STATE OF MARYLAND
PUBLIC INFORMATION ACT COMPLIANCE BOARD

PIACB 23-06 & 23-07
January 4, 2023
Montgomery County Public Schools, Custodian
Safa Rifka, M.D., Complainant

Over the course of the last two years, the complainant, Safa Rifka, has sent numerous Public Information Act ("PIA") requests to the Montgomery County Public Schools ("MCPS"). Two of those requests, sent in March 2021, are at issue here. The first, labeled by MCPS as FY21-193, sought records of communications between eight named individuals. The second request, labeled by MCPS as FY21-204, sought records of communications between two named individuals on 24 specific dates between April and September in 2020. MCPS produced records—with redactions—in January 2022. The complainant, believing (among other things) that the redactions were not appropriate, sought dispute resolution through the Public Access Ombudsman who, on September 23, 2022, issued a final determination stating that the dispute was only partially resolved. The complainant then filed two complaints with this Board, which we have consolidated for purposes of our review and decision. *See* COMAR 14.02.01.04. MCPS, through counsel, responded. As discussed in more detail below, we conclude that MCPS improperly redacted certain records—identified with more specificity below—and therefore order MCPS to produce those records in unredacted form.

Background

This is not the first time our Board has been asked to review issues arising in the context of the complainant's PIA requests to MCPS. In March 2021, the complainant submitted three separate PIA requests to MCPS and, unhappy with the estimated fees that MCPS charged, the complainant filed a complaint alleging that those fees were unreasonable. After reviewing the complaint and MCPS's response, we determined that the estimated fees were, in fact, unreasonable, and ordered that they be reduced to certain specific amounts. *See* PIACB 21-14 (July 23, 2021). The complainant apparently paid the reduced fees associated with two of his three requests, FY21-193 and FY21-204, and MCPS produced the responsive records. That production included nearly 1,800 pages of records, many of which were redacted. The response letters—issued a day apart in January 2022—provided a link for electronic access to the responsive records and indicated that the

records had been redacted pursuant to two provisions in the PIA: (1) § 4-301(a)(1),[1] which requires a custodian to withhold records that are "by law . . . privileged or confidential"; and (2) § 4-344, which allows a custodian to withhold certain inter- or intra-agency memoranda, including those that contain communications that fall under the deliberative process privilege, if disclosure would be contrary to the public interest. MCPS cited the attorney-client privilege in particular as applicable to the responses to both PIA requests.

The complainant was dissatisfied with MCPS's responses. He attempted to address his concerns through the Office of the Public Access Ombudsman via mediated dispute resolution. Ultimately, though, the Ombudsman issued a final determination stating that the dispute had been only partially resolved. Of the three discrete issues addressed in mediation, the issue related to the "redaction of sender/recipient and date information from certain records" was not resolved.[2] The complainant timely filed two complaints—one related to each of the two PIA requests that were subject to mediation—which, as stated above, we have consolidated. At the outset, the complainant indicates that both of his complaints "regard[] issues pertaining to the redaction of sender/recipient and date information from certain records produced [by MCPS] in response to [the complainant's] MPIA requests."[3] As to FY21-193, he challenges the redactions applied by pointing out

[1] Citations are to the General Provisions Article of Maryland's Annotated Code, unless otherwise stated.

[2] The Ombudsman's final determination, dated September 23, 2022, indicates that the two issues resolved were: (1) whether there were records other than email records responsive to the complainant's PIA requests—MCPS represented that there were not; and (2) "whether all attachments to responsive emails were reviewed and produced to the extent disclosable"—MCPS advised that it did not ignore or exclude email attachments. Ordinarily, information and communications exchanged with the Ombudsman in the context of mediated dispute resolution are confidential. *See* Md. Code Ann., Cts. & Jud. Proc. §§ 3-1801(c)(1), 3-1803(a); COMAR 14.37.03.01. However, the law allows the Ombudsman to transfer "basic information about a dispute," including "the nature of the dispute," to the Board so long as "appropriate steps have been taken to protect the confidentiality of communications made or received in the course of attempting to resolve the dispute." § 4-1B-04(d)(3).

[3] Despite this initial limiting language, the complaints appear to raise a host of other issues, including issues related to a discrepancy between the number of records MCPS initially estimated would be produced and the number actually produced, and the production of records that the complainant believes were non-responsive to his PIA requests. The complainant asks us to order MCPS to do a variety of things, including "[p]roduce the redacted emails with dates, subject, important, attachments, and contents in the unredacted form," "refund . . . pre-collected funds," and explain "the actual ordinary and necessary costs [that] were incurred to produce [the responses]." Aside from the dispute regarding the redacted emails, it does not appear to us that any of these specific disputes were *both* subject to an attempt to resolve them through the Ombudsman *and* unresolved subsequent to that attempt. We thus lack authority to resolve them now. *See* § 4-1A-05(a) (permitting Board review if "the complainant has attempted to resolve

that five of the eight individuals identified in his PIA request are neither MCPS attorneys nor MCPS employees. Regarding FY21-204, which sought records of communications between Kristin Henrikson and Emily Rachlin on 24 specific dates between mid-April and the end of September of 2020, the complainant argues that redaction pursuant to the attorney-client privilege was improper because, while Ms. Rachlin is an MCPS attorney, Ms. Henrikson is not.

MCPS responds by noting first that, of the many individuals party to the redacted email communications provided to the complainant, six of them either are currently or were at the time employed by MCPS's Office of General Counsel, including Ms. Rachlin, who was a named subject for both of the complainant's PIA requests. Focusing on FY21-204 in particular, MCPS asserts that all of the redacted emails were either sent from or addressed to one or more of these attorneys. MCPS contends that all redactions were appropriate—including the redaction of the date and sender/recipient information—because the emails involved confidential attorney communications. In a reply filed on November 22, 2022, the complainant reiterates his position that email communications involving non-MCPS attorneys or employees are not privileged.

Analysis

The PIA authorizes us to review and resolve complaints that allege certain violations of the PIA, including allegations that a custodian erroneously denied inspection of public records. § 4-1A-04(a). Our authority to do so is limited to certain circumstances, however. In particular, we may not resolve an allegation unless the complainant has first attempted to resolve the issue through the Public Access Ombudsman, and then only if the Ombudsman has issued a final determination stating that the particular dispute raised in the allegation was not resolved. § 4-1A-05(a). If a complaint is properly before us, we send it to the custodian for a response. § 4-1A-06(a). When a response does not provide enough information to resolve the complaint, we are permitted to request additional information, including—in cases alleging an improper denial of access to public records—"a copy of the public record, descriptive index of the public record, or written reason why the record cannot be disclosed." § 4-1A-06(b)(2)(ii). A custodian bears the burden of justifying its denial of access to public records. *See Cranford v. Montgomery County*, 300 Md. 759, 771 (1984). If, after review of all of the submissions and information before us, we conclude that a violation of the PIA has occurred, we must issue a written decision and order an appropriate remedy, as provided by the statute. § 4-1A-04(a)(2), (3). For example, if we find that a custodian has denied inspection of a public record in error, we must order that the custodian "produce the public record for inspection." § 4-1A-04(a)(3)(i).

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the dispute through the Office of the Public Access Ombudsman," and if the Ombudsman "has issued a final determination stating that *the dispute* was not resolved," (emphasis added)).

Section 4-301(a)(1) of the PIA provides that "a custodian shall deny inspection of a public record or any part of a public record if . . . by law, the public record is privileged or confidential."[4] Maryland has long recognized the attorney-client privilege as a privilege that protects certain communications between attorneys and their clients from disclosure, *see Harrison v. State*, 276 Md. 122, 131-35 (1975), and thus one of the privileges implicated by § 4-301(a)(1), *see Caffrey v. Dep't Liquor Control for Montgomery County*, 370 Md. 272, 303-04 (2002) (explaining that "public records subject to the attorney-client privilege 'shall' be denied," unless the privilege is waived). For the privilege to apply, a communication must have been made during the existence of an attorney-client relationship (or the contemplation of such relationship), and it must "relate 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)).

Not every communication between an attorney and his or her client is protected. *See Judicial Watch v. United States Postal Off.*, 297 F. Supp. 2d 252, 267 (D.D.C. 2004) ("The privilege does not allow an agency to withhold a document merely because it is a communication between the agency and its lawyers.") Rather, "[o]nly those attorney-client communications *pertaining to legal assistance* and *made with the intention of confidentiality* are within the ambit of the privilege." *E.I. du Pont de Nemours & Co. v. Forma-Park, Inc.*, 351 Md. 396, 415-16 (1998) (emphasis original) (cleaned up). Thus, in general, when a third party that is not encompassed within the attorney-client relationship is privy to communications between an attorney and the client, those communications are not considered subject to the privilege. *See id.* at 416 ("[F]or a communication to be confidential, it is essential that it not be intended for disclosure to third persons."); *see also, e.g., CR-RSC Tower I, LLC v. RSC Tower I, LLC*, 202 Md. App. 307, 364 (2011) (communications between law firm and opposing counsel "not even remotely related to a confidential communication with the client concerning legal advice").

We start by observing that there is no question that an attorney-client relationship exists between the lawyers in the Office of General Counsel for Montgomery County Public Schools ("OGC") and the MCPS employees party to many of the redacted communications at issue here. The communications between the OGC lawyers and its clients are "no less entitled to the protection of the attorney-client privilege than any other client," 82 Md. Op. Att'y Gen. 15, 17 (1997), thus MCPS may invoke the privilege to withhold records properly subject to it under the PIA, *id.* at 22.

[4] Although in its responses to the complainant's PIA requests MCPS also cited § 4-344's discretionary exemption as a reason for the redactions, we will focus only on § 4-301(a)(1) because that is the justification for the redactions advanced by MCPS in response to the specific allegations raised in the complaints here.

Upon reviewing the redacted records responsive to the complainant's PIA requests,[5] however, we noted that many of the redactions were applied to email communications that included people other than OGC lawyers or MCPS employees. That responsive records might include communications with parties outside of the attorney-client relationship is, as the complainant points out, fairly clear from the PIA requests themselves. For example, the PIA request in FY21-193 sought records of communications involving eight individuals, five of which are neither OGC lawyers nor clients of the OGC. As is clear from the redacted records provided, Kristin Henrikson is an attorney representing a parent involved in the matters to which the records pertain. Two of the individuals, Keith Purtee and Laurie Bennett (who is an administrative law judge, or "ALJ"), are employees of the Office of Administrative Hearings ("OAH").[6] And, for FY21-204, the PIA request sought only certain records of communications between Emily Rachlin, an OGC lawyer, and Ms. Henrikson, who, as stated above, is neither an OGC lawyer nor an MCPS employee/client.

Because the identities of the senders and/or recipients of some of the redacted records raise genuine questions about whether the attorney-client privilege applies to those records, we asked MCPS to provide us with unredacted versions of the records involving Ms. Henrikson, Mr. Purtee, ALJ Bennett, and Ms. Rachlin. *See* § 4-1A-06(b)(2)(ii)(1). MCPS complied with our request and submitted unredacted versions of these responsive records. As required by both statute and our regulations, we will strictly maintain the confidentiality of these records. § 4-1A-06(b)(5); COMAR 14.02.06. We address the records responsive to each PIA request in turn, starting with FY21-193, and will refer to any redacted information only in general terms and/or by the PDF page number of the redacted responses provided to the complainant.

I. FY21-193

MCPS produced 1,145 pages of redacted records to the complainant in response to his PIA request labeled FY21-193. As stated above, MCPS justifies those redactions on grounds that they are exempt from disclosure under § 4-301(a)(1)—specifically by

[5] We were able to access the redacted records that MCPS provided to the complainant via the links included in MCPS's response letters to FY21-193 and FY21-204, which were attached as exhibits to the complaints. Because these records appear to disclose information that must otherwise be withheld under the PIA if not requested by a "person in interest," *see, e.g.*, § 4-313 (requiring a custodian to deny inspection of "a school district record about the home address, home telephone number, biography, family, physiology, religion, academic achievement, or physical or mental ability of a student," unless the requester is a "person in interest"), we will maintain their confidentiality, *cf.* § 4-1A-06(b)(5); COMAR 14.02.06.

