

FILED
THIRD DISTRICT COURT
MAR 30 2017
WEST JORDAN DEPT.

THIRD JUDICIAL DISTRICT COURT
SALT LAKE COUNTY, STATE OF UTAH
WEST JORDAN DEPARTMENT

UTAH LEGAL CLINIC

Petitioner,

vs.

SALT LAKE CITY CORPORATION; and
STATE RECORDS COMMITTEE OF THE
STATE OF UTAH,

Respondents.

**FINDINGS OF FACT, CONCLUSIONS
OF LAW AND ORDER**

Case No. 160905336

Judge James D. Gardner

THIS MATTER is before the Court on a Petition for Judicial Review of Final Agency Action (Petition) filed by Petitioner Utah Legal Clinic (ULC). The Court has reviewed the contested documents *in camera* and conducted a bench trial on February 3, 2017, before taking the matter under advisement. Petitioner ULC was represented at trial by Angela Elmore. Respondent Salt Lake City Corporation (SLC) was represented at trial by Catherine L. Brabson. The State Records Committee of the State of Utah (State Records Committee) was represented at trial by Paul H. Tonks. Having reviewed the record, examined the evidence and considered the arguments of counsel, the Court now issues the following Findings of Fact, Conclusions of Law and Order.

FINDINGS OF FACT

1. In July 2013, Trenton Mellen was arrested on suspicion of driving under the influence (DUI), driving with an expired driver's license, and failure to stop or yield at a stop sign.

2. In October 2013, the Salt Lake City Prosecutor's Office (Prosecutor's Office) brought misdemeanor charges against Mr. Mellen in Salt Lake City Justice Court, Case No. 131413190 (Criminal Case). Angela Elmore, counsel for ULC in this case, represented Mr. Mellen in the Criminal Case.

3. In November 2013, Mr. Mellen was arraigned in the Criminal Case. He pled not guilty to the charges and the Prosecutor's Office voluntarily dismissed the expired driver's license charge without prejudice.

4. In January 2014, the Prosecutor's Office received a toxicology report from the state toxicologist. That report was forwarded to Mr. Mellen's counsel, Ms. Elmore. The report indicates that Mr. Mellen's blood sample tested positive for the prescription drug Trazodone.

5. Mr. Mellen had a prescription for Trazodone and Ms. Elmore conveyed this fact to the Prosecutor's Office. Ms. Elmore also sent documentation of Mr. Mellen's brain injury and other medical information to the Prosecutor's Office.

6. The state toxicologist confirmed that the concentration of Trazodone in Mr. Mellen's blood was within therapeutic levels. Nevertheless, the state toxicologist opined that Trazodone can still be impairing even at therapeutic levels.

7. In April 2014, Brandon Simmons, assistant city prosecutor, communicated the state toxicologist's opinion to Ms. Elmore. In that communication, Mr. Simmons extended the following plea offer to Mr. Mellen: "If he pleads guilty to an added charge of incapable driver ... and pleads guilty to failure to stop at a stop sign, the City will dismiss the DUI charge and the no license charge." (Joint Trial Exhibit I.) Mr. Simmons explained the reason for the offer as follows: "subsequent investigation revealed that the defendant has a prescription for the

Trazodone, that he was within therapeutic levels, within the prescribed levels; but very bad performance on [field sobriety tests] suggest issue with divided attention, which is crucial to driving.” (*Id.*)

8. In response, Ms. Elmore expressed her displeasure with the offer and stated that both she and Mr. Mellen found the offer “somewhat offensive.” (*Id.*) She indicated that she would “utilize all opportunities to zealously advocate for [Mr. Mellen,]” which would “likely include media coverage in the upcoming month.” (*Id.*)

9. In May 2014, Mr. Mellen moved the justice court to suppress evidence related to the DUI charge for lack of probable cause. On July 9, 2014, the justice court “GRANT[ED] DEFENSE MOTION TO SUPPRESS CHARGE OF UNDER THE INFLUENCE OF DRUGS OR ALCOHOL. NO PC TO ARREST ON DUI.” (Joint Trial Exhibit AA.) The Prosecutor’s Office appealed this decision and, following an evidentiary hearing on November 24, 2014, the district court found that “the officer had probable cause to test and arrest [Mr. Mellen].” (Joint Trial Exhibit T.) Accordingly, the district court denied Mr. Mellen’s motion to suppress and the matter was remanded to the justice court for further proceedings.

10. In June 2014, Mr. Mellen’s mother, Barbara Mellen, sent an e-mail to members of the Salt Lake City Council. In the e-mail, Barbara Mellen complained about the Prosecutor’s Office’s handling of Mr. Mellen’s Criminal Case and noted that “there is a potential class action suit by and for the disabled” and that she “would like to see this avoided.” (Joint Trial Exhibit N.)

11. The Court finds that as of the June 2014 communication from Barbara Mellen that SLC was put on notice of potential litigation to be pursued by the Mellens (and others) and that

the work product and attorney-client privileges attached to subsequent communications related to that threatened litigation.¹

12. In August 2014, *Salt Lake City Weekly* published a story entitled “My Rule is Law” (City Weekly Article). The City Weekly Article discussed Mr. Mellen’s Criminal Case and was critical of the way the Prosecutor’s Office was managed. The City Weekly Article was particularly critical of Chief City Prosecutor Padma Veeru-Collings and the way she ran the Prosecutor’s Office.

13. Soon after the City Weekly Article was published, Mr. Mellen’s uncle, Dan Jones, sent an e-mail to the Salt Lake City Mayor and members of the Salt Lake City Council. In the e-mail, Mr. Jones noted his “outrage with the prosecution process” in the Criminal Case. He decried the “counterproductive policies currently emanating from the city prosecutor” and urged the Mayor and City Council members to “look into what’s going on in the prosecutor’s office.” (Joint Trial Exhibit Q.)

14. On March 27, 2015, Ms. Elmore notified the Prosecutor’s Office that she had retained an expert to provide testimony in support of Mr. Mellen’s defense. Ms. Elmore provided a copy of the expert’s report, which included the opinion that “Trazodone did not influence or impair [Mr. Mellen’s] driving” on the date in question.

¹ At the bench trial, ULC concedes that the June 2014 communication from Barbara Mellen “may” be interpreted as a threat of litigation if it is interpreted as SLC is interpreting it. The Court finds that SLC’s interpretation of the June 2014 communication from Barbara Mellen as a threat of litigation is a reasonable interpretation.

15. On April 1, 2015, the Prosecutor's Office filed a motion to dismiss the remaining charges without prejudice. On April 8, 2015, the justice court dismissed the remaining charges without prejudice.

16. During the Criminal Case, Ms. Padma Veeru-Collings was the chief city prosecutor. She is no longer with the Prosecutor's Office. However, some of the prosecutors involved in the Criminal Case are still with the Prosecutor's Office, including Scott Fisher and Paige Williamson.

17. Although the Criminal Case has concluded, the Court finds that there remains a threat of civil litigation against SLC, the Prosecutor's Office and individual prosecutors.

18. Specifically, in April 2016, Mr. Mellen filed a Notice of Claim against SLC and several individual prosecutors.²

19. The Notice of Claim alleges that the Prosecutor's Office "committed the intentional tort of Malicious Prosecution ... when it, through its employees, caused [Mr. Mellen] to be prosecuted or continued to