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STATE OF MARYLAND
PUBLIC INFORMATION ACT COMPLIANCE BOARD

PIACB 24-83

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Anne Arundel County Council, Custodian
Claudia Barber, Complainant

Complainant Claudia Barber challenges the Anne Arundel County Council's ("AACC") response to her Public Information Act ("PIA") request for certain email communications sent or received by the seven members of the AACC. In response to the complaint, the AACC maintains that it properly withheld or redacted the responsive records and cites several exemptions in the PIA, including those encompassing the attorney-client and deliberative process privileges, the attorney work product doctrine, and the exemption for personnel records. After review of the submissions, we conclude that the AACC has violated the PIA by improperly withholding certain responsive records. We provide more detail below.

Background

The submissions provide the following background information. At the end of 2023, the complainant applied for a position as legislative counsel for the AACC. After she was not selected for the position, the complainant was "told [her] resume was removed from consideration" by the Council Chair. This prompted the complainant, in February of this year, to request all communications to and from the councilmembers pertaining to her, the "qualifications of legislative counsel," and to "excluding candidates for [the] legislative counsel vacancy." The complainant asked for communications sent and received within the last ninety days of her request.

After the AACC received the PIA request, the AACC searched the Gmail and Google Drives for all seven members using certain search terms. That search returned 1,865 records. The complainant then agreed to revised search terms, which resulted in twenty-nine records. After review, the AACC produced seven of those records to the complainant, two with redactions applied pursuant to the personnel records exemption. The AACC explained that seven records were not responsive to the PIA request. The fifteen remaining records, the AACC explained further, were withheld under various privileges and exemptions in the PIA, including the attorney-client and deliberative process privileges, and the personnel records exemption.

The complainant was dissatisfied with the AACC's response to her PIA request and thus contacted the Public Access Ombudsman.¹ After the Ombudsman issued a final determination stating that the dispute was not resolved, the complainant filed this complaint with our Board.

The complainant continues to dispute the AACC's response to her PIA request which, she explains, "[s]ought communication pertaining to [her]," as she "applied for a legislative counsel vacancy" and "was told [her] resume was removed from consideration" by the Council Chair. The complainant asserts that she was "fully qualified and provided relevant experience on [her] application." Thus, she asked for "all communications between [the Chair] and county councilmembers pertaining to [her] as well as communications about qualifications."

In response to the complaint, the AACC provides a detailed explanation of the bases for denial. First, the AACC addresses the eight records withheld under § 4-301(a)(1)² of the PIA, which applies to records that are privileged or confidential "by law." The AACC contends that these records are subject to the attorney-client privilege. The AACC explains that the records are email communications exchanged between the County Attorney, who "holds the highest attorney position in the County," and the County's Administrative Officer and a councilmember, who were seeking the County Attorney's legal advice "regarding the candidates under consideration for a vacant legislative counsel position." The County Attorney provided the advice, and the three individuals continued to exchange emails to discuss the advice. The AACC asserts that, because "the entirety of the emails were substantive discussions regarding the legal advice," redaction was not possible.

In addition to providing advice within the emails, the AACC states that the County Attorney also attached a legal memorandum to provide guidance about "proper consideration of a candidate's qualifications for a position."³ The AACC contends that this memorandum is both an attorney-client communication exempt under § 4-301(a)(1) and also attorney work product subject to § 4-344, the PIA's discretionary exemption for "interagency or intra-agency letter or memorandum that would not be available by law to a private party in litigation with the unit." The AACC argues that, because the memorandum was prepared to address legal issues related to "consideration of a potential candidate's qualifications for a position," it is thus protected by the attorney-client

¹ See Md. Code Ann., Gen. Provisions § 4-1B-04(a), which charges the Ombudsman with making "reasonable attempts to resolve disputes between [PIA] applicants and custodians relating to requests for public records." Before filing a complaint with our Board, a requester or custodian must attempt to resolve the dispute through the Ombudsman. *Id.* § 4-1A-05(a).