[6] The other two non-MCPS individuals named in the PIA request were Mark Martin, Esq. and Margaret Dillenburg, Esq. The overwhelming majority of records involving Ms. Dillenburg were produced in unredacted form, as was the record containing the one email communication involving Mr. Martin.

application of the attorney-client privilege. In response to our request for unredacted versions of a selected portion of MCPS's response,[7] MCPS provided 159 pages of unredacted email communications. Upon review of these records, we conclude that several of them are not protected from disclosure by the attorney-client privilege. Two of those communications are found at pages 110 and 111 of MCPS's redacted response to FY21-193. The first, found at the bottom of page 110, is an email from Ms. Rachlin to Keith Purtee, an Administrative Aide employed by OAH. The second, found on page 111, is an email from Mr. Purtee to Ms. Rachlin communicating the status of a certain matter in response to an email from her inquiring about that matter—Ms. Rachlin's email to Mr. Purtee is included. Mr. Purtee is not an OGC client and, in any event, none of these messages contain or even relate to confidential legal advice. Thus, MCPS must disclose these records in unredacted form.[8]

The remaining communication that, in our view, was improperly redacted begins at the bottom of page 703 and continues on to page 704 of the redacted response provided to the complainant. These two pages of records contain an email sent from Ms. Henrikson to three MCPS employees, and copied to four other individuals.[9] Again, Ms. Henrikson is not an OGC attorney, nor is she an MCPS employee. Rather, she is an attorney representing the parent of a child enrolled in the school system. And, although in broad context the records suggest that the interests of Ms. Rachlin's and Ms. Henrikson's clients were, to some degree, aligned, we think that the internal responses and reactions of MCPS employees and attorneys to Ms. Henrikson's email here—which *are* privileged—belie any application of the common interest doctrine that might extend the privilege to protect this communication between Ms. Henrikson and MCPS. *Cf. Gallagher v. Office of the Attorney General*, 141 Md. App. 664 (2001).

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[7] Numerous redacted emails responsive to FY21-193 include lawyers from the law firm of Carney, Kelehan, Bresler, Bennett & Scherr LLP ("Carney Kelehan"), a firm that provides legal services to many Maryland public school systems, including Montgomery County. *See* Carney, Kelehan, Bresler, Bennett & Scherr LLP, Education Law https://carneykelehan.com/practice-areas/education-law/ (last visited Dec. 1, 2022). MCPS confirmed that the Carney Kelehan lawyers were retained to advise MCPS on certain legal matters, thus we have no reason to doubt MCPS's assertion that the email communications between the Carney Kelehan and OGC lawyers—communications that do not include third parties outside of the attorney-client relationship—are subject to the attorney client privilege. In determining such, we do not apply a rule that these communications are privileged *per se*. *See EEOC v. BDO USA, LLP*, 876 F.3d 690, 697 (5th Cir. 2017) (error for the district court to conclude that all communications between a corporation's employees and its counsel are *per se* privileged). Rather, our conclusion is also supported by unredacted portions of the response, which confirm MCPS's description of Carney Kelehan's role.

[8] The top of page 110 of MCPS's redacted response contains a communication that *is* protected by the attorney-client privilege, and should therefore remain redacted pursuant to § 4-301(a)(1).

[9] Ms. Rachlin was apparently later copied on this particular email communication.

Gallagher involved a challenge to the application of the attorney work product doctrine (via § 4-344) to protect records involving "the exchange of information and legal theories" between the Office of the Attorney General ("OAG") and "various officials of governmental organizations in other states and the federal government," and "sought as part of the development of [a] case." *Id.* at 674. The appellate court ultimately found that, under the "common interest rule"—where "parties with shared interests in actual or pending litigation against a common adversary may share privileged information without waiving their right to assert the privilege"—the protections of the work product doctrine were preserved, even though the records were shared with others outside of the OAG. *Id.* at 676-77.

