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Date: July 2, 2019 at 9:40:07 AM EDT

To: Matthew Hardin <matthewhardin@gmail.com>

Subject: RE: Records Request

Mr. Hardin:

The Baltimore City Law Department received your attached request, which is governed by the Maryland Public Information Act ("PIA"). Md. Code, Gen. Prov., §4-101, *et. seq.* Each governmental entity, including each Baltimore City agency, is the custodian of its own records. Md. Code, Gen. Prov., §4-101; Baltimore City Code, Art. 1 §10-1. The PIA requires that a request be directed to the custodian of the record requested. The Law Department is not the custodian of some of the records you seek. However, the correspondence between Robert B. McKinstry Jr. and the City's attorneys, in the Law Department, or outside counsel, seek legal advice in confidence and are therefore privileged attorney-client communication and the client has not waived that privilege. Md. Code, Gen. Prov., §4-301 (protecting records that are privileged or confidential by operation of other law); *see also Maryland Bd. Of Physicians*, 225 Md. App. 114, 153 (2015) (holding confidentiality of communications between administrative employees and their government counsel); *Ehrlich v. Grove*, 396 Md. 550 (2007)(confirming that governments in Maryland have attorney-client relationships with their lawyers); *accord AC v. v. Office of the Attorney Gen.*, No. 791, Sept. Term 2016, 2018 WL 878989, *28 (Md. Ct. Spec. App. Feb. 13, 2018)(unreported)(affirming that lawyers do not lose their status as lawyers and become administrators simply because they work for the government).

It is unclear what you are requesting when you seek "statutorily prescribed time copies of" certain enumerated agreements. A request for public information must sufficiently identify the records sought so as to notify the receiving custodian of the specific records requested. *See Sears v. Gottschalk*, 502 F.2d 122, 125 (4th Cir. 1974) (Freedom of Information Act ("FOIA") requires a "reasonable description enabling the Government employee to locate the requested records"); *see also MacPhail v. Comptroller of Maryland*, 178 Md. App. 115, 119 (2008) (explaining that pertinent FOIA cases are "persuasive" authority in Maryland because the PIA and FOIA share "virtually identical" purposes"). We assume you are seeking the agreement between the Law Department and outside counsel, which would not be disclosed because it is attorney-client communication. Md. Code, Gen. Prov., §4-301.

Additionally, that agreement embodies the "legal theories of an attorney or other representative of" the City in active litigation as well as the "analysis of pending or possible claims" making it attorney work product and deliberative material. *AC, supra*, *19, *22. Deliberative material, a subset of which is attorney work product, is able to be withheld from disclosure in response to a PIA request when its release would not be in the public interest. Md. Code, Gen. Prov., §4-344. Citizens are best served when their government can have the benefit of confidential legal advice just as any other private litigant and when their government can deliberate about how it desires to handle its legal affairs. *N. L. R. B. v. Sears, Roebuck & Co.*, 421 U.S. 132, 149-50 (1975) (Supreme Court noted that attorney client and attorney work product privileges are "available to all litigants" even the government and the legislature recognized that "the 'frank discussion of legal or policy matters' in writing might be inhibited if the discussion were made public; and that the 'decisions' and 'policies formulated' would be the poorer as a result."); *accord Stromberg Metal Works, Inc. v. University of Maryland*, 382 Md. 151, 163-64 (2004)(deliberative privilege is designed "to protect from legislatively mandated disclosure" communications or memoranda that "would not be available by law to a private party in litigation with the unit" of government so as to create a level litigation playing field); *Hamilton v. Verdow*, 287 Md. 544, 558 (1980)(recognizing that a government's decision making process is best fostered through facilitating candid communications that "may well be hampered if their contents are expected to become public knowledge"); *accord AC, supra*, *10 ("when a privilege applies to protect a document from disclosure, there is a presumption that disclosure of the document is contrary to the public interest. That is because the interest that underlies a privilege suffices to prove that inspection of the document is contrary to the public interest.").

Selective redaction of the agreement would undermine the deliberative and attorney work product privileges in that it would create an un-level playing field in any litigation by allowing the government's opposing parties to have access to information about government representation and strategy that is generally not available to private parties in litigation. *AC, supra*, at *18 ("attorney work product is not routinely discoverable and therefore generally is not available by law to a party in litigation with the agency."). As Maryland's highest court has recognized, a document cannot be parsed into "reasonably severable" portions when such parsing would "violate the substance of the exemption" asserted. *Glass v. Anne Arundel County*, 453 Md. 201, 244 (2017).

Nothing in this response is intended to indicate that any records sought from City agencies exist or to waive any privileges held by the Mayor and City Council. You may contest this response by filing a complaint in Circuit Court pursuant to GP § 4-362.

Sincerely,

Khadeja Farahmand, L.L.M
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