



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

Rebecca S. Murray
Supervisor of Records

April 10, 2019
SPR19/0610

Lorraine A.G. Tarrow, Esq.
Office of the Attorney General
One Ashburton Place
Boston, MA 02108

Dear Attorney Tarrow:

I have received the petition of Christopher Horner of *Competitive Enterprise Institute* appealing the response of the Office of the Attorney General (AGO) to a request for public records. G. L. c. 66, § 10A; see also 950 C.M.R. 32.08(1). Specifically, Mr. Horner requested “all correspondence dated from January 1, 2016, through April 15, 2016, inclusive, which was sent to or from or copying (whether as cc: or bcc:) Christopher Courchesne and/or Michael Firestone, which also includes any party, be it to, from or copying (again whether as cc: or bcc:), a) mp@pawalaw.com, b) steve@hbsslaw.com c) any address ending in @sheredding.com, d) any address including Oreskes, and/or e) any address ending in @bordaslaw.com.”

Previous appeals

This request was the subject of two previous appeals. See SPR19/0396 Determination of the Supervisor of Records (March 5, 2019); SPR19/0610 Determination of the Supervisor of Records (April 8, 2019). In my April 8th determination I found the AGO was to provide Mr. Horner with a supplemental response.

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); 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). To meet the specificity requirement a custodian must not only cite an exemption, but must also state why the exemption applies to the withheld or redacted portion of the responsive record.

If there are any fees associated with a response a written, good faith estimate must be provided. G. L. c. 66, § 10(b)(viii); see also 950 C.M.R. 32.07(2). Once fees are paid, a records custodian must provide the responsive records.

The AGO's March 20th response

In its March 20, 2019 response, the AGO indicates that it is “. . . currently investigating ExxonMobil Corporation (“ExxonMobil”) and is currently engaged with ExxonMobil in pending litigation over AGO’s investigation of the Company.” The AGO additionally indicates that it possesses “. . . six (6) pages of e-mails that are responsive to [Mr. Horner’s] request.”

The AGO explains that “. . . [it] can give [Mr. Horner] no further information about these records without compromising our investigation or litigation strategies to the same extent as disclosing the records themselves. The senders and recipients, the dates, and the content of these e-mails relate to [the AGO’s] ongoing ExxonMobil investigation, or, in one instance, other potential environmental enforcement, and, if released, might not only prejudice the investigation going forward, but would also likely impact the related litigation.”

Pending litigation

950 C.M.R. 32.08(2)(b) provides in pertinent part:

the Supervisor may deny an appeal for, among other reasons if, in the opinion of the Supervisor: 1. the public records in question are the subjects of disputes in active litigation, administrative hearings or mediation.

Whereas the requested records at issue in this appeal relate to the subject matter of a pending litigation involving the AGO and ExxonMobil, I find these records are the subject of dispute in active litigation. Therefore, I decline to opine on this matter. See 950 C.M.R. 32.08(2)(b)(1); Exxon Mobil Corp. v. Healey, No. 18-1170 (2d Cir.); Exxon Mobil Corp. v. Schneiderman, 316 F.Supp.3d 679 (2018); Exxon Mobil Corp. v. Att’y Gen., 479 Mass. 312 (2018). It should be noted that a change in the status of this action could impact the applicability of 950 C.M.R. 32.08(2)(b)(1).

Conclusion

Accordingly, I will now consider my April 8, 2019 determination void and this determination dated April 10, 2019 in effect. This administrative appeal is now closed. If Mr. Horner is not satisfied with the resolution of this administrative appeal, please be advised that

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this office shares jurisdiction with the Superior Court of the Commonwealth. See G. L. c. 66, § 10(b) (pursuing administrative appeal does not limit availability of applicable judicial remedies).

Sincerely,

A handwritten signature in black ink that reads "Rebecca Murray". The signature is written in a cursive, flowing style.

Rebecca S. Murray
Supervisor of Records

cc: Christopher Horner