DISTRICT COURT, CITY AND COUNTY OF DENVER, COLORADO 1437 Bannock, Rm 256 Denver, Colorado, 80202	DATE FILED: January 11, 2021 12:32 PM CASE NUMBER: 2020CV34122
	▲COURT USE ONLY▲
Plaintiff: FLORENCE SEBERN, v. **Defendant:** THE CITY AND COUNTY OF DENVER, a home rule municipality; and MICHAEL B. HANCOCK, in his official capacity as the Mayor of the City of Denver	Case Number: **2020CV34122** **Courtroom: 269**
ORDER REGARDING PLAINTIFF'S SHOW CAUSE COMPLAINT FOR RELEASE OF MATERIALS UNDER CORA	

This matter is before the Court on Plaintiff Florence Sebern's Complaint and Application for an Order to Show Cause filed on December 4, 2020.

I. Summary of Pertinent Facts.

Plaintiff had previously served certain records requests under the Colorado Open Records Act ("CORA") to Defendants City and County of Denver and Mayor Michel B Hancock (collectively "the City"). On December 11, 2020, the City responded that it had denied release of the requested documents because the requested records were protected from disclosure under the deliberative

process privilege pursuant to *City of Colorado Springs v. White*, 967 P.2d 1042, 1045 (Colo. 1998); *see also* C.R.S. § 24-72-3 204(3)(a)(XIII). The City also asserted attorney client privilege. On December 23, 2020, the Court ordered that the City provide the documents to the Court for an in-camera review. The documents were provided to the Court via email on December 28, 2020. The Court reviewed the documents and the matter was set for a hearing on January 7, 2021. Ms. Sebern testified as Plaintiff and Michael Strott testified for the City. Counsel then made argument to the Court. Having considered the pleadings, the exhibits, the documents at issue, the hearing testimony, hearing exhibits, testimony and argument of counsel, the Court finds and Orders as follows:

II. Applicable Law

The question before the Court is whether the documents responsive to Plaintiff's request under the Colorado Open Records Act, and withheld by the City, are exempt from release based on the deliberative process privilege.

The controlling authorities on this issue are the statute, C.R.S. § 24-72-204(3)(a)(XIII) and *White* 967 P.2d 1042 (Colo. 1998).

III. Analysis

First, the deliberative process is a qualified privilege. *White,* 967 P.2d at 1051. (internal citations omitted). The primary purpose of the privilege is to protect the frank exchange of ideas and opinions critical to the government's

decision-making process where disclosure would discourage such discussion in the future. *Id.* The privilege serves to assure that subordinates within an agency will feel free to provide the decisionmaker with their uninhibited opinions and recommendations without fear of later being subject to public ridicule or criticism; to protect against premature disclosure or proposed policies before they have been finally formulated or adopted; to protect against confusing the issues and misleading the public by dissemination of documents suggesting reasons and rationales for a course of action which were not in fact the ultimate reasons for the agency's action. *Id.*

Thus, a key question in a deliberative process privilege case is whether disclosure of the material would expose an agency's decision-making process in such a way as to discourage discussion within the agency and thereby undermine the agency's ability to perform its functions. *Id.* In light of the purposes of the privilege, it protects only material that is both predicational (i.e., generated before the adoption of an agency policy or decision) and deliberative (i.e., reflective of the give-and-take of the consultative process). *Id.* Of course, not all predecisional material is privileged; the material must also be part of the deliberative process by which a decision is made. *Id.* at 1052. The material must reflect the "give-and-take of the consultative process" *Id.* Finally, in addition to assessing whether the material is predecisional and deliberative, and in order to determine if disclosure of the material is likely to adversely affect the purposes of the privilege, courts inquire whether "the

document is so candid or personal in nature that public disclosure is likely in the future to stifle honest and frank communication within the agency."

A public record may be withheld under this qualified privilege if the material is so candid or personal that public disclosure is likely to stifle honest and frank discussion within the government and public disclosure would cause substantial injury to the public interest. C.R.S. § 24-72-204(3)(a)(XIII). In determining whether disclosure of the records would cause substantial injury to the public interest, the court shall weigh, based on the circumstances presented in the particular case, the public interest in honest and frank discussion within government and the beneficial effects of public scrutiny upon the quality of governmental decision-making and public confidence therein. *Id.* Depending upon the circumstances, the court should use the inspection "to determine whether the material is privileged, to sever privileged from non-privileged material if severability is feasible, and to weigh the government's need for confidentiality against the litigant's need for production." *White,* 967 P.2d at 105.

The Court first addresses the issue of attorney-client privilege. The Court finds that merely because Mr. Nathan Lucero, a City Attorney, was a member of this group, included because of his experience in planning and law, and was a recipient of a group email, does not thereby afford attorney-client privilege to these documents. The emails don't reflect that the sender was either seeking legal advice, or that legal advice was returned. Attorney-client

privilege, "protects communications between an attorney and client relating to legal advice." *Alliance Construction Solutions, Inc. v. Department of Corrections*, 54 P.3d 861, 864 (Colo. 2002). Colorado codified the common law attorney-client privilege at C.R.S. § 19-90-107(1)(b), [an attorney shall not be examined without the consent of his client as to any communication made by the client to him or his advice given thereon in the course of professional employment . . .]

Turning now to the deliberative process privilege, with the above authority and guidance in mind, the Court finds as follows:

The Court first finds that Plaintiff has an interest, as a resident of the City and County of Denver, in the governmental process involved in the amendment to be brought before the Denver City Counsel. Plaintiff seeks transparency and an understanding of how the Group Living Advisory Committee ("GLAC") was formed.

