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STATE OF MARYLAND
PUBLIC INFORMATION ACT COMPLIANCE BOARD

PIACB 24-56

May 30, 2024

Comptroller of Maryland, Custodian
Elsie Bateman, Complainant

Complainant Elsie Bateman sought, under Maryland's Public Information Act ("PIA"), records related to the recruitment and selection process for a specific position in the Office of the Comptroller of Maryland ("Comptroller"). The Comptroller denied inspection of some responsive records and produced other records, some with redactions. The Comptroller cited §§ 4-301, 4-343, and 4-344¹ of the PIA as authority for the denial. In this complaint, the complainant challenges certain withholdings and alleges that there are additional records responsive to her request that the Comptroller has withheld, in particular emails and text messages from "Maryland state issued cell phones." In response, the Comptroller maintains that it appropriately applied exemptions to withhold the information it did, and that it does not have any responsive text messages in its custody. After the complaint was filed, the Comptroller performed an additional, expanded email search and provided 1,934 pages of "non-privileged, responsive records." The complainant challenges redactions applied to those records as well. Although not without some hesitation, after review of the parties' submissions we find no violation of the PIA. We explain below.

Background

In June of 2023, the complainant applied for a position in the Field Enforcement Bureau of the Comptroller's office. The complainant interviewed for the position in July, and felt that she did well. Several weeks later, the complainant participated in a second interview and again thought she did well. Then, in August, the complainant learned that the recruitment for the position had been canceled. This development prompted the complainant's August 23, 2023, PIA request for:

Any and all hand written and/or electronic communications, to include notes and cellular phone text messages (in existence or deleted) from the following individuals pertaining to the recruitment, interview and selection process and

¹ Statutory citations are to the General Provisions Article of Maryland's Annotated Code unless otherwise specified.

cancellation of said recruitment for the Administrator I position (PIN 003443/posted July 11, 2023) for the Field Enforcement Bureau.

The complainant provided the names of sixteen State employees, most of them in the Comptroller's office. The complainant contacted the Comptroller about two weeks after sending her PIA request to ask how long the process would take. The Comptroller responded that it had received the data from IT and would begin the review process. The Comptroller also advised that it would not have "any of the cellular/text message data" or "material from the [Alcohol, Tobacco, and Cannabis Commission, or "ATCC"] individuals" the complainant sought. That was so, the Comptroller explained, "because Verizon holds all the cellular information and only releases that data under subpoena," and "the ATCC is a separate agency to which [the Comptroller's] authority does not extend."

In October, the Comptroller sent the complainant a letter advising that responsive records had been collected, but that certain information was being withheld—namely "personally-identifiable information" and "portions of records deemed part of the deliberative process related to hiring." The Comptroller also advised that "internal materials prepared by executive staff to advise the Comptroller and senior staff" had been withheld under § 4-344. The Comptroller explained that disclosure would be contrary to the public interest because "it would discourage the Comptroller's receipt of full and frank advice in day-to-day briefing materials written by senior staff." In addition, the Comptroller noted that many redactions covered "topics unrelated to the subject matter" of the complainant's PIA request. The Comptroller provided the complainant with ninety-one pages of responsive records.

The complainant was dissatisfied with the records she received. Thus, she contacted the Public Access Ombudsman for assistance in resolving her disputes about the Comptroller's denial of access to certain records, the application of redactions to others, and her concern that the response was incomplete. At the close of mediation, the Ombudsman issued a final determination indicating that the matter was partially resolved, with the complainant continuing to believe that the Comptroller's production was "incomplete and that records [were] being improperly withheld."

As a result of the mediation process, the Comptroller issued a supplemental response to the complainant's PIA request and provided an additional 218 pages of redacted records. Those records included "interview scoresheets and candidate information for the Administrator I (003443) posting," and emails exchanged by specified individuals during the recruitment process. After reviewing those records, the complainant still believed that the Comptroller had not fully responded to her PIA request and that there are additional responsive records that have not been disclosed. Thus, the complainant filed this complaint with our Board.

At the outset, the complainant stresses that the Comptroller has not disclosed any text messages responsive to her PIA request. Regarding the Comptroller's first production, of ninety-one records, the complainant states that she was "disappointed to see . . . an incomplete set of emails and other requested documents," and notes that many records "were just duplicates of the same emails." The complainant explains that "several of the employees who were instrumental in the [hiring] process were completely absent from any email communications." The complainant found this "very alarming." The complainant also disagrees with the Comptroller's assertion of the deliberative process privilege, arguing that it is not "prudent or justified" to withhold records that "would suggest a single employee was unjustly discriminating against [the complainant] to bar [her] employment."