As we see it, *Gallagher* does not control here. First, that case involved the application of the work product doctrine, not the attorney-client privilege. *See In re United Mine Workers*, 159 F.R.D. 307, 313 n.4 (D.D.C. 1994) (noting the distinction between the work product and attorney-client privileges and suggesting that "it is possible that the precise scope of the common interest rule will vary as applied to each privilege because of the differing purposes of the privileges"). Moreover, as stated above, and as the records generally make clear, MCPS's interests and the interests of Ms. Henrikson's client are not so closely aligned so as to make application of the common interest rule to Ms. Henrikson's communications with MCPS appropriate. OGC's interest is in ensuring that MCPS provides public educational services in accordance with State and federal law. Ms. Henrikson's interest, on the other hand, is in advocating for her client, a parent of a child enrolled in MCPS schools. *Cf. Government Counsel and their Obligations*, 121 Harv. L. Rev. 1409, 1414 (2008) (noting that "a lawyer representing a governmental client must seek to advance the public interest rather than merely the partisan or personal interests of the government entity or officer involved," (quotations and citations omitted)). Such variegation of interests sets this matter apart from *Gallagher*, which involved different law enforcement agencies all jointly focused on prosecuting securities-related crimes allegedly perpetrated by certain individuals. *See Office of the Attorney General v. Gallagher*, 359 Md. 341, 343 (2000).

Finally, we note that MCPS does not cite to or rely on the common interest doctrine in its response to the complaints before us. Rather, MCPS points to *State v. Pratt*, for the proposition that the attorney-client privilege may, "at least in criminal causes," encompass communications made by "agents whose services are *required by the attorney* in order that he [or she] may properly prepare [a] client's case." 284 Md. 516, 520 (1979) (emphasis added). While this general principle may extend to some degree beyond criminal cases, *see Levitsky v. Prince George's County*, 50 Md. App. 484, 494 (1982) (noting that extension of the privilege to include experts hired by an attorney "should be predicated on the source of the expert's information, rather than civil versus criminal"), here there is no suggestion or argument by MCPS that Ms. Henrikson's legal services were *required* in order for OGC lawyers to adequately represent their clients. Thus, MCPS must disclose an unredacted version of the email from Ms. Henrikson found at pages 703 and 704 of its

redacted response to FY21-193. At the same time, the four email communications between Ms. Rachlin and her clients, found at the top of page 703, are privileged and should remain redacted.

Our review of the remaining 155 pages of unredacted records convinces us that MCPS properly applied § 4-301(a)(1) to redact the email communications exchanged between OGC lawyers and its MCPS employee clients. It is clear that these records are subject to the attorney client privilege. They contain communications between attorneys and their clients, and pertain to a variety of legal issues and questions that arose over the course of MCPS's work to carry out its mission to provide public educational services as required by law.

II. FY21-204

MCPS's response to the PIA request labeled FY21-204 comprises 646 pages of records. Many of these records were redacted, including records containing email communications between Ms. Rachlin and Ms. Henrikson, which were the subject of the request. Given the lack of an attorney-client relationship between these two individuals, we asked MCPS to provide unredacted versions of these email communications. In response to our request, MCPS provided a total of 32 pages of unredacted records. After reviewing the unredacted records, we conclude that the records found at the following pages of the redacted response to FY21-204 are not protected by the attorney-client privilege and therefore must be disclosed in unredacted form: 12, 21, 22, 24-26, 28-31, 58, 166, 219, 275, 282, 287, 309, 320, 331, 381, 449, 451-53 458-60, 462, 500, 512-13.[10] The communications contained on these pages were not made during the existence of an attorney-client relationship between the sender and recipient, nor do they relate to professional advice sought by a client. *Harrison*, 276 Md. at 132. To the contrary, several of the emails sent by Ms. Henrikson simply communicate her client's position as to certain matters involving MCPS. Others provide, by way of attachment, documents that appear to be a matter of public record in the first place, or at least documents that would be disclosable to the complainant here. *Cf.* 82 Md. Op. Att'y Gen. at 20 ("[A] document that is not itself privileged does not gain privileged status merely because it passes through the attorney's hands or is attached to an attorney's communication to the client."). Still others communicate status information about pending matters. *Cf. Gallagher*, 141 Md. App. at 677 (communications between agencies sharing "status information" are "not generally protected from revelation").

