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STATE OF MARYLAND
PUBLIC INFORMATION ACT COMPLIANCE BOARD

PIACB 24-100

September 12, 2024

Anne Arundel County Office of Equity & Human Rights, Custodian
Tim McClay, Complainant

Complainant Tim McClay requested, under Maryland’s Public Information Act (“PIA”), records held by the Anne Arundel County Office of Equity and Human Rights (“OEHR”),¹ including meeting minutes and agendas, a strategic plan, and “all e-mail, memos, correspondence, and documentation to and from the DEI² office and generated internal to the office in the last two year period.” OEHR responded that it had no records responsive to the requests for meeting minutes and agendas or a strategic plan, and did not timely respond to the request for email, memos, correspondence and documentation. After further exchanges, OEHR denied inspection of responsive records under § 4-344³ of the PIA, which permits a custodian to deny inspection of certain intra- or interagency memoranda if inspection would be contrary to the public interest. The complainant disputed OEHR’s response and sought the assistance of the Public Access Ombudsman. As a result, OEHR produced 249 pages of records it deemed responsive to a narrowed request, but withheld others under §§ 4-301 and 4-344. The complainant challenges that denial in this complaint. In response, OEHR maintains that it has not improperly denied inspection of records. As explained below, we conclude that OEHR properly withheld most, but not all, of the responsive records by invoking the deliberative process privilege.

¹ The complainant submitted his request via Anne Arundel County’s online PIA portal. See Anne Arundel County, Maryland, Public Information Request, <https://www.aacounty.org/pia> (last visited Sept. 11, 2024). The portal contains links to various “topics” to which a request might pertain, e.g., “Animal Related,” “Department of Health,” or “Planning & Zoning.” We understand that the complainant selected the topic “County Executive,” and thus his request eventually reached OEHR through the County Executive’s office.

² We understand that OEHR was formerly the Equity, Diversity and Inclusion Department. See Dana Munro, *Anne Arundel County Names New Leader to Rebranded Equity, Human Rights Office*, Balt. Sun (July 11, 2023, 8:59 p.m.), <https://www.baltimoresun.com/2023/07/11/anne-arundel-county-names-new-leader-to-rebranded-equity-human-rights-office/>. The abbreviations “OEHR” and “EDI” are thus used interchangeably in this decision.

³ Statutory citations are to the General Provisions Article of Maryland’s Annotated Code unless otherwise stated.

Background

On May 2, 2023, the complainant sent a PIA request seeking the following:

1. Minutes and agendas for all meetings held by the Office of Diversity, Equity, and Inclusion since it's [sic] inception.
2. The operative countywide equity, diversity, and inclusion strategic plan. (Mission statement of the office is stated as "The Anne Arundel County Office of Equity, Diversity and Inclusion (EDI) was established on December 29, 2020, with the mission of establishing a countywide equity, diversity, and inclusion strategic plan.")

Staff from the County Executive's office, *see supra*, note 1, responded on June 19, 2023, with an email stating that there were no responsive records. The complainant sent an email in response asking that person to "confirm that there have been no DEI meetings since the inception of the DEI office" and that "there is no DEI guidance or planning documentation that is being used to guide the county's DEI effort." Assuming such was confirmed, the complainant asked that his PIA request be amended "to include all e-mail, memo[s], correspondence, and documentation to and from the DEI office and generated internal to the office in the last two year period."

OEHR itself responded to the complainant's email on July 3, 2023. OEHR explained that "[t]he Office of Equity, Diversi[ty] and Inclusion has met consistently since its inception," but that staff did not "utilize an agenda" and had not "kept minutes from these meetings." OEHR also explained that there were "no specific documents that encompass the strategic plan" because the office's work had been "integrated into the larger work of the County Executive's office, the government's 30 departments, and select boards and commissions." OEHR reiterated that "the strategy has not been captured in a single document." OEHR advised that it considered the complainant's PIA request closed and asked, regarding any amendments to his PIA request, that the complainant submit a new PIA request "with any additional information [he] may still be looking for."

On July 7, 2023, the complainant sent an email asking OEHR to "reconsider [its] position on providing the requested information," which the complainant summarized as:

- a. In lieu of meeting minutes: presentation materials, memos, emails, and anything that would reveal what was discussed at the numerous meetings on the subject of DEI in the various departments (over the last 2 years)
- b. Any aggregation of documents, memos, reports, analyses that collectively might be described as a strategic plan.

- c. DEI completed needs assessments
- d. [C]apacity building analysis
- e. [L]ists of short and long term priorities
- f. [A]ny other analyses and reports used to justify the implementation of the DEI concepts being envisioned
- g. [A]ll e-mail, memo[s], correspondence, and documentation to and from the DEI office and generated internal to the office in the last two year period. (over the last 2 years)

On July 21, 2023, OEHR sent the complainant a letter in which it denied inspection of any records responsive to the complainant's most recent PIA request.⁴ OEHR stated that all records were being withheld under § 4-344 as "inter or intra-departmental communications that are part of the pre-decisional and deliberative decision making process." OEHR described the responsive records as "internal materials prepared by and at the direction of the Office of Equity, Diversi[ty], and Inclusion to document and guide their research and efforts in developing a County wide strategic plan under the supervision of the County Executive." Disclosure of these records would be contrary the public interest, OEHR maintained, because it would "discourage the Office's receipt of full and frank advice and inhibit open discussion and debate."

On February 12, 2024, the complainant sent a letter to OEHR.⁵ The complainant expressed dissatisfaction with OEHR's "blanket refusal" to provide any records, stating "[s]urely, there are non-deliberative documents responsive to this request." OEHR responded the next day and provided 249 pages of documents that were "most responsive" to the records described in the complainant's PIA request and subsequent communications, including documents titled "Inclusivity, Diversity, Equity, and Awareness (IDEA)

⁴ OEHR also took the position that it was not subject to the Open Meetings Act because it was not a "public body" for purposes of that Act. Therefore, OEHR explained, it was not required to, and did not, keep meeting minutes or agendas. We note, as we have before, that we are not empowered to review alleged violations of the Open Meetings Act. See PIACB 23-27, at 4 (June 16, 2023).

⁵ The complainant explained that he had not responded sooner because OEHR's July email was lost in his email system. In the interim, the complainant contacted the Public Access Ombudsman to assist with his disagreements with OEHR. See § 4-1B-04(a) (requiring the Ombudsman to "make reasonable attempts to resolve disputes between applicants and custodians relating to requests for public records"). Before filing a complaint with our Board, a complainant must attempt to resolve a dispute through the Ombudsman and receive a final determination stating that the dispute was not resolved. § 4-1A-05(a).

Committee Charter,” “Memorandum Re: The Equity Lens,” “EDI Strategic Planning Goals,”⁶ and “Strategic Plan Outline Brainstorm.”

The complainant sent OEHR a letter, dated February 15, 2024, in which he provided “comment,” in the form of numerous questions, about the records that OEHR disclosed. The complainant also asked OEHR to provide a seventy-one page “needs assessment” generated by OEHR. The complainant expressed appreciation for OEHR’s efforts but stated that the records it provided did not “meet the letter or intent of the original MPIA request.” On March 27, 2024, OEHR sent the complainant a supplemental response letter. In that letter, OEHR answered many of the questions that the complainant asked in his February letter. For example, OEHR provided information about how many DEI committees there were and advised that no recommendations for improving access and identifying barriers had come from those committees yet.

On April 11, 2024, OEHR sent the complainant its final supplemental response, in which it denied the complainant’s request for the seventy-one page needs assessment. OEHR stated that the responsive needs assessment was composed of three documents, “the 1) Assessment Guide, 2) 2022 EDI (Equity Diversity & Inclusion) Assessment at a Glance, and 3) Countywide EDI Assessment.” OEHR explained that the records all pertained to “the EDI assessment which was a survey of County agencies to ascertain their knowledge and current practices of EDI concepts and make recommendations for courses of action for improvement based on the survey results.” OEHR denied inspection of those records under § 4-344, asserting that the records were “both pre-decisional and deliberative as the Strategic Plan [was] not yet finalized and the recommendations in the documents [were] still being discussed as part of that process.” OEHR also asserted that disclosure would be contrary to the public interest because it would “prevent the EDI office from fulfilling its goals of implementing an effective Strategic Plan by suppressing candor in communications and inhibiting the cooperation of the County departments.” OEHR explained that it “sought cooperation from department leaders on the assessment under assurances of confidentiality,” thus disclosure would “seriously erode the departments[’] confidence and cooperation in this process.”

OEHR also claimed that the needs assessment records were exempt under § 4-301(a)(1) as subject to executive privilege. OEHR explained that the records were “created based on direction from the County Executive” and that the information was compiled by the EDI Office Executive Director and “subsequently related to the County Executive during their on-going discussions and deliberations related to developing the final Strategic Plan.”

⁶ OEHR explained that this document, as well as one titled “EDI Strategic Plan Roll Out,” were the “[p]ersonal notes of Asha Smith in preparation for discussion.”

In its final supplemental response, OEHR advised that it had identified two additional responsive documents. Those records pertained to “the drafting of the Strategic Plan,” and consisted of a “3 Year Strategic Plan Narrative” and a “Strategic Plan Outline.” OEHR described the records as “the notes and outline of [Executive Director] Smith containing ideas and potential layouts and concepts being contemplated and discussed with the County Executive for inclusion in the final Strategic Plan.” As it had with the needs assessment records, OEHR claimed that these additional records were exempt from disclosure under §§ 4-344 and 4-301(a)(1). As to the former, OEHR asserted that the notes and outline were pre-decisional and deliberative because they were “being used to guide the drafting of the final Strategic Plan and contain ideas / deliberations for the plan.” OEHR maintained that disclosure of the records would “inhibit the candor of communications and discourage individuals from freely expressing and documenting their ideas,” and thus be contrary to the public interest. As to § 4-301(a)(1), OEHR contended that the records constituted “confidential executive communications of an advisory nature” used to “inform the County Executive of [the Executive Director’s] ideas and information for inclusion in the Strategic Plan pending the County Executive’s approval.” Thus, OEHR maintained, the records were also subject to executive privilege.

OEHR’s final supplemental response also advised that it had performed a “subsequent remedial search” in an attempt to locate records responsive to the complainant’s request for “long and short term priorities, milestones, metrics and responsibilities.” OEHR did not find any responsive records. According to the letter, OEHR also searched, unsuccessfully, for additional records responsive to the request for training materials and resources, “DEI definitions used,” and descriptions of the organization and relationship to other organizations.

As noted above, OEHR sent its final supplemental response letter on April 11, 2024. That same day, the Public Access Ombudsman issued a final determination stating that the dispute was not resolved. *See supra*, note 5. The complainant then filed this complaint with our Board. The complainant prefaces his complaint by stating that OEHR’s “sole objective” was to create “a plan that would define how DEI would be implemented” in Anne Arundel County, and that his original PIA request asked OEHR to “simply . . . provide the plan.” When no plan was provided, the complainant explains, his PIA request morphed into “fallback questions” about what records OEHR had that defined the strategy and process for implementing DEI. The complainant describes the records produced as “240 pages of non-responsive filler material.” The complainant notes that he still has no idea what the “DEI goals, the organizational responsibilities, the metrics, the plans and procedures, and the impacts and benefits” are.

The complaint also takes issue with OEHR’s application of § 4-344, which he characterizes as “reflexive and abusive.” The complainant argues that “[t]he needs assessment is over and is no longer pre-deliberative.” He notes that two weeks after OEHR sent its final supplemental response to his PIA request, “a piece of legislation related to the

power and scope of the Human Relations Commission,” which the complainant states is “generally understood be under the umbrella of [OEHR],” appeared “without forewarning at the county council meeting for a vote.” The complainant is of the opinion that this legislation was “part of the unrevealed strategic plan.” Thus, the complainant believes that “[t]here is some underlying strategic plan that is being used to guide and make decisions,” but that OEHR is not letting people see it.

In response to the complaint, OEHR maintains that it has not improperly denied inspection—explicitly or constructively—of records responsive to the complainant’s PIA request. OEHR states that it performed “numerous reasonable searches for records” and provided all “responsive, non-privileged records” it found. OEHR defends its application of §§ 4-344 and 4-301(a)(1). OEHR also disputes the complainant’s assertion that there are additional responsive records exist that OEHR has not provided or claimed exempt. OEHR contends that this assertion is rooted in the complainant’s “dissatisfaction with the search results and documents provided,” and his “unfounded belief that the OEHR should have certain records to provide, and refusal to accept that the OEHR simply did not have some of the documents requested.”

OEHR characterizes the complainant’s PIA requests as “overly broad, burdensome, and confusing,” noting that the requests were “frequently posed as questions, follow up questions, dissatisfaction regarding the OEHR’s search results and responses, and complaints about the OEHR’s general operations, rather than requests for documents.” Despite these circumstances, OEHR states, OEHR fulfilled its obligations under the PIA.

OEHR first addresses the complainant’s allegation that OEHR constructively denied his PIA request by failing to locate and provide records responsive to certain portions of his PIA requests. OEHR takes the position that the claim is a result of the “overly broad and repetitive nature” of the complainant’s requests. OEHR contends that the overly broad nature of the requests made it difficult for OEHR to identify specific records to provide. As example, OEHR points to the request that sought “all memos, e-mails, correspondence, and documentation to and from the DEI office and generated internal to the office in the last two-year period.” Understanding that the complainant did not wish to pay extensive fees, OEHR explains that it attempted to work with the complainant to “narrow the topics of interest and identify some specific categories or other areas of interest.” Stressing at the outset that it conducted six different searches, OEHR asserts that it provided the responsive, non-privileged records it had to the complainant.

Turning next to the records it withheld, OEHR maintains that they are “clearly covered by the deliberative process and executive privilege,” and that OEHR provided the full explanation that the PIA requires to the complainant in its various response letters, which are detailed above. OEHR asks us to find that it has not violated the PIA.

In reply, the complainant insists that, by describing his PIA request as overly broad and burdensome, OEHR has mischaracterized that request. In the complainant's view, there was "really only one request"—which was "the original one asking for the advertised DEI Plan." The requests and questions that followed, the complainant explains, were "compromises that attempted to adapt to the county's inability to provide responsive records or even state what type of records they had." Moreover, the complainant reasons, "[i]f the requests were overly broad, then it should have been easier to find responsive documents." To support his claim of constructive denial, the complainant points out that there were five documents provided that related to the DEI strategic plan and expresses disbelief that, "in two years of consistently conducting meetings with 30 county departments and select boards and commissions," only these five records were generated. The complainant stresses that he asked for "ANY material, such as presentation material, related e-mail, [and] memos," which the complainant believes must exist because it is unlikely that "the whole two year effort was . . . conducted on a solely verbal basis." The complainant also states that "[c]ost was not an issue" and that he "presumed that the county would have provided some rough estimate of what could be provided at what cost." Ultimately, the complainant suggests that OEHR suffers "deficiencies in the doctrine for documenting and storing agency processes, or the database infrastructure, or the search mechanism, or all three."

Focusing on the PIA exemptions claimed by OEHR, the complainant contends that OEHR has applied § 4-344 as a "blanket denial" of all information, including "memos, reports, analyses, presentation material, lists of priorities, and correspondence." The complainant argues that OEHR has not met its burden to provide a "fairly detailed analysis as to why the exemption applies," and that "the claim that it would not be in the public interest was conclusory and unconvincing." The complainant stresses that the additional explanation OEHR provided in its final supplemental response letter pertained only to select specified documents.

Analysis

The PIA directs us to review and resolve complaints that allege certain violations of its provisions, including that a custodian improperly denied inspection of public records. § 4-1A-04(a)(1)(i). In addition to instances in which a custodian applies an exemption to withhold entire records or redact information in records that are disclosed, we have interpreted this provision to apply to allegations that a custodian has conducted an insufficient search that failed to locate all responsive records, *see, e.g.*, PIACB 24-34 (Apr. 1, 2024), or has withheld certain records without explaining why, *see, e.g.*, PIACB 23-23 (June 20, 2023). We have reasoned that such circumstances are "tantamount to a constructive denial of access to records." PIACB 23-03, at 4 (Nov. 2, 2022). Once we

receive a complaint, we forward it to the custodian (or requester)⁷ for a response. § 4-1A-06(a). If, after review of the submissions, we find that the alleged violation occurred, we must issue a written decision and order a remedy as provided in the PIA. § 4-1A-04(a)(2) and (3). When we determine that a custodian has 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). For constructive denials, we may direct the custodian to conduct another search and “produce any non-exempt responsive records.” PIACB 24-08, at 6 (Sept. 28, 2023).

The PIA was enacted 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 through § 4-201(a), which requires a custodian to allow inspection of public records “at any reasonable time” unless “otherwise provided by law.” Thus, while the PIA is concerned with ensuring access to *information*, the mechanism for providing that information is *public records*. Importantly, a custodian is not required to create a new record in response to a PIA request. § 4-205(c)(4)(iii). Nor is the PIA intended as a vehicle to question or cross-examine a government agency. *See* PIACB 23-23, at 5 n.5 (June 20, 2023) (noting that the PIA requests at issue straddled the line between requests for public records and interrogations directed toward the custodian and stressing that the custodian’s “only obligation under the PIA is to search for and provide any existing public records that may respond to those questions”).

When custodians receive requests for public records, they must “conduct a search in good faith that is reasonably designed to capture all responsive records,” and that uses “methods that can be reasonably expected to produce the information requested.” *Glass v. Anne Arundel County*, 453 Md. 201, 232 (2017) (quoting *Oglesby v. Dep’t of the Army*, 920 F.2d 57, 68 (D.C. Cir. 1990)). The quality of a search is not judged “by its success in locating every responsive record,” but rather “prospectively by how the agency designed the effort to find responsive records.” *Id.* Our State’s Supreme Court has explained that “[r]easonableness must be measured against the specificity of the request and the willingness of the requestor to focus a request to improve the efficiency of the search.” *Id.* at 233.

A custodian’s obligation to disclose records under § 4-201(a) is “limited by the scope of the statutory exemptions.” *Immanuel v. Comptroller*, 449 Md. 76, 88 (2016). OEHR has invoked two of those exemptions here. Read together, §§ 4-343 and 4-344 allow a custodian to “deny inspection of any part of an interagency or intra-agency letter or memorandum that would not be available by law to a private party in litigation with the unit,” but only if the custodian determines that disclosure would be “contrary to the public interest.” Section 4-344 encompasses an exemption commonly known as the deliberative

⁷ We are also empowered to review and resolve complaints by custodians that a PIA request or pattern of requests is “frivolous, vexatious, or in bad faith.” § 4-1A-04(b).

process privilege. *Admin. Office of the Courts v. Abell Found.*, 480 Md. 63, 89 (2022). The privilege applies to communications between government officials and employees that are pre-decisional and deliberative, and thus designed to aid in the decision-making process. *Stromberg Metal Works, Inc. v. Univ. of Maryland*, 382 Md. 151, 164-65 (2004). “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.” *Abell Found.*, 480 Md. at 92 (cleaned up). Thus, to withhold or redact records that contain pre-decisional and deliberative communications, a custodian must demonstrate that disclosure would harm the decision-making process and therefore not be in the public interest.

Records subject to executive privilege must be withheld under § 4-301(a)(1), the PIA’s exemption for records that are “by law . . . privileged or confidential.” This is the second exemption invoked by OEHR. Rooted in the concept of separation of powers, these records are typically “made in connection with the deliberative decision-making process used by chief or high Executive officials—Presidents, Governors, and their immediate advisors,” or are records that contain “diplomatic, military, and security-laden secrets.” *Stromberg*, 382 Md. at 161-62. When executive privilege is invoked in relation to these sorts of records, the claim must be “given the most serious attention.” *Id.* at 162. Though it is “not unusual for the physical custodian of the record to be someone other than the person holding the [executive] privilege,” that custodian cannot “waive or ignore another’s Constitutionally based privilege.” *Id.*

We were unable to resolve the complaint without reviewing the records that OEHR withheld under §§ 4-343, 4-344 and 4-301(a)(1). We thus asked OEHR to provide those records, see § 4-1A-06(b)(2)(ii), which we will hold in confidence, § 4-1A-06(b)(5); COMAR 14.02.06. As described by OEHR in its responses to the PIA request and to this complaint, those records comprise: (1) an Assessment Guide; (2) a 2022 EDI Assessment at a Glance; (3) a Countywide EDI Assessment; (4) a 3 Year Strategic Plan Narrative; and (5) a Strategic Plan Outline. Any references to the content of these records in this decision will be by generic descriptions or characterizations so as not to disclose any information that OEHR maintains is not subject to disclosure. COMAR 14.02.06.05.

We first address OEHR’s contention that the records related to the EDI needs assessment and the strategic plan are subject to the deliberative process privilege and thus exempt under the discretionary exemption found in § 4-344. As described by OEHR in one of its response letters, the needs assessment records relate to “a survey of County agencies to ascertain their knowledge and current practices of EDI concepts.” The records include “recommendations and findings” based on that survey. OEHR maintains that the records are pre-decisional and deliberative because the strategic plan has not been finalized and the recommendations are still being discussed and considered. In the same response

letter, OEHR described the strategic plan narrative and outline as “notes and outlines” that are also pre-decisional and deliberative because “they are being used to guide the drafting of the final Strategic Plan and contain ideas / deliberations for the plan.”

After review of the records themselves, and in light of recent case law addressing the deliberative process privilege in the context of the PIA, we largely—although not completely—agree that OEHR’s application of § 4-344 did not run afoul of the PIA. First, the records relate to the creation and adoption of the County’s strategic plan for equity, diversity, and inclusion, which OEHR is spearheading. Given that the final plan has not been solidified or adopted yet, and that these records are being used in that process, they are pre-decisional. We also note that, even after that plan is adopted, these records may remain subject to the privilege, *see May v. Dep’t of the Air Force*, 777 F.2d 1012, 1014-15 (5th Cir. 1985), although at that point the public interest calculus may shift.

We also find that the needs assessment records, and the strategic plan narrative and outline are deliberative, although perhaps not wholly in the traditional sense that they “make recommendations, express opinions, or contain subjective personal thoughts,” *Abell Found. v. Balt. Dev. Corp.*, —Md. App.— (2024), 2024 WL 3633431, at *21—although the records certainly contain many recommendations. The Appellate Court of Maryland has explained that records that are actually used in an agency’s deliberative process and that contain “deliberative analysis” may also qualify for the deliberative process privilege and thus potentially be properly withheld under § 4-344.⁸ *Id.* at *22; *see also Gallagher v. Office of Att’y Gen.*, 141 Md. App. 664, 675 (2001) (quoting *Ryan v. Dep’t of Justice*, 617 F.2d 781, 790 (D.C. Cir. 1980)) (explaining that “consultants are an integral part of [the government’s] deliberative process” to the extent that “an agency often needs to rely on the opinions and recommendations of temporary consultants” that may be contained in their analyses and reports). Based on the information provided, it appears that the needs assessment and strategic plan records have been and are being used in OEHR’s strategic plan creation process. To the extent that the records report out or, as in the case of the strategic plan outline and narrative, incorporate the results of the needs assessment, the records also contain “deliberative analysis” that OEHR is using to cement the strategic plan.

⁸ In *Abell Found. v. Balt. Dev. Corp.*, one of the disputed records was a “model analysis [used] to forecast the likely future returns” of a profit-sharing agreement that was created by the Baltimore Development Corporation to advise the City on whether to accept a buyout of those profit-sharing rights, which had been offered by a developer. 2024 WL 3633431, at *3. In addition to concluding that the model analysis was subject to the deliberative process privilege, the Appellate Court also found that portions of the records contained confidential commercial information, thus § 4-335’s mandatory exemption applied. *Id.*, at *22. There is no contention that § 4-335 applies here.

We are mindful of our State Supreme Court’s caution that “purely factual data” is not ordinarily subject to the deliberative process privilege. *Stromberg*, 382 Md. at 166. However, the court tempered that caution with its observation that factual material “cannot always be neatly separated into fact-finding and decision-making categories,” thus “some factual material is entitled to a degree of protection under the privilege”—e.g., “investigative facts underlying and intertwined with opinions and advice, and facts the disclosure of which would impinge on the deliberative process.” *Id.* (quoting *Hamilton v. Verdown*, 287 Md. 544, 564-65 (1980)). The records at issue here, particularly those related to the EDI needs assessment, contain facts in the sense that they report out the results of the assessment—e.g., that a certain percentage departmental leaders responded to an EDI-related question in a certain way. But, those results are more akin to “investigative facts underlying and intertwined with,” *id.*, the recommendations made in the needs assessment. The records here are similar to the model analysis that the Appellate Court found subject to the deliberative process privilege and described as “the functional equivalent of a narrative account of how much [money] the profit-sharing arrangement was likely to generate under [certain] scenarios.” *Abell Found. v. Balt. Dev. Corp.*, 2024 WL 3633431, at *22. The EDI needs assessment records are also a “narrative account” in the sense that they constitute an analysis of the strengths and weaknesses of various units of Anne Arundel County government when it comes to equity, diversity, and inclusion.

There is, however, a small portion of the records that we do not think are subject to the deliberative process privilege.⁹ Rather, the records contain purely factual information about the needs assessment itself—information that does not disclose, and is not based upon, the results of or recommendations formed by the assessment. Those records are the “Assessment Guide,” and certain pages found in the “Countywide EDI Assessment”—namely, pages 007 through 011 of OEHR’s index. In its response to the PIA request, OEHR described the needs assessment as “a survey of County agencies to ascertain their knowledge and current practices of EDI concepts.” In our view, these records do not disclose anything beyond this broad characterization that OEHR has already made public or basic information about OEHR that is already well-known. While there is more detail included—e.g., *which* agencies were surveyed—that factual detail is neither pre-decisional nor deliberative in the ways discussed above. Because these records do not qualify for the deliberative process privilege, OEHR improperly withheld them under §§ 4-343, 4-344. Further, as explained below, we do not think that the executive privilege applies here. We thus direct OEHR to produce the records identified *infra*, note 9.

Before moving to the executive privilege, we must resolve whether OEHR properly determined that disclosure of the records that do qualify for the deliberative process privilege would be contrary to the public interest. See *Abell Found.*, 480 Md at 92 (noting that § 4-344 is a “conditional exemption” that may be invoked only if the custodian believes

⁹ For reference, those records are found at pages 001 through 004 and 007 through 011, according to the inspection index provided by OEHR with the records.

that inspection would be contrary to the public interest). Given that the privilege is concerned with encouraging “candid advice” and “think[ing] out loud,” *id.*, the public interest analysis must be focused on the quality of government decision-making. OEHR maintains that disclosure of the needs assessment records and the strategic plan narrative and outline would be contrary to the public interest because disclosure would “suppress[] candor in communications and inhibit[] the cooperation of the County departments.”

OEHR asserts that it sought the cooperation of leadership “under assurances of confidentiality,”¹⁰ and that disclosure of the results and recommendations of the needs assessment before leadership has “received specific goals, as will be outlined in the final Strategic Plan would seriously erode the departments['] confidence and cooperation in the [needs assessment] process.” The confidential records we reviewed support these assertions, as they demonstrate that county agencies provided candid answers to the survey questions—for example, indicating that the leadership of an agency does not understand certain EDI concepts at all. Such candid and truthful answers are important to ensuring that OEHR develops a robust and functional strategic plan for EDI. It is not hard to imagine that those answering the needs assessment might not have been as forthcoming about agency shortfalls if they thought those answers would be disclosed to the general public, especially before the strategic plan has been adopted. We thus cannot find that OEHR’s application of § 4-344 was improper. OEHR has provided a detailed explanation of why disclosure of these records—at least at this point in time—could negatively affect its ability to make competent decisions about the County’s EDI policies.¹¹

Having concluded that a majority of the disputed records were not improperly withheld under §§ 4-343, 4-344, we turn only briefly to OEHR’s contention that the executive privilege, as applied via § 4-301(a), requires denial of inspection. Although not necessary to our resolution of the complaint, we are not inclined to agree. First, given its Constitutional underpinnings, it is not clear to us that the executive privilege is available to shield records at the county and municipal level. *See Stromberg*, 382 Md. at 161 (explaining that executive privilege applies to “records made in connection with the deliberative decision-making process used by chief or high Executive officials—*Presidents, Governors, and their immediate advisors*,” (emphasis added)). We are not so sure that the “Constitutional doctrine of separation of powers,” *id.* at 162, would require that these records be protected from public view. *Cf. Sugarloaf Citizens Assoc., Inc. v. Gudis*, 319 Md. 558, 572 (1990) (explaining that “the constitutional concept of separation

¹⁰ We note that we do not (and could not) rely on counsel’s unsworn statement alone. Rather, the record itself supports counsel’s assertion and leads us to conclude that OEHR has narrowly met its burden to show that disclosure of these records would be contrary to the public interest.

¹¹ This explanation further illustrates why the records identified *supra*, note 8, were improperly withheld under § 4-344. The records contain no information that department leaders are not already aware of, and we see no reason why disclosure of those records might deter leadership from cooperating further with OEHR.

of powers does not apply to local government”). Moreover, after review of the records, we are satisfied that they contain no “diplomatic, military, [or] security-laden secrets.” *Stromberg*, 382 Md. at 162. In short, we do not believe that executive privilege is implicated here.

Finally, we address the complainant’s allegation that OEHR has constructively denied inspection of records responsive to his PIA request. The question before us is really whether OEHR conducted a “search in good faith that [was] reasonably designed to capture all responsive records.” *Glass*, 453 Md. at 232. Before explaining our finding, we pause to note a particularly relevant observation of our State’s Supreme Court:

It is often true that a requestor is at a disadvantage in formulating a PIA request because the requestor does not know what records the agency keeps or how it keeps them. It is part of every agency's mission to be as transparent as the State's sunshine laws, including the PIA, require it to be. A public records request is not an occasion for a game of hide and seek. For that reason, if possible, an agency should in good faith provide some reasonable assistance to the requestor in refining the request for the records the requestor seeks. Of course, nothing requires the requestor to accept such assistance.

It is also sometimes the case that a requestor, suspicious of the particular agency or of government in general, submits a broadly-worded request, intending to afford the agency no excuse for not producing for the records the requestor really wants. Literal compliance with such a request, however, would often require such a diversion of resources and agency time as to amount to a huge expense. *In practice, a productive response to a PIA request is often an iterative process in which the agency reports on the type and scope of the files it holds that may include responsive records, and the requestor refines the request to reduce the labor (and expense) of searching those records.* When the requestor and agency work together, the process approximates the purpose and policy of the PIA. When they do not, what results is the requestor insisting on what, to the agency, is an unbounded and unreasonable search and the agency insisting on what, to the requestor, is an unbounded and unreasonable fee.

Id. at 232-33 (emphasis added).

After review of the submissions, which include several letters that detail OEHR’s efforts to locate the records the complainant desires and—though not required by the PIA—answer his questions about the records produced, we would be hard-pressed to find that OEHR’s searches fell short of what the PIA requires. Nothing in the record before us suggests that OEHR was playing “hide and seek” with the complainant. Instead, it devoted time and effort to understanding what specific records the complainant sought and

explaining why it did not have some of those records. It seems to us that OEHR and the complainant engaged in the “iterative process” envisioned by *Glass*, but, unfortunately, that process did not yield records to the complainant’s satisfaction. Such dissatisfaction, however, does not necessarily suggest a violation of the PIA, and we do not find one here. It appears to us that the complainant is incredulous that there is not yet a final strategic plan, which he indicates in his submissions to this Board is all he is really seeking. Based on our review of the documents produced confidentially for our inspection, we have no cause to believe that such a finalized strategic plan exists and has been withheld. But, to the extent that the complainant still seeks “all e-mail, memo[s], correspondence, and documentation to and from the DEI office and generated internal to the office in the last two year period. (over the last 2 years)” and represents that “cost [is] not an issue,” OEHR should prepare an estimate of the cost of producing those records.

Conclusion

Based on our review of the submissions, which include the public records that OEHR withheld, we find that OEHR did not constructively deny the complainant’s PIA request. OEHR conducted several good faith searches in an effort to locate records responsive to the complainant’s request, even if it ultimately did not locate records to the complainant’s satisfaction. As to the records located and withheld, we find that the executive privilege is not implicated and thus § 4-301(a)(1) does not apply. We also find that OEHR improperly applied §§ 4-343, 4-344 to a specific subset of the records because they are not pre-decisional or deliberative in nature, and thus do not qualify for protection under the deliberative process privilege. OEHR must disclose those records, as indicated *supra*, note 9, to the complainant. We find that the remaining records withheld are subject to the deliberative process privilege and that OEHR did not violate the PIA by denying inspection of those records.

Public Information Act Compliance Board

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