Turning to the Comptroller's second production following mediation, the complainant contends that those email records "shed additional light" on her complaint. The complainant focuses on one email in particular and suggests that the substantive content is indicative of a plot to prevent her from getting the Field Enforcement Bureau position. Such plot, the complainant seems to imply, would provide motive for the Comptroller to hide records that confirm its existence. The complainant emphasizes that this email refers to a meeting about the recruitment that involved a specific employee—"Robin"—and that the Comptroller has not produced any email communications from "Robin" in response to the complainant's PIA request.

In closing, the complainant reiterates her belief that there are "unprotected emails and text messages sent from Maryland [S]tate issued cell phones that [she] is entitled to," and that those communications would support her "claim of wrongful discrimination and unfair hiring practices."

In response to the complaint, the Comptroller maintains that it appropriately withheld and redacted records subject to the deliberative process privilege as "records related to the decision-making process of government officials." The Comptroller's response also indicates that it has "performed an additional email search with revised search terms and expanded date range," and will "provide non-privileged, responsive records" to the complainant.²

The Comptroller also provides more information about its search process. Upon receipt of the PIA request, the Comptroller asked its IT Department to search the email accounts of the twelve Comptroller employees identified in the request using the keywords "Administrator I" and "Field Enforcement" and the timeframe of June 1 to July 31, 2023. While the results were pending, the Comptroller advised that it could not produce the cellular and text message data, or any records relating to the ATCC employees. The

² The Comptroller provided these records—1,934 pages of them—to the complainant on March 27, 2024, after we received the Comptroller's response to this complaint.

Comptroller and the complainant continued to communicate throughout this initial search process.

According to the Comptroller, once it provided that initial ninety-one page production of records, the complainant “complained that the records appeared incomplete.” This caused the Comptroller to “reexamine[] its initial search and production to determine whether revised search terms or an expanded date range may be warranted.” In doing so, the Comptroller found that the records it withheld had “inadvertently not been saved,” so the Comptroller reran the initial search terms. The Comptroller explains that, after reviewing the full set of records again, it determined that an expanded search was appropriate. “To ensure completeness,” the Comptroller contacted the employees named in the PIA request to “ask that they directly provide any responsive materials they may have.”

The Comptroller further explains that, as a result of the mediation process, it elected to produce “two categories of additional materials” that the Comptroller believed went to “the core” of the PIA request. Those records were (1) an email explaining the rationale for canceling the recruitment and (2) redacted interview score sheets for the applicants for the position. The Comptroller indicates that it had initially withheld the email record as subject to the deliberative process privilege, which is encompassed by § 4-344, a discretionary exemption in the PIA.

Though it maintains that its response complied with the PIA, the Comptroller indicates that, as a result of the complainant’s “continued concerns,” the Comptroller has performed a revised search of the employees’ email accounts using more specific search terms. As noted, *supra*, note 2, that search ultimately returned 1,934 pages of records.³

Addressing next the substantive bases for withholding or redacting the records it did, the Comptroller asserts that, §§ 4-301, 4-343, and 4-344 apply here. The Comptroller first emphasizes the rationale of the “two related privileges”—i.e., that the candid assessment and vetting of different options and alternatives necessary to good government decision-making may be compromised if those doing the vetting expect their communications to become public. The Comptroller distinguishes between deliberative communications falling under § 4-301’s mandatory exemption for records that are “by law” privileged or confidential, and those subject to §§ 4-343, 4-344’s discretionary denial. The former “applies to records created in connection with the deliberative-decision making

³ After receipt of these records, the complainant stated that she was “highly offended” by the inclusion of “hundreds and hundreds of duplicate MEANINGLESS and IRRELEVANT pages scattered throughout.” The complainant also notes that, while Robin Funk is copied on emails produced with this batch of records, the records do not contain any reply emails from Robin Funk.

process of high-level government officials,” while the latter encompasses “lower-level government officials” as well.

The Comptroller states that the records withheld “addressed broader personnel-related concerns, which encompassed cancellation and reposting of the position for which [the complainant] applied in July 2023, and discussed possible next steps to be taken by the agency in connection with these concerns.” The communications contained in the records were between the Comptroller, the Comptroller’s Chief of Staff and other high-level personnel, which, the Comptroller states, is “not surprising in that seven of the Comptroller employees identified in [the] request were at the Director level or higher.” The Comptroller asserts that those communications were pre-decisional and concerned the “assessment and consideration of next steps related to the personnel matters.” The Comptroller maintains that redaction would not have addressed the concerns about disclosing the records because redaction would have “remove[d] all substance from the documents.”

In reply, the complainant argues that the Comptroller’s interpretation of the relevant exemptions is “far reaching and inapplicable” to the records she has requested. She maintains that the communications she seeks will reveal “personal, non-professional bias toward [her] which ultimately caused [her] not to be hired as a means of retaliation.” She accuses the Comptroller of “trying every legal method, no matter how far reaching, to keep certain slanderous, retaliatory, and discriminatory communications from being divulged.” The complainant asserts that she is entitled to “all communications” from Robin Funk,⁴ and additional emails from Van Howeth⁵ and Kara Blouin.⁶ The complainant also specifically demands the “written pre-approvals signed and approved by the Comptroller’s Office of Fair Practices regarding the wording used for the recruitment,” and the “questions to be asked in the panel interview,” as well as “notes or transcripts” from her interviews with Comptroller employees regarding an internal investigation. The complainant asks that we “conduct a deep dive” into the records that the Comptroller has withheld.

Analysis

We are authorized to review and resolve complaints alleging certain violations of the PIA, including that a custodian improperly denied inspection of a public record.⁷ § 4-1A-04(a)(1)(i). When we determine that we need additional information to resolve the

⁴ Deputy Director, Human Resources, Comptroller’s Office.

⁵ Deputy Director, Field Enforcement Bureau, Comptroller’s Office.

⁶ Director, Human Resources, Comptroller’s Office.

⁷ Before filing a complaint, a complainant must attempt to resolve the dispute through the Public Access Ombudsman and receive a final determination that the dispute was not resolved. § 4-1A-05(a).

complaint, the PIA empowers us to ask for it. *See, e.g.*, § 4-1A-06(b)(2)(ii)(1) (allowing the Board to request “a copy of the public record” or a “descriptive index of the public record”). If, after review of the submissions, we conclude that the alleged violation occurred, then we must issue a written decision and order a statutory remedy. § 4-1A-04(a)(2) and (3). For example, if we find that a custodian improperly denied inspection of a public record, we must “order the custodian to . . . produce the public record for inspection.” § 4-1A-04(a)(3)(i).

The General Assembly enacted the PIA to provide people with “access to information about the affairs of government and the official acts of public officials and employees.” § 4-103(b). Thus, “[e]xcept as otherwise provided by law, a custodian shall allow a person or governmental unit to inspect any public record at any reasonable time.” § 4-201(a)(1). As the text makes plain, however, § 4-201(a) is not an absolute mandate for disclosure of all public records. *See Immanuel v. Comptroller*, 449 Md. 76, 88 (2016) (“While the public policy of the MPIA favors disclosure, the purpose of the Act reveals a legislative goal other than complete *carte blanche*, unrestricted disclosure of all public records.”). Rather, a custodian’s “duty to disclose certain records is limited by the scope of the statutory exemptions.” *Id.* Some exemptions—like § 4-301, cited by the Comptroller—are mandatory in nature, meaning that a custodian must deny inspection of records or information falling within its scope. *See, e.g.*, § 4-301(a)(1) (mandatory denial for records that are “by law” privileged or confidential); § 4-329(b)(1) (mandatory denial for “medical or psychological information about an individual”). Other exemptions are discretionary. A custodian may invoke these exemptions only if disclosure would be “contrary to the public interest.” § 4-343; *see, e.g.*, § 4-344 (discretionary denial for an “interagency or intra-agency letter or memorandum that would not be available by law to a private party in litigation with the unit”). In all cases, a custodian has the burden of justifying the application of an exemption to withhold or redact records. *Cranford v. Montgomery County*, 300 Md. 759, 780 (1984).

