the emails were only copied to counsel. However, the test is not whether counsel was the primary sender or recipient, but whether the investigation communication was “incident to or related to any legal advice” that the attorney would give in the matter. *Toledo Blade* at ¶ 29-31. These communications appear to meet that test as factual conclusions and opinions of legal counsel shared with a SWACO board member and other agency personnel. (Egelhoff Aff. at ¶ 11-12.) See *Graff v. Haverhill North Coke Co.*, S.D. Ohio No. 1:09-cv-670, 2012 U.S. Dist. LEXIS 162013, ** 31-32, 42-44,124-126 (Nov. 13, 2012). There is no evidence or hint that this email was copied to counsel merely to enable future assertion of attorney-client privilege. *Id.* at *38.

{¶13} I conclude, with the one exception noted, that respondent has met its burden to show that the remaining materials withheld are subject to the common law attorney-client privilege and were properly withheld from disclosure.

Failure to Provide Records Within a Reasonable Period of Time

{¶14} Prior to the decision of the special master, SWACO disclosed all but the highlighted material filed under seal, rendering Bush’s claim for production of the bulk of the requested records MOOT. While acknowledging SWACO’s efforts to resolve this matter through response to requester’s correspondence, and willingness to review previous withholdings, I find that the four-month delay between the public records request and the final production of additional records was a violation of SWACO’s obligation to produce records within a “reasonable period of time.” R.C. 149.43(B)(1).

Conclusion

{¶15} Accordingly, I recommend that the court issue an order GRANTING Bush’s claim with regard to the portion of Bates Page No. 581 that is an email sent on May 24, 2017, 10:40 AM., and DENYING the claim for production of any other records identified at Response p. 9-11, Egelhoff Aff. at ¶ 11-19, and duplicates identified in Response

Exhibit A. Because Bush was denied access to some of the requested public records for longer than a reasonable period of time, I recommend that Bush is entitled to recover from SWACO the costs associated with this action, including the twenty-five dollar filing fee. R.C. 2743.75(F)(3)(b).

{¶16} 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

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