The City certainly has an interest in protecting documents that come within the deliberative process. For example, here, the group tasked with deciding which stakeholders should be a part of the GLAC may certainly have had robust discussions about who to include. However, those discussions, while the Court agrees would fall under the privilege, are not among the documents in question.

The documents the Court reviewed contain emails from Skye Stuart to the planning committee. The emails contain discussions about what will be on

the agenda for the next meeting and the scope of the meetings and organizational charts. The first email then attaches agendas, objectives and plans for meetings. The emails at the end of the documents provided to the Court contain some discussion, but even assuming they are privileged, the protection doesn't necessarily extend to the attachments.

The attachments simply provide information to the group. The Court is aware, as discussed in White, that such documents may also be privileged where there are so closely connected to privileged documents that it is impossible to separate them without disclosing material that should be protected. *White*, 967 P.2d at 1052. However, in the Court's view these attachments do not contain nor do they reveal a "give and take," or deliberative process. There is discussion of the upcoming end of a moratorium and of a need to update zoning issues, but this is simply in the context of setting an agenda for discussion. It is not in itself deliberative. Should they be disclosed, the Court is hard-pressed to understand how, the City, its employees, or future committee members would be stifled from robust discussion of proposed city projects because these documents do not contain candid or personal material. Indeed, the material found in Exhibit 5, which had no privilege asserted, is very similar to the material in the attachments. It is also hard to understand how disclosure of the attachments would "cause substantial injury to the public interest."

Mr. Strott, in his position as Deputy Communications Director, has the unenviable task of fielding CORA requests, obtaining the documents from the appropriate agency, making the determination whether any of the documents are privileged, and then referring the documents and his decision to the City Attorney's Office. It seems curious to the Court that he in effect makes this decision on his own without conferring with the agency in question. For example, here, he did not confer with Skye Stuart or anybody else participating in the group involved with forming the GLAC. Without such conferral to provide context and to understand what the agency is doing, it has to be difficult to make the decision whether the documents are relevant, whether they are deliberative, or whether they reflect candid "give and take" that might harm the public interest if disclosed. He made his decision primarily on the fact that the documents were pre-decisional, they were drafts, and contained no final documents. He decided they were privileged because they reflected they contained a "give and take" and "back and forth." However, the Court is hard pressed to find the same candid discussion in the attachments.

The City argues, at the risk of over-simplification, that generally, the pre-decisional process contains candid, frank discussions. And that even if those discussions are not part of these particular documents, that the documents are still part of the pre-decisional process and should therefore be protected by the privilege. However, the general policy of the statute is for disclosure. The exceptions should be narrowly construed. *See* C.R.S. § 24-72-201, *Denver*

Publishing Co. v. Dreyfus, 520 P.2d 104, 106 (Colo. 1974). Also, it is the City's burden to show whether the privilege applies.

The documents certainly are pre-decisional and contain drafts, but, of course, that is only half of the analysis. The documents must also reveal the deliberative process before they can be found to be protected from disclosure by the privilege.

Under *White*, the Court in making its determination may sever privileged from non-privileged material. *White*, 967 P.2d at 1054. Also following guidance from White, the deliberative process privilege typically covers recommendations, advisory opinions, draft documents, proposals, suggestions, and other subjective documents that reflect the personal opinions of the writer rather than the policy of the agency. *Id.* at 1053. Here, the attachments to the emails, while they may be drafts, do not also reflect the personal opinions of the writer.

In short, there is no deliberation contained in the attachments. While the meetings may have had plenty of robust deliberation, those were verbal and not reduced to writing or a transcript. Perhaps an imperfect analogy is that of a jury. While their deliberations are sacrosanct and not reviewable, the exhibits and instructions they receive to guide their deliberations are generally part of a public file.

The first email from Ms. Stuart is not deliberative. It is a one-way email that simply greets the members of the group and asks them to review the draft

documents to discuss at the meeting. It also provides the proposed agenda for a meeting in 2017. The Court finds that the attachments are labeled as drafts regarding the "group living work program." The Court finds that the attachments are not deliberative.

The email that appears at page 23[1] in the packet which is dated November 15, 2017, at 9:19 a.m. from Skye Stuart to city council members Kniech and Ortega, while a one-way email, is indicative of the discussions had and the Court finds it is protected by the privilege.

The Court also finds, that the emails between Ms. Stuart and the councilmembers, which appear at pages 43-46 are protected by the privilege as they discuss steps taken, people with whom they have had conversations, and other possible stakeholders to include apparently in the GLAC.

IV. Conclusion

Accordingly, the Court **Orders** disclosure of pages 1 through 22, and 24 through 42. The Court **Denies** disclosure of the emails from pages, 23, and 43-46.

Attorney Fees: Plaintiff also seeks attorney fees. Given the Court's discussion, and that some of the documents have been disclosed and others not disclosed, Plaintiff may file her motion for fees within twenty-one days (21)

[1] The pagination is a bit confounding. It appears to be page 43 to 46, but when scrolling it also seems to start at page 42. If counsel for the City is unclear regarding pages, counsel may contact the Court for clarification.

and attach the documentation showing the billing for fees incurred and grounds for request. Defendant may respond within fourteen days (14) as to whether attorney fees are appropriate in the first instance and if so, whether Plaintiff's counsel's billing is reasonable. Plaintiff may reply within seven days.

So Ordered: January 11, 2021

BY THE COURT:

Michael J. Vallejos
District Court Judge

cc: Parties via electronic filing: