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Bruce Friedman v. EOTSS

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Suffolk Superior Court Civil Action No. 2284CV00496 A
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Order on Defendant's Motion to Dismiss (No. 10)

This is an action filed by Plaintiff challenging Defendant, EOTSS's responses to his public record requests, pursuant to G.L. c. 66, §10(b). The Defendant has moved to dismiss the Plaintiff's complaint. There are two public record requests at issue here, dated October 28, 2022 ("first request") and December 29, 2022 ("second request").

The first request sought, from October 1, 2021, to present, all communications between Edward McGrath ("McGrath") (the former Records Access Officer for DALA and BSEA, and/or the BSEA/DALA and any employees of EOTSS. On December 31, 2022, EOTSS provided its response, which included a privilege log and an explanation that while approximately 220 responsive records were identified, all responsive pleadings were protected by the attorney-client privilege and therefore exempt from production.

The second request sought all documents and communications about the creation of or changes to McGrath's accounts, the granting and/or denying of the BSEA director's any permission regarding McGrath's accounts, the removal of permissions for McGrath's accounts, and any communication from McGrath's accounts relating to his leaving his position at DALA. The supervisor granted EOTSS's fee petition for the production of records. The total was $991.75.

The Defendant asserts that Count I ("first request"), must be dismissed as the records sought are facially exempt from disclosure pursuant to attorney-client privilege. The interplay between public records requests and the attorney-client privilege was addressed in *Suffolk Constr. Co. v. Div. of Capital Asset Mgmt.*, 449 Mass. 444 (2007). "The general features of the attorney-client privilege are well known: the attorney-client privilege shield from the view of third parties all confidential communications between a client and its attorney undertaken for the purpose of obtaining legal advice." Id. at 448, See, e.g. *Matter of a John Doe Grand Jury Investigation*, 408 Mass. 480, 481 (1990), quoting *Hunt v. Blackburn*, 128 U.S. 464, 470 (1888)("seal of secrecy" on confidential communications between client and counsel"); *Foster v. Hall*, 12 Pick. 89, 93, 29 Mass. 89 (1831)("the general rule [is] that [where] matters [are] communicated by a client to his attorney, in professional confidence, the attorney shall not be at any time afterwards called upon or permitted to disclose in testimony"). The case law in Massachusetts presumes the existence of an attorney-client privilege for public officials and public entities. *Suffolk Constr. Co. v. Div of Capital Asset Mgmt.*, 449 Mass at 449, See e.g. *District Attorney for the Plymouth Dist. v. Selectman of Middleborough*, 395 Mass. 629, 632 n.4 (1985)(assuming without deciding that "public clients have an attorney-client privilege");

Vigoda v. Barton, 348 Mass. 478, 485-486 (1995); *Judge Rotenberg Educ. Ctr., Inc. v. Commissioner of the Dep't of Mental Retardation (No. 1)*, 424 Mass. 430, 457 n.26 (1977).

In *Suffolk Constr. Co.* the Court stated "explicitly that confidential communications between public officers and employees and governmental entities and their legal counsel undertaken for the purpose of obtaining legal advice or assistance are protected under the normal rules of the attorney-client privilege. *Id.* at 450. With regard to public record requests, "the statute establishes a clear 'presumption that the record sought is public' and places the burden on the record's custodian to 'prove with specificity the exemption which applies' to withheld documents". Id. at 454, G.L. c. 65, §10(c).

In the case at bar, the Defendant has identified the attorney-client privilege as the exemption as to why the documents have not been produced. In *Suffolk Constr. Co.* emphasized "that public officials seeking the protection of the attorney-client privilege are required to produce detailed indices to support their claims of privilege. *Id.* at 460, Cf. *Worcester Tel. & Gazette Corp v. Chief of Police of Worcester*, 436 Mass. 378, 384 (2002)(where applicability of public records law exemption is questionable, review may "be accomplished through the use of an itemized and indexed document log in which the custodian sets forth detailed justifications for its claims of exemption"). In the case at bar, the Defendant has produced a log. The court must then consider whether or not that is sufficient when applying the motion to dismiss standard.

To survive a motion to dismiss under Mass. R. Civ. P. 12(b)(6), a complaint must allege facts "plausibly suggesting . . . entitlement to relief[.]" *Iannacchino* v. *Ford Motor Co.*, 451 Mass. 623, 636 (2008), quoting *Bell Atl. Corp.* v. Twombly, 550 U.S. 544, 557 (2007). Detailed factual allegations are not required but the plaintiff must present more than mere "labels and conclusions," such that the alleged facts "raise a right to relief above the speculative level." *Iannacchino*, 451 Mass. at 636, quoting *Twombly*, 550 U.S. at 555. In determining whether a complaint meets this standard, the Court accepts the factual allegations in the complaint as true, and all draws reasonable inferences in favor of the non-moving party. *Harrington* v. *Costello*, 467 Mass. 720, 724 (2014).

In considering a motion to dismiss, the Court is generally limited to the four corners of the complaint. There are exceptions to this general rule. The Court may consider "matters of public record, orders, items appearing in the record of the case, and exhibits attached to the complaint" without converting the motion to one for summary judgment. *Reliance Ins. Co.* v. *Boston*, 71 Mass. App. Ct. 550, 555 (2008), quoting *Schaer* v. *Brandeis Univ.*, 432 Mass. 474, 477 (2000).

With regard to the first request, the Defendant has a defense to the allegations contained in the Complaint as to Count I – the records sought are privilege. However, in applying the standard by which the court must consider this Motion to Dismiss, the court must

accept the facts as true and favor the non-moving party. While the court may consider items appearing in the record of the case, this court does not believe that it is appropriate at this junction to make a determination as to whether or not the attorney-client privilege applies and if the log provided is sufficient. As such, the court must deny the Motion to Dismiss as to Count .I

With regard to the second request, the parties disagree as to whether or not the Defendant has produced all records sought. As such, the court must deny the Motion to Dismiss as to Counts II and III, as well.

For the reasons stated herein, the Defendant's Motion to Dismiss is **DENIED**.

Katie Rayburn
Associate Justice of the Superior Court

Date: April 10, 2024