



The Commonwealth of Massachusetts
William Francis Galvin, Secretary of the Commonwealth
Public Records Division

Rebecca S. Murray
Supervisor of Records

November 18, 2019

SPR19/2246

Mark J. Purple
Town Administrator
Town of Southborough
17 Common Street
Southborough, MA 01772

Dear Mr. Purple:

I have received the petition of Carl Guyer appealing the response of the Town of Southborough (Town) to a request for public records. G. L. c. 66, § 10A; see also 950 C.M.R. 32.08(1). Specifically on September 26, 2019, Mr. Guyer requested “historical documents from the Board of Selectmen, Board of Health and the Conservation Commission related to actions and decisions made regarding the commercial dump/landfill still in existence on the town own[ed] property referred to as the Breakneck Hill conservation land.”

The Public Records Law

The Public Records Law strongly favors disclosure by creating a presumption that all governmental records are public records. G. L. c. 66, § 10A(d); 950 C.M.R. 32.03(4). "Public records" is broadly defined to include all documentary materials or data, regardless of physical form or characteristics, made or received by any officer or employee of any town of the Commonwealth, unless falling within a statutory exemption. G. L. c. 4, § 7(26).

It is the burden of the records custodian to demonstrate the application of an exemption in order to withhold a requested record. G. L. c. 66, § 10(b)(iv); (written response must “identify any records, categories of records or portions of records that the agency or municipality intends to withhold and provide the specific reasons for such withholding, including the specific exemption or exemptions upon which the withholding is based ...”); 950 C.M.R. 32.06(3); see also *Dist. Attorney for the Norfolk Dist. v. Flatley*, 419 Mass. 507, 511 (1995) (custodian has the burden of establishing the applicability of an exemption).

The Town's October 10th response

In its October 10th response, the Town gave Mr. Guyer’s request a number #19-30 and identified two responsive documents as follows:

1. [M]eeting notes from an executive session the Conservation Commission had on 12/1/2005; and
2. attorney-client communications dated 2/21/2006 addressing the topic of the landfill.

The Town redacted portions of the executive meeting notes for 12/1/2005 and further denied all attorney-client communications dated 2/21/2006 pursuant to the common law attorney-client privilege. Unsatisfied with the Town's response, Mr. Guyer petitioned this office and this appeal SPR19/2246 was opened as a result.

Burden of specificity in claiming exemptions

Under the Public Records Law, the burden shall be upon the records custodian to prove with specificity the exemption which applies. G. L. c.66, § 10(b)(iv); (written response must "identify any records, categories of records or portions of records that the agency or municipality intends to withhold and provide the specific reasons for such withholding, including the specific exemption or exemptions upon which the withholding is based ...") see also Globe Newspaper Co. v. Police Comm'r, 419 Mass. 852, 857 (1995); Flatley, 419 Mass. at 511. See also Reinstein v. Police Comm'r of Boston, 378 Mass. 281, 289-90 (1979) (the statutory exemptions are narrowly construed and are not blanket in nature).

The Town's response did not contain the specificity required in a denial of access to public records. Instead, the Town simply redacted portions of the responsive records without claiming any exemption(s) in the Public Records Law to support the redactions made. Accordingly, I find that the Town has not established how it can withhold the records or portions of the record(s) at issue in this appeal.

Common law attorney-client privilege

The Town has claimed that the 2/21/2006 attorney-client communications are protected entirely under the common law attorney-client privilege.

A records custodian claiming the attorney-client privilege under the Public Records Law has the burden of not only proving the existence of an attorney-client relationship, but also (1) that the communications were received from a client during the course of the client's search for legal advice from the attorney in his or her capacity as such; (2) that the communications were made in confidence; and (3) that the privilege as to these communications has not been waived. See Suffolk Constr. Co. v. Div. of Capital Asset Mgmt., 449 Mass. 444, 450 n.9 (2017); see also Hanover Ins. Co. v. Rapo & Jepsen Ins. Servs., 449 Mass. 609, 619 (2007) (stating that the party seeking the attorney-client privilege has the burden to show the privilege applies).

Pursuant to the Public Records Law, in assessing whether a records custodian has properly withheld records based on the claim of attorney-client privilege the Supervisor of Records "shall require, as part of the decision making process, that the agency or municipality provide a detailed

description of the record, including the names of the author and recipients, the date, the substance of such record, and the grounds upon which the attorney-client privilege is being claimed." G. L. c. 66, § 10A(a).

Based upon the Town's response, I find the Town has not established the existence of an attorney-client relationship in compliance with Suffolk and the Public Records Law. The Town must identify the records, categories of records or portions of records in its possession that are responsive to the request and those which it intends to withhold. See G. L. c. 66, § 10(d)(iv); 950 C.M.R. 32.06(3)(c)(4).

Consequently, I find the Town did not meet its burden of specificity in claiming the attorney-client privilege to withhold records from disclosure under the requirements of the three part test in Suffolk and the Public Records Law under G. L. c. 66, § 10A(a).

Conclusion

Accordingly, the Town is ordered to provide Mr. Guyer with a response to the request, provided in a manner consistent with this order, the Public Records Law, and its Regulations within 10 business days. A copy of any such response must be provided to this office. It is preferable to send an electronic copy of this response to this office at pre@sec.state.ma.us.

Sincerely,



Rebecca S. Murray
Supervisor of Records

cc Carl Guyer