

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, SS.

SUPERIOR COURT
CIVIL ACTION NO. 1984CV01753

ENERGY POLICY ADVOCATES,

Plaintiff,

v.

OFFICE OF THE ATTORNEY GENERAL
OF MASSACHUSETTS, MAURA
HEALEY, in her official capacity as
ATTORNEY GENERAL, OFFICE OF THE
SECRETARY OF THE
COMMONWEALTH, and WILLIAM
FRANCIS GALVIN, in his official capacity
as Secretary of the Commonwealth,

Defendants.

**MEMORANDUM OF DEFENDANT ATTORNEY GENERAL'S OFFICE
CONCERNING APPLICABILITY OF EXEMPTIONS TO SUBJECT RECORDS**

In accordance with the Court's Procedural Order on January 9, 2023, defendants submit this brief memorandum of law addressing the applicability of Public Records Law exemptions to the nine records that remain in dispute.¹ Defendants' arguments are set forth more fully in defendants' summary judgment memorandum (Docket No. 17) at pages 10-19.

I. Record # 8 Contains Material Exempt from Disclosure as "Personnel Information" under G.L. c. 4, § 7, cl. 26(c) and under G.L. c. 4, § 7, cl. 26(o), Governing Contact Information of Commonwealth Employees.

The AGO properly redacted personal identifying information in Record # 8, which consists of two emails relating to the AGO's hiring of Megan Herzog as an Assistant Attorney General and "NYU Fellow".² A portion of the redacted material in Record # 8 outlines Ms. Herzog's employment experience, identifies her written work, and describes her educational background. All of the foregoing information falls within the "absolute" exemption under G.L. c. 4, § 7, cl. 26(c), for "personnel . . . information," a term that "includes, at a minimum, employment applications, employee work evaluations, disciplinary documentation, and promotion, demotion, or termination information pertaining to a particular employee." *Wakefield Teacher's Ass'n v. School Comm. of Wakefield*, 431 Mass. 792, 798 (2000). "These constitute the core categories of personnel information that are 'useful in making employment decisions regarding an employee.'" *Id.* (internal citation omitted). "Information falling within the 'personnel and medical files or information' category is absolutely exempt from disclosure" under the PRL. *Id.* at 799 (internal citation omitted). The AGO also properly redacted, from Record # 8, Ms. Herzog's personal email address, pursuant to G.L. c. 4, § 7, cl. 26(o), which

¹ Defendants filed unredacted versions of the nine records on February 17, 2023, for *in camera* inspection by the Court; defendants also provided copies of the unredacted records to those counsel for plaintiffs who signed an agreement to comply with the Court's Protective Order.

² Record # 8 appears at Joint Appendix ("JA") 185-86.

exempts, from the definition of “public records,” the “personal email address” and other contact information of certain state employees, including “an unelected employee of . . . an agency . . . of the commonwealth.” *Id.*³ See also Defendants’ Summary Judgment Memorandum at 10-12.

II. Records 1, 4, 5, 6, and 9 Contain Material Protected from Disclosure by the Attorney-Client Privilege.

The AGO properly redacted material in Records 1, 4, 5, 6, and 9, that is protected by the attorney-client privilege. Some of the redacted material consists of communications from the AGO’s General Counsel to other Assistant Attorneys General, providing legal advice concerning the AGO’s participation in the NYU Fellow program. See Record # 1 (JA 52) and Record # 6 (JA 54). In another record, Record # 5 (JA 50), AAG Christopher Courchesne referred to the General Counsel’s legal advice and set forth his legal view concerning the agreement between the AGO and NYU. The foregoing communications are protected by the attorney-client privilege, which applies to attorneys in the AGO. See *Suffolk Constr. Co., Inc. v. Division of Capital Asset Mgmt.*, 449 Mass. 444, 448 (2007) (holding that PRL did not extinguish the attorney-client privilege as to government entities and employees); *DaRosa v. City of New Bedford*, 471 Mass. 446, 453 (2015) (“[W]e concluded [in *Suffolk Construction*] that communications within the attorney-client privilege are impliedly exempt from the definition of ‘public records’ and therefore are protected from public disclosure under the act”).⁴

³ The AGO initially redacted Ms. Herzog’s personal cell phone number as well as her email address, as discussed in defendants’ summary judgment memorandum at page 12. However, (even prior to the AGO’s filing of the unredacted records with the Court on February 17, 2023), the AGO provided plaintiffs (on January 19, 2023) with a partly-unredacted version of Record # 8, in which Ms. Herzog’s cell phone number no longer was redacted; the AGO did so upon learning that in her current job at a private firm, Ms. Herzog has listed her cell phone number on the firm’s public website, reflecting that it is now her business phone number.

⁴ The Attorney General is the chief law enforcement officer of the Commonwealth, and the AGO provides legal representation on behalf of the Commonwealth, the public interest, and specific client agencies. In addition, the Assistant Attorneys General appointed by the Attorney General

All of the email communications referenced above are protected by the attorney-client privilege because they constitute confidential communications in which either the AGO's General Counsel, Judy Zeprun, provided legal advice to AAGs, or in which AAG Courchesne provided a legal opinion to other AAGs concerning the AGO's hiring of applicants and the retainer agreement between the AGO and New York University.⁵ In making such communications, the General Counsel and other AAGs act as attorneys providing legal advice to the AGO itself, as a "client" and on behalf of the Commonwealth as "client" more generally.

Redacted material in the first sentence in Record # 9, the "Pro Bono Legal Services Agreement" between the AGO and NYU, also is protected by the attorney-client privilege because it sets forth the subject matter of the legal advice to be provided by NYU (acting as legal counsel) to the AGO (as client) under that agreement. *See* JA 53 (defining AGO as "Client" and NYU School of Law as "Counsel"). Such information falls within the privilege. *See, e.g., Commonwealth v. O'Brien*, 377 Mass. 772, 775-76 (1979).⁶

The AGO also properly redacted, as privileged, material in Record # 4, an email between the AGO and NYU, discussing the then-draft legal services agreement that the AGO and NYU ultimately finalized.⁷ *See also* Defendants' Summary Judgment Memorandum at 13-16, for a

serve as her legal counsel in litigation and investigative and other matters that are undertaken on behalf of the Attorney General, the AGO, and/or the Commonwealth. Communications between and among Assistant Attorneys General relating to decisions to follow one course of action over another are the very sort of communications that are protected under the attorney-client privilege as articulated in *Suffolk Construction*.

⁵ Although the "to" and "from" fields and "subject" field are missing on the email in question from Christophe Courchesne (Record # 5), it is apparent from a later email in the same chain, and which appears at the top of the page on JA 50, that Mr. Courchesne's email was addressed to Mike Firestone and Melissa Hoffer, two other Assistant Attorneys General. *See* JA 50.

⁶ The redacted material in Record # 9 also is protected from disclosure by the investigatory exemption. *See* Defendants' Summary Judgment Memorandum at 16 n.17.

⁷ Record # 4 appears at JA 50 and 55. Although the AGO ultimately provided a largely

further discussion of the attorney-client privilege as it applies to Records # 1, 4, 5, 6, and 9.

III. Records 2, 3, 4, 5, 6, 7, and 9 Contain Material Protected from Disclosure by the “Deliberative Process” Exemption.

The AGO properly redacted material in several records based on G.L. c. 4, § 7, cl. 26(d) (exempting, from definition of “public records,” material that constitutes “inter-agency or intra-agency memoranda or letters relating to policy positions being developed by the agency; but this subclause shall not apply to reasonably completed factual studies or reports on which the development of such policy positions has been or may be based”). *See DaRosa*, 471 Mass. at 457 (purpose of “deliberative policy” exemption in G.L. c. 4, § 7, cl. 26(d) is to protect open internal discussions among government officials in the formulation of policy).

Record # 2 (JA 56) contains material that is exempt from disclosure as “deliberative process” because it reflects the AGO’s deliberations concerning ongoing budget and personnel policy relating to salary and benefits in connection with hiring of AGO personnel, and Record # 3 (JA 58) reflects the AGO’s ongoing policy relating to the hiring process at the AGO. The AGO also properly redacted a draft agenda for a meeting that occurred between the AGO and NYU, *see* Record # 7 (JA 57), reflecting the AGO’s deliberations concerning the scope of discussions with outside entities such as NYU.⁸ All of the above records are exempt from

unredacted version of the finalized Legal Services Agreement with NYU (with the exception of the redacted material in Record # 9, describing the subject matter of the legal services to be provided under the agreement), the AGO’s discussions with NYU prior to finalizing that agreement – including in the email in Record # 4 – remain privileged because they reflect legal advice provided by NYU to the AGO in connection with the execution of the agreement.

⁸ The AGO provided Energy Advocates with an unredacted version of the final agenda of the meeting that occurred between the AGO and NYU, *see* JA 184. But in redacting the *draft* agenda of the meeting, the AGO properly invoked exemption (d), because the draft agenda reflects the AGO’s ongoing deliberations concerning the framework for working with outside entities such as NYU, and such deliberations continued beyond the occurrence of the particular meeting between the AGO and NYU that was reflected in the final agenda that the AGO did provide to Energy Advocates.

disclosure under G.L. c. 4, § 7, cl. 26(d), because they reflect ongoing AGO policy with respect to hiring processes, budgetary and personnel matters, and the nature and subject matter of legal services to be provided by NYU. Disclosure of such records, reflecting internal deliberations at the AGO with respect to continuing, ongoing policy matters, would inhibit the very type of “open, frank . . . intra-agency deliberations regarding government decisions,” *see DaRosa*, 471 Mass. at 457, that exemption (d) was specifically intended to protect.

Finally, several of the records that were protected from disclosure under the attorney-client privilege, *see supra* Section II, are additionally protected from disclosure under exemption (d), because they reflect deliberations among AGO lawyers concerning ongoing legal policy with respect to the relationship with NYU. *See* Record # 5 (JA 50) (email from AAG Courchesne expressing legal opinion to two other AAGs concerning agreement with NYU); Record # 6 (JA 54) (email from General Counsel to other AAGs, discussing legal policy concerning arrangement with NYU). Other records that are protected under exemption (d) as well as the attorney-client privilege are those reflecting discussions between the AGO and NYU concerning the form of the legal services agreement, *see* Record # 4 (JA 50); and subject matter of legal services to be provided, *see* Record # 9 (JA 53). The foregoing records are protected under exemption (d) because – for much the same reason that they constituted communications protected by the attorney-client privilege – they reflect deliberative processes of the AGO attorneys involved in the communications, regarding legal policy matters at the AGO, and disclosure of such records would inhibit full and open communication between AGO lawyers concerning legal policy. *See* Defendants’ Summary Judgment Memorandum at 17-19 for a further discussion of the deliberative process exemption as it applies to Records # 2, 3, 4, 5, 6, 7, and 9.

Respectfully submitted,

ANDREA JOY CAMPBELL
ATTORNEY GENERAL

/s/ Amy Spector

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CERTIFICATE OF SERVICE

I hereby certify that I served the above Memorandum by e-mailing the Memorandum to plaintiff's counsel, Robert Meltzer, Esq., on March 1, 2023, at the following email address:
r.meltzer@mountainstateslawgroup.com

/s/ Amy Spector

Amy Spector
Assistant Attorney General