² Statutory citations are to the General Provisions Article of Maryland's Annotated Code unless otherwise stated.

³ The AACC notes that the memorandum had been prepared previously for a different matter.

privilege. In addition, the memorandum constitutes attorney work product, the AACC contends, because it was prepared “once it became evident that there was the potential for litigation.”

Next, the AACC maintains that it properly withheld four records that are protected personnel records and/or deliberative, pre-decisional discussions captured by the deliberative process privilege. The AACC describes these records as email communications “sent between several AACC employees” that “contained discussions and exchange of information related to the potential candidates for the vacant legislative counsel position.” The discussions related to potential salaries, interview statuses, and the qualifications of the candidates. The AACC provides information about which employees exchanged the emails and states that the emails “did not contain substantive discussions” about the complainant’s qualifications; rather, they were “regarding other applicants for the legislative counsel position.” The AACC asserts that the discussions related entirely to the candidates’ applications for employment, and also included “details regarding the former legislative counsel employee and their qualifications.” The AACC argues that these are “the exact type of things that are clearly protected” by § 4-311.

The AACC also maintains that these four records are subject to discretionary withholding under the deliberative process privilege, which is encompassed by § 4-344. The AACC explains that the emails “contain pre-decisional deliberations among the AACC employees while attempting to make a hiring decision,” and that disclosure would be contrary to the public interest in light of “the AACC’s need to freely discuss potential candidates for employment to enable them to make the best hiring decisions.” And, the AACC argues, disclosure could harm “the overall hiring process if candidates knew that all of their qualifications and status could be released to the public and shared with the other candidates.” Redaction was impossible here too, the AACC maintains, because the emails comprised only “substantive, on-going discussions regarding the candidates.”

Turning to the redactions applied to two of the seven records disclosed, the AACC explains that the redactions were applied under § 4-311 to “prevent disclosure of information related to other applicants.” The AACC states that all of the hiring information related to the complainant was disclosed.⁴

Analysis

The PIA charges us with reviewing and resolving complaints that allege certain violations of its provisions, including that a custodian wrongfully denied inspection of a public record. § 4-1A-04(a)(1)(i). After we receive a complaint, we forward it to the

⁴ We note that the complainant attaches the seven records produced by the AACC to her complaint. They consist of four emails and the complainant’s application for the legislative counsel position, which was produced in triplicate.

custodian or PIA applicant⁵ for a response. § 4-1A-06(a). When the submissions do not supply enough information to resolve a complaint, the PIA permits us to request additional information, including “a copy of the public record.” § 4-1A-06(b)(2). If, after review of the submissions and information before us, we determine that the alleged violation has occurred, we must issue a written decision and order a remedy, as provided by the statute. § 4-1A-04(a)(2) and (3). For instance, when 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 “access to information about the affairs of government and the official acts of public officials and employees.” § 4-103(a). This purpose is given effect in § 4-201(a) of the PIA, which requires a custodian to “allow a person or governmental unit to inspect any public record at any reasonable time,” unless the law provides otherwise.⁶ As suggested by the limiting language in § 4-201, the PIA contains exemptions to the general rule of disclosure. Some of those exemptions apply to an entire record and are mandatory in nature. If a record falls within one of these exemptions, a custodian ordinarily may not disclose it. *See, e.g.*, § 4-305 (adoption records); § 4-311 (personnel records); § 4-313 (student records). Other exemptions are mandatory but apply only to specific information within an otherwise disclosable record. *See, e.g.*, § 4-329 (medical or psychological information); § 4-336 (financial information). When one of these exemptions applies, a custodian must redact the specific exempt information and disclose the rest of the public record. § 4-203(c)(1)(ii). Still other exemptions are discretionary in nature, permitting a custodian to deny inspection if the custodian “believes that inspection of a part of a public record by the applicant would be contrary to the public interest.” § 4-343; *see, e.g.*, § 4-351 (investigation records, intelligence information, and security procedures). Generally, “unless an unwarranted invasion of the privacy of a person in interest would result,” these exemptions must be construed narrowly “in favor of allowing inspection of a public record.” § 4-103(b).

Before turning to the specific exemptions invoked by the AACC—which include both mandatory and discretionary exemptions—we note that we were unable to resolve this complaint based on the submissions alone. Thus, we asked the AACC to provide us with copies of the records that it withheld entirely and unredacted versions of the records it provided in redacted form. *See* § 4-1A-06(b)(2)(ii)(1). We will maintain the confidentiality of these records as required by law. § 4-1A-06(b)(5); COMAR 14.02.06. The AACC provided twenty-eight pages of email communications and a five-page memorandum written by a Deputy County Attorney. Within those twenty-eight pages of email communications, we count eighteen unique emails (some were duplicated at various

⁵ Section 4-1A-04(b) authorizes us to review and resolve complaints from records custodians that an applicant’s request or pattern of requests is “frivolous, vexatious, or in bad faith.”

⁶ The PIA also requires a custodian to provide copies of public records if requested. § 4-205(b).

points). We will refer to those emails by the date and time sent and, where necessary, the sender and/or recipient. Any references to the substance of the records will be by “generic descriptions or characterizations” so as not to disclose information that the AACC maintains is confidential.⁷

We start with the records that the AACC claims are subject to the attorney-client privilege and thus exempt from disclosure under § 4-301(a)(1). Section 4-301(a)(1) requires a custodian to deny inspection if “by law, the public record is privileged or confidential.” The attorney-client privilege, which has long been recognized in Maryland, *see Harrison v. State*, 276 Md. 122, 131-35 (1975), exists to “protect not only the giving of professional advice to those who can act on it but also the giving of information to the lawyer to enable him to give sound and informed advice,” *Upjohn v. United States*, 449 U.S. 383, 390 (1981). A communication between a lawyer and client may be protected from disclosure if it relates to “professional advice and to the subject-matter about which such advice is sought.” *Harrison*, 276 Md. at 132 (quoting *Lanasa v. State*, 109 Md. 602, 617-18 (1909)). A government agency “is no less entitled to the protection of the attorney-client privilege than any other client.” 82 Md. Op. Att’y Gen. 15, 17 (1997).

The AACC denied inspection of eight email communications and the memorandum prepared by a Deputy County Attorney as subject to the attorney-client privilege. All of the email communications were exchanged on February 16, 2024, and were generated in response to a Councilmember’s request for guidance from the County Attorney. The County Attorney, the Councilmember, and another AACC employee are the only senders and recipients of the emails. As described in the AACC’s response to the complaint, the five-page memorandum relates to questions about a potential candidate’s qualifications for a position, and was provided in connection with the County Attorney’s guidance and advice. After review of these records, we are satisfied that the attorney-client privilege applies. The County Attorney is the “legal advisor” for the AACC, *see Anne Arundel County Charter*, § 526(a)—i.e., its lawyer. The communications exchanged and the memorandum provided all relate to “professional advice and to the subject-matter about which such advice [was] sought.” *Harrison*, 276 Md. at 132. Thus, the AACC properly denied inspection of these eight email communications and the memorandum under § 4-301(a)(1).⁸

⁷ This is so even though, as detailed below, we ultimately conclude that some of the redacted information is not subject to any exemptions and was therefore improperly redacted. Section 4-1A-06(b)(5) is clear: Our Board “shall maintain the confidentiality of any record or information submitted by a custodian or applicant under [subsection (b)(2)(ii)].” *See also* COMAR 14.02.06.08 (requiring, when a decision is appealed, the Board to transmit confidential records or information received by the Board under seal).

⁸ The AACC also asserts that the memorandum is protected attorney work product, which a custodian may withhold under §§ 4-343, 4-344 if disclosure would be contrary to the public interest. *See Gallagher v. Office of the Att’y Gen.*, 141 Md. App. 664, 674 (2001) (explaining

The AACC maintains that the remaining ten email communications are either subject to § 4-311's mandatory denial for personnel records, or that they are subject to the deliberative process privilege as encompassed by § 4-344 and that the AACC properly determined that disclosure would be contrary to the public interest. Seven of those communications were exchanged between certain Councilmembers on February 15, 2024. Three of the email communications were exchanged by two Councilmembers and an AACC staff member on January 4 and January 9, 2024. In its response to the complaint, the AACC describes these emails as "discussions and exchange of information related to the potential candidates for the vacant legislative counsel position."⁹

We take the personnel exemption first. Section 4-311(a) generally precludes disclosure of "a personnel record of an individual, including an application, a performance rating, or scholastic achievement information." Under § 4-311(b), however, a custodian must allow inspection by "the person in interest," i.e., the person "that is the subject of a public record," § 4-101(g)—this is the reason that the AACC disclosed the complainant's records, including her application, to the complainant.

After review of the records withheld under § 4-311, we find that the AACC applied the exemption too broadly. While the email communications here certainly relate to "applications" for employment, in our view they are not necessarily "personnel records of an individual" once the names and identifying information of the applicants mentioned in the emails are redacted. See *Maryland Dep't of State Police v. Maryland State Conf. of NAACP Branches*, 430 Md. 179, 195 (2013) ("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.'"). The AACC seems to recognize this to some degree, given that it disclosed email records containing the complainant's name with the identifying information of other candidates redacted—and

that "the attorney work product privilege is embodied within the § 618(b) exemption," which is now § 4-344). Though we need not conclusively resolve that claim, we note that the memorandum may indeed also be protected attorney work product. See *Balt. Action Legal Team v. Office of the State's Att'y for Balt. City*, 253 Md. App. 360 (2021) ("The attorney work-product doctrine protects from disclosure documents 'produced in anticipation of litigation or in rendition of legal services.'"). Based on our review of the record, litigation was certainly anticipated to some degree, although it is not entirely clear whether there was a "particular, identifiable claim or impending litigation," *id.*, as must exist for the doctrine to apply.

⁹ The AACC's response indicates that four documents were withheld under both § 4-311 and § 4-344. As stated above, we count seven separate email communications. Based on the AACC's response to the complaint, it appears that two "documents" contain more than one email. The AACC explains that one document contains "[e]mails between Councilmembers Allison Pickard and Pete Smith" and another contains "[e]mails between Councilmembers Allison Pickard, Pete Smith, and Julie Hummer." We will refer to each email individually.

we find those redactions proper under § 4-311. Thus, rather than withholding the entireties of the seven emails under § 4-311, the AACC should redact the names of the candidates from the emails, along with any identifying information that might appear in, e.g., an email attachment.¹⁰ Doing so removes those email records from the ambit of § 4-311.

Next we turn to §§ 4-343 and 4-344, which encompass the deliberative process privilege. The AACC maintains that the privilege applies to these ten email communications because they contain “pre-decisional deliberations among the AACC employees while attempting to make hiring decisions for the vacant legislative counsel position” and disclosure would be contrary to the public interest. If the AACC is correct, then the records were permissibly withheld, notwithstanding the overbroad application of the personnel exemption discussed above.

The deliberative process privilege may be invoked to shield certain deliberative, pre-decisional communications from disclosure, if disclosure would be contrary to the public interest. *See Stromberg Metal Works, Inc. v. Univ. of Maryland*, 382 Md. 151, 165 (2004); *see also Admin. Office of the Courts v. Abell Foundation*, 480 Md. 63, 92 (2022) (“As a threshold matter, GP § 4-344 is a conditional exemption. To invoke it, a custodian must ‘believe[]’ that the requested inspection ‘would be contrary to the public interest.’”). The privilege applies to communications of both high-level executives and lower-level government employees. *Stromberg*, 382 Md. at 163. The United States Supreme Court has explained that “communications made after the decision and designed to explain it” do not normally fall within the privilege. *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 151-52 (1975). Similarly, “purely factual data” is not ordinarily entitled to protection, though our State’s Supreme Court has recognized that the distinction between facts and deliberative opinions “is not always a clear one and is not rigid.” *Stromberg*, 382 Md. at 166. Thus, when such factual information appears in a record that also contains pre-decisional deliberative communications subject to the privilege, a custodian has an obligation to provide the factual material so long as it is “severable from its context.” *Id.*

The deliberative process privilege exists for the benefit of the public and is focused on the quality of decision-making in government. *Maryland Bd. of Physicians v. Geier*, 451 Md. 526, 568 (2017); *Stromberg*, 382 Md. at 165. The privilege is meant to encourage

¹⁰ For identification purposes, the relevant emails were sent on: January 9, 2024, at 9:57 a.m.; January 9, 2024, at 5:16 p.m.; February 15, 2024, at 9:10 a.m.; and February 15, 2024, at 10:37 a.m. We note that the email sent on February 15, 2024, at 9:10 a.m. contains information about salary. That information is not exempt under § 4-311. *See* § 4-101(k)(2) (“‘Public record’ includes a document that lists the salary of an employee of a unit or an instrumentality of the State or of a political subdivision.”); § 4-336(a) (exemption for “information about the finances of an individual” does not apply to “the salary of a public employee”). To the extent that applications of other candidates are attached to any of the emails, those entire applications are exempt under § 4-311.

“open, frank discussion between subordinate and chief concerning administrative action,” *Stromberg*, 382 Md. at 164 (cleaned up), and is premised on the notion that “those who expect public dissemination of their remarks may well temper candor with a concern for appearances . . . to the detriment of the decisionmaking process,” *Sears, Roebuck & Co.*, 421 U.S. at 150-51; *see also Abell Found.*, 480 Md. at 92 (“The purpose of the privilege is to encourage such employees and officials to give completely candid advice by reducing the risk that they will be subject to public disclosure, criticism and reprisals, and to enable decisionmakers to think out loud uninhibited by the danger that tentative but rejected thoughts will become the subject of public discussion.” (cleaned up)). Thus, to demonstrate why disclosure would be contrary to the public interest under § 4-343, 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.

The AACC contends that the email communications were exchanged “while attempting to make hiring decisions.” While the ultimate hiring decision may be to whom to make a job offer, there are many other decisions made along the way—e.g., which candidates are qualified, which candidates to interview, and which to move along for further consideration. Our review of the records suggests that these email communications relate more to these preliminary decisions, and that they contain communications “designed to explain [them].” *Sears, Roebuck & Co.*, 421 U.S. at 151-52. In other words, these communications are largely post-decisional. Given that the deliberative process privilege protects only *pre-decisional* deliberative communications, *Stromberg*, 382 Md. at 165, in our view, the privilege does not reach many of the communications here.

Even if the communications might be considered pre-decisional to the extent that they all pre-date the AACC’s final hiring decision (i.e., which candidate got the job offer), many of them also strike us as factual in nature. Most of the emails are short, containing only a sentence or two, and describe an action taken or pose a question about an action taken. Most of the emails do not contain “confidential opinions, deliberations, advice or recommendations from one governmental employee or official to another official for the purpose of assisting the latter official in the decision-making function.” *Office of the Governor v. Washington Post Co.*, 360 Md. 520, 551 (2000). And, while there are a handful of email communications that arguably contain opinions and recommendations between councilmembers, it seems to us that the factual material surrounding those opinions and recommendations is “severable from its context.” *Stromberg*, 382 Md. at 166. Thus, as we see it, rather than deny inspection of the emails entirely, the AACC had an obligation to redact the deliberative material—assuming that disclosure is contrary to the public interest—and provide the factual material. Again looking to the emails provided

in redacted form to remove information related to other candidates, we see no material difference between these emails and most of the emails that were withheld.¹¹

There are two emails that contain communications that may qualify for withholding under §§ 4-343 and 4-344. Those are both dated February 15, 2024, one sent at 9:10 a.m., the other at 10:16 a.m. The earlier email proposes taking a certain hiring action. The subsequent email responds and offers an opinion as to the proposed action. These communications may fairly be characterized as pre-decisional and deliberative. The AACC argues that “[t]he public interest in disclosure of these discussions is outweighed by the [AACC’s] need to freely discuss potential candidates for employment to enable them to make the best hiring decision,” and that disclosure would “inhibit the candor of communications between councilmembers and staff.” The AACC also argues that disclosure could compromise the hiring process if “candidates knew that all of their qualifications and status could be released to the public.” We think this second argument, regarding the effect on the hiring process, is addressed by the redactions required by § 4-311. Those redactions remove the possibility that any one candidate will be identified and associated with a particular qualification or status.

As to the AACC’s argument that disclosure would have a negative effect on the councilmembers’ ability to “freely discuss potential candidates” or “inhibit candor in communications,” it is hard to see how that would be the case in light of the nature of the communications themselves. Between the two emails, there are only three sentences that even potentially qualify for withholding under our understanding of the deliberative process privilege.¹² While these sentences comprise a recommendation and an opinion on that recommendation, they contain no candid remarks or assessments or frank, substantive discussions about candidates or their qualifications. It is hard to understand how release of this information might cause the councilmembers to “temper candor with a concern for appearances,” *Sears, Roebuck & Co.*, 421 U.S. at 150-51, or worry about making similar recommendations in the future. This is so especially given that the type of recommendation that was made is one that must be made, one way or another, during the hiring process. If it had been made alongside commentary regarding candidates or argument about why the recommendation was sound, our conclusion might be different. But, based on what is before us, we find that the AACC has failed to demonstrate that disclosure of *these specific communications* would be contrary to the public interest. In light of that conclusion, and our determination above that the rest of the communications do not fall within the deliberative process privilege, we find that that the AACC improperly applied §§ 4-343 and 4-344.

¹¹ We note that one of the emails that the AACC provided to us as withheld entirely—an email dated January 4, 2024, at 1:37 p.m. contained in an email thread—appears to have been provided by itself in redacted form. As noted above, we find the redactions proper under § 4-311.

¹² In the email sent on February 15, 2024, at 9:10 a.m., the sentence beginning “I would like,” and the sentence following. In the email sent on February 15, 2024, at 10:16 a.m., the first sentence.

To recap, the eight email communications and attached memorandum from a Deputy County Attorney are privileged attorney-client communications properly withheld under § 4-301(a)(1) of the PIA. As to the remaining email communications withheld, most of them are post-decisional and/or factual in nature and thus do not qualify for withholding under the deliberative process privilege. For the two communications that may qualify for the deliberative process privilege, the AACC has failed to demonstrate that disclosure would be contrary to the public interest. Thus, §§ 4-343 and 4-344 do not apply and the AACC improperly withheld those email communications under those exemptions. Finally, to the extent that the remaining email communications might come within § 4-311 because they pertain to other candidates and their applications for the legislative counsel position, those communications cease to be personnel records of an individual once the names and identifying information of those candidates are redacted. Thus, the AACC must redact that information and provide the rest of the communications to the complainant, *see supra*, note 10.

Conclusion

The AACC properly withheld records subject to the attorney-client privilege under § 4-301(a)(1). However, the AACC's application of §§ 4-343 and 4-344, and § 4-311 violated the PIA. We direct the AACC to produce the seven email communications exchanged on February 15, 2024, and two exchanged on January 9, 2024, to the complainant with redactions to the names and any identifying of other candidates. The email communications already produced in redacted form were properly redacted under § 4-311.

Public Information Act Compliance Board

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