The Comptroller produced numerous records in response to the complainant’s PIA request, but withheld or redacted others on several different grounds. The focus of this complaint is on: (1) records of emails and text messages from Maryland State issued cell phones, which the Comptroller has stated it does not have; and (2) records of emails that have been withheld or redacted under §§ 4-301, 4-343, and 4-344 of the PIA, which the Comptroller claims are subject to the executive and deliberative process privileges, and constitute intra-agency memoranda. Because the complainant does not appear to challenge the redactions applied under § 4-311’s mandatory exemption for personnel records, we do not review or draw any definite conclusions about those redactions.⁸

⁸ We do, however, note that those redactions—which the Comptroller states were applied to “personal identifying information for an employee/applicant other than the requester”—appear consistent with what § 4-311 requires. Section 4-311(a) requires a custodian to deny inspection of “a personnel record *of an individual*, including an application, a performance rating, or

We begin with the intra-agency memoranda records the Comptroller asserts are protected by the executive and deliberative process privileges. Though they are related in many ways, the executive and deliberative process privileges are distinct as far as the PIA is concerned. The executive privilege is encompassed by § 4-301(a)(1)'s exemption for records that are "by law" privileged or confidential. Ordinarily, when executive privilege applies, a custodian must deny inspection. *See Stromberg Metal Works, Inc. v. Univ. of Maryland*, 382 Md. 151, 162 (2004) (explaining that the executive privilege encompassed by what is now § 4-301(a)(1) "must be given the most serious attention and, when properly invoked by the person holding the privilege, require[s] the custodian to deny inspection").

The Supreme Court of Maryland has described the types of records subject to executive privilege as recognized in § 4-301(a)(1). They include "records made in connection with the deliberative decision-making process used by chief or high Executive officials—Presidents, Governors, and their immediate advisors" and also records that contain "diplomatic, military, and security-laden secrets that may not involve those officials." *Id.* at 161-62. The privilege exists "for the benefit of the public and not the governmental officials who claim the privilege," *Hamilton v. Verdow*, 287 Md. 544, 563 (1980), and is "based on both: (i) the need for frank advice and confidential deliberations within the Executive Branch; and (ii) the separation of powers provisions of Article 8 of the Declaration of Rights," 66 Md. Op. Att'y Gen. 98, 100-101 (1981).

As with the constitutionally-based executive privilege, the broader deliberative process privilege is focused on the quality of decision-making by government officials and employees. *See Stromberg*, 382 Md. at 164-65 (explaining that the privilege exists to encourage "open, frank discussion between subordinate and chief concerning administrative action," and that the "focus is on the decision-making process"). This form of deliberative process privilege—which can apply to communications of both high-ranking officials and lower-level employees—is located in § 4-344, the PIA's discretionary exemption for interagency or intra-agency letters or memoranda that "would not be available by law to a private party in litigation with the [government] unit." *Admin. Office of the Courts v. Abell Found.*, 480 Md. 63, 89 (2022). Maryland's Supreme Court has observed that the purpose of the discretionary exemption for the deliberative process privilege is to encourage these officials and employees "to give completely candid advice by reducing the risk that they will be subject to public disclosure, criticism and reprisals,

scholastic achievement information." (emphasis added). However, the Supreme Court of Maryland has observed, regarding records related to complaints about police misconduct that, at the time, were subject to § 4-311's mandatory denial: "After the names of State Police troopers, the names of complainants, and all identifying information are redacted, the records clearly do not fall within the statutory language of 'record[s] of an individual,' because '[t]here would be no 'individual' identified in the redacted records.'" *Maryland Dep't of State Police v. Maryland State Conf. of NAACP Branches*, 430 Md. 179, 195 (2013).

and to enable decisionmakers to think out loud uninhibited by the danger that tentative but rejected thoughts will become the subject of public discussion.” *Id.* at 92 (cleaned up).

To qualify for withholding under § 4-344, the communications in the record must be “both pre-decisional and deliberative.” *Stromberg*, 382 Md. at 165. And, a custodian must also explain why inspection of the communications by the requester would be “contrary to the public interest.” § 4-343. *See Abell Found.*, 480 Md. at 92. As explained in the Maryland Public Information Act Manual, a custodian should give “specific reasons why agency decision-making may be compromised if the questioned records are released.” *Maryland Public Information Act Manual* (18th ed. Oct. 2023), at 3-38.

We were unable to resolve the applicability of the cited exemptions based on the material submitted with the complaint and response alone. We therefore asked the Comptroller to provide a descriptive index of the records that were withheld or redacted. *See* § 4-1A-06(b)(2)(ii)(1). We asked the Comptroller to include enough specific information in that index so that we could assess the applicability of the claimed exemption or privilege in each instance. After receipt of the descriptive index, we continued to have questions about the records and information withheld under the executive and deliberative process privileges—i.e., under § 4-301 and §§ 4-343, 4-344—and thus asked the Comptroller to provide unredacted copies of those records only. *See* § 4-1A-06(b)(2)(ii)(1). We will maintain the confidentiality of both the descriptive index and the unredacted records, as required by law. § 4-1A-06(b)(5); COMAR 14.02.06. Our references to the records in this decision will be generalized so as not to disclose any information that the Comptroller maintains is confidential. *See* COMAR 14.02.06.05.

After review of the unredacted records, we find that they are eligible for withholding under the deliberative process privilege as recognized in §§ 4-343, 4-344. Before addressing the exemption in a substantive way, we first note that, though we reviewed approximately 200 pages of records, those 200 pages contained many duplicate email communications.⁹ We estimate that roughly thirty to forty unique email communications were redacted. Those communications were both pre-decisional and deliberative in nature. *Stromberg*, 382 Md. at 165. In its response to the Board complaint, the Comptroller explains that the communications “addressed broader personnel-related concerns, which encompassed cancellation and reposting of the position for which [the complainant] had applied,” and “discussed possible next steps to be taken by the agency in connection with

⁹ The Comptroller has not charged any fees in connection with responding to the complainant’s PIA request. However, we encourage the Comptroller—and all custodians—to use whatever de-duplication methods are available to reduce the number of records in need of review, and the cost for the time spent reviewing them. *See* PIACB 21-01, at 2 (Oct. 5, 2020) (noting that a custodian had “determined that there were approximately 3,511 potentially responsive emails, which it further narrowed to 305 through an electronic de-duplication process in order to reduce review time”).

these concerns.” Our review of the records confirms this description and reveals that there were multiple decision points and that different options regarding those decision points were vetted. The email communications were also deliberative. They contained questions, opinions, advice, and recommendations from many different officials and employees within the Comptroller’s office as certain individuals—including the Comptroller herself—sought to make a number of different decisions.

The Comptroller did not redact the sender, recipient or date information for any of the emails. However, the bodies of these emails were redacted in their entirety. The Comptroller’s response to the complaint states that more granular redaction was not appropriate because “the extent of redaction required” to protect the deliberative material “would remove all substance from the documents.” See § 4-203(c)(1)(i)(2)(B) (requiring, “if inspection is denied under § 4-343,” a custodian to explain “why redacting information would not address the reasons for the denial”). Ordinarily, the deliberative process privilege does not encompass “purely factual data,” *Stromberg*, 382 Md. at 166, thus, when such data appears in a record otherwise subject to the privilege, that factual data—assuming it can be separated—may not be redacted. However, Maryland’s Supreme Court has recognized that the distinction between facts and opinions “is not always a clear one and is not rigid.” *Id.* Rather, “some factual material is entitled to a degree of protection under the privilege,” including “investigative facts underlying and intertwined with opinions and advice, and facts the disclosure of which would impinge upon the deliberative process.” *Id.* (quoting *Hamilton v. Verdow*, 287 Md. at 564-65).

After review, we agree with the Comptroller that redaction of the bodies of the emails is not a feasible alternative. The factual content here is so “intertwined with opinions and advice,” *id.*, that it is not capable of isolation and extraction in a meaningful way. This case stands in clear contrast to *Stromberg*, where our State’s Supreme Court observed that “[t]he one aggregate number that allegedly incorporate[d] but [did] not identify or segregate [the] consultative views” did not qualify for the deliberative process privilege. *Id.* at 167. The Court explained:

If we were dealing with any clear articulation of those [consultative] views—if, in his report, Mr. Mitchell set forth his analysis of pending or possible claims, or what remained to be done, or the extent to which further construction would likely occur on schedule, or whether additional funding was necessary or should be sought, or whether the project should be scaled back, enhanced, or changed in some material way—we might well regard that information as deliberative and consultative in nature.

Id. Here, the redacted records contain myriad “consultative views”—i.e., analyses of potential courses of action, questions and answers regarding what needed to be done, and suggestions as to how to proceed to resolve certain personnel-related issues. In addition, we note that the Comptroller disclosed many email communications that appear largely

factual in nature—e.g., emails regarding the specifics of the job posting and the scheduling of interviews. In our view, the redacted communications fall within the bounds of the deliberative process privilege as we understand it.

Our conclusion that the redacted email communications fall within the ambit of the deliberative process privilege is only the first step. Even if the records qualify as pre-decisional and deliberative, the Comptroller still must explain why their disclosure would be “contrary to the public interest.” § 4-343; *Abell Found.*, 480 Md. at 92. In evaluating the Comptroller’s explanation, we are mindful that the privilege is concerned with the provision of “completely candid advice by reducing the risk that [officials and employees] will be subject to public disclosure, criticism and reprisals,” and encouraging those making decisions “to think out loud uninhibited by the danger that tentative but rejected thoughts will become the subject of public discussion.” *Id.* (cleaned up). The Comptroller argues that disclosure would “discourage the Comptroller’s receipt of full and frank advice in day-to-day briefing materials written by senior staff.” This justification is both consistent with the Supreme Court of Maryland’s articulation of the purpose of the deliberative process privilege and apparent from our review of the unredacted records. The records contain “candid advice” and instances of individuals freely sharing thoughts and recommendations. And, the records tend to demonstrate that a lot of “day-to-day briefing” and decision-making in the Comptroller’s office occurs by email—a circumstance that is surely not unusual these days. We thus cannot conclude that the Comptroller improperly determined that disclosure of these email communications would be contrary to the public interest.

Although we are generally satisfied that the exemption applies here, we pause to express some broader concerns that the deliberative process privilege is overused in connection with agency decision-making, and is invoked as both a shield and a sword to withhold information. While we understand that the privilege is meant to enhance the quality of decision-making—surely a laudable goal—there is an inherent tension between the exemption and the PIA’s purpose of shedding light on government action, which often consists of making decisions on a day-to-day basis. As discussed above, the privilege exists for the benefit of the public, not to shield public officials or employees from embarrassment or discomfort. *Cf. City of Frederick v. Randall Family, LLC.*, 154 Md. App. 543, 571 (2004) (explaining that, though “revelation of the names listed in the black book might embarrass [a house of prostitution’s] customers”—which were alleged to include government officials—this was not enough to invoke the discretionary exemption for records of investigations). However, the fuzzy contours of the deliberative process privilege exemption can make it difficult to parse an agency’s true motivation for withholding records. In this case, though, we note that our concerns are mitigated to some extent by the fact that the Comptroller did disclose an email that provided some insight into the Comptroller’s decision to cancel the recruitment.

Because we have determined that the Comptroller did not improperly exercise discretion to withhold the redacted email communications under §§ 4-343, 4-344, we need

not definitively resolve whether the § 4-301(a)(1)'s mandatory exemption for material subject to executive privilege might also apply. However, we note that the Comptroller is a high-level executive, *see* Md. Const., Art. VI, § 1, and several of the communications include the Comptroller herself, in addition to her "immediate advisors," e.g. her Chief of Staff or the Deputy Comptroller of Law and Oversight. To the extent that these communications constitute "records made in connection with the deliberative decision-making process used by chief or high Executive officials" and "their immediate advisors," *Stromberg*, 382 Md. at 161-62, they may well qualify for withholding under § 4-301(a)(1) as well. Such finding would not be inconsistent with the rationale behind the executive privilege, which recognizes "the need for frank advice and confidential deliberations within the Executive Branch." 66 Md. Op. Att'y Gen. at 100.

Finally, we turn to the complainant's allegation that the Comptroller violated the PIA by failing to produce any text messages responsive to her PIA request. The Comptroller's response—that it could not produce any text messages because they could only be obtained by subpoena to the service provider—was essentially a response under § 4-202(d), applicable when "a custodian determines that the record does not exist."

The PIA requires a custodian to "conduct a search in good faith that is reasonably designed to capture all responsive records." *Glass v. Anne Arundel County*, 453 Md. 201, 232 (2017). A custodian must use "methods that can be reasonably expected to produce the information requested" and focus a search "on where responsive records are likely to be found." *Id.* While we understand that the Comptroller is not the custodian of *all* of the cellular and text message data that its carrier might hold, and that a subpoena may be necessary to access some of that data, it seemed to us that the Comptroller nevertheless may possess responsive records contained on the devices that *are* in the Comptroller's custody—e.g., records of text messages sent and received that are stored in a messaging application. We thus asked the Comptroller for additional information regarding any searches conducted on the devices themselves.

In response, the Comptroller states that "the individual employees identified in [the complainant's] PIA request" were asked to "look for any responsive text messages." The absence of any text message records in the Comptroller's records productions implies that those employees did not locate any responsive messages. We see nothing in the broader record that tends to call the Comptroller's representation into question. The responsive records, including the unredacted records we reviewed, suggest that the decision-making process here was carried out largely through email and in-person meetings, of which only the former leaves a record capable of production. Text messages are not mentioned in the records at all. And, while the Comptroller was able to both ask individual employees to search for responsive emails and search the email archives using certain key terms, it appears that the Comptroller is unable to perform a similar archival search for the text messages. The Comptroller thus searched for responsive text messages by using "methods that can be reasonably expected to produce the information requested" and focused the

search for messages “on where responsive records are likely to be found.” *Glass*, 453 Md. at 232. We find no violation of the PIA regarding the text messages.

Conclusion

Based on the submissions, which include a confidential descriptive index and unredacted versions of the records redacted under § 4-301(a)(1) and §§ 4-343, 4-344, we find no violation of the PIA. The Comptroller applied redactions to communications that were both pre-decisional and deliberative, and provided sufficient justification for those redactions—i.e., the Comptroller explained why disclosure of the redacted emails would be contrary to the public interest. We also find that the Comptroller performed a sufficient search for text messages and therefore did not constructively deny the complainant’s PIA request by failing to locate any responsive messages.

Public Information Act Compliance Board*

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* For the reasons outlined below, Board Member Debra Lynn Gardner does not join in the Board’s decision.

I cannot agree with the conclusions reached by the Board in this case. After review of the unredacted records, I disagree with the Comptroller’s characterization of the records withheld as pertaining to “broader personnel-related concerns.” In my view, they all relate inextricably to one specific, idiosyncratic personnel situation that arose in the Comptroller’s office. They do not relate to “broader” issues of personnel policy or process, only how to respond to this specific hiring decision and its aftermath. And though I express no view whatever on whether any form of discrimination or other improper conduct took place in the hiring process underlying this complaint, I believe that, in hypothetical civil litigation by a private party against the government unit, all of the withheld records would almost certainly be discoverable. Unless they would presumptively not be, like a testifying expert’s report, for example, that takes the records outside the deliberative process by the explicit terms of § 4-344 and the cases interpreting it. *See, e.g., Stromberg*, 382 Md. at 163. Therefore, as I see it, the records that the Comptroller withheld do not fall within the deliberative process privilege.

Moreover, I do not believe that general justifications for invoking the deliberative process exemption such as “disclosure would ‘discourage the Comptroller’s receipt of full

and frank advice in day-to-day briefing materials written by senior staff” are sufficient. Such an explanation merely paraphrases the general purpose underlying the exemption and does not constitute “*specific* reasons why agency decision-making may be compromised if the questioned records are released.” *Maryland Public Information Act Manual* (18th ed. Oct. 2023), at 3-38; *Abell Found.*, 480 Md. at 89 (emphasis added).

Finally (as relates to deliberative process), I am troubled by the Board relying on the custodian having voluntarily, selectively released specific records it nonetheless claims were subject to the exemption to approve the decision to withhold the remainder. This is not in my view a mitigation but instead a red flag. The purpose of the PIA is not fulfilled if a custodian can succeed in defeating a request for public records by selecting records it is comfortable releasing for whatever reason while claiming that withholding the rest is contrary to the public interest. As noted in the Board’s decision, the deliberative process exemption is for the benefit of the public, not for the protection of government employees and officials.

For these reasons and others, I share the Board’s concerns that the privilege is overused and abused and would go farther and decide that the privilege does not apply in this instance. Relying on what the Board characterizes as the “fuzzy contours” of the exemption at issue to approve nondisclosure of the disputed records is inconsistent with the PIA’s mandate that its provisions be “construed in favor of allowing inspection of a public record,” § 4-103(b), and its exemptions be narrowly applied.

I also disagree with the conclusion that the Comptroller conducted a reasonable and adequate search for responsive text messages. First, I do not think we can assume no such records exist merely because no text messages were included in the unredacted records produced to the Board. Nor do I think we can draw the conclusion that there were no other communications outside those produced to the Board solely because there are none mentioned in what was produced. Most importantly, I do not think it was sufficient for the Comptroller to simply ask individual employees to search their State-issued phones and provide any responsive messages they found. Rather, a reasonable search requires the Comptroller to collect those phones to conduct an independent and comprehensive search. I would thus direct the Comptroller to do so.

Debra Lynn Gardner