Nor does the common interest doctrine apply to extend the protections of the attorney client privilege to these communications between Ms. Rachlin, an attorney for MCPS, and Ms. Henrikson, an attorney representing the parent of a child enrolled in the school system. Though both the redacted and unredacted records suggest that MCPS and

[10] Several of the unredacted records were produced in duplicate. We have not listed them here.

Ms. Henrikson's clients may have had, at times, a "common adversary," *id.* at 676-77, this is so only in a colloquial sense. To the extent that MCPS may have been defending against certain claims during the relevant time period, it seems to us that those claims were not lodged against, nor did they directly involve, Ms. Henrikson's client. *Cf. Maxtena, Inc. v. Marks*, Civ. Action No. DKC 11-0945, 2013 WL 1316386, at *7-8 (D. Md. Mar. 26, 2013) (common interest rule properly applied where, among other things, corporation and State had oral agreement to "work cooperatively" regarding a "shared concern" that an individual might bring certain claims against both the corporation and State).

Finally, and with respect to the records responsive to both FY21-193 and FY21-204, we take note of the confidentiality statement appended to Ms. Rachlin's emails that "[t]his communication and any accompanying documents are confidential information that is legally privileged and intended only for the use of the person to whom it is addressed." It goes almost without saying that this statement does not automatically trigger the protections of the attorney-client privilege—or any other confidentiality-based privilege for that matter. *Cf. United States Fish & Wildlife Serv. v. Sierra Club*, 141 S. Ct. 777, 786 (2021) (noting, regarding the deliberative process privilege, that the label "draft" is not determinative, and that "a court must evaluate the documents 'in the context of the administrative process which generated them,'" (citation omitted)); *cf. also Gov't Accountability & Oversight v. Frosh*, No. 2602, Sept. Term 2019, 2021 WL 785797, at *7 (Md. Ct. Spec. App. Mar. 1, 2021) (unreported) ("Whether a document is privileged depends on the specific nature of the communication within[.]"). While it is certainly good practice to label as confidential those categories of communications that are, in general, subject to privilege, a label alone will not suffice to invoke a privilege such that it will shield records from disclosure under the PIA.

Conclusion

Given the submissions before us, including the unredacted email communications that MCPS provided in response to our request, we conclude that the attorney-client privilege does not protect certain responsive records redacted by MCPS from disclosure. To that end, MCPS improperly redacted those records in its responses to both of the complainant's PIA requests. Therefore, pursuant to § 4-1A-04(a)(3)(i), we order MCPS to produce to the complainant the following unredacted records, identified by page number of the PDF of the redacted responsive records already produced to the complainant:

- For **FY21-193**, pages 110-11 (the email communications between Keith Purtee and Emily Rachlin) and 703-04 (the email communication sent by Kristin Henrikson to certain MCPS employees).

- As to the email communication, found at the top of page 110, between Emily Rachlin, OGC lawyers, MCPS employees, and outside counsel, this communication is subject to the attorney-client privilege and should be redacted.

- Similarly, the email communications between OGC lawyers and MCPS employees that precede the email from Ms. Henrikson, on page 703, are subject to the attorney-client privilege and should be redacted.

- For **FY21-204**, pages 12, 21, 22, 24-26, 28-31, 58, 166, 219, 275, 282, 287, 309, 320, 331, 381, 449, 451-53 458-60, 462, 500, 512-13.

In ordering this disclosure, we take pains to stress the special status of the complainant here. That he is entitled to inspection of these records under the PIA does not mean that the general public is also so entitled. *See* 20 U.S.C.A. § 1232g (Family Educational and Privacy Rights Act); *see also supra*, note 5.

Public Information Act Compliance Board*

John H. West, III, Esq., Chair
Christopher Eddings
Darren S. Wigfield

* Board member Michele L. Cohen, Esq. did not participate in the preparation or issuance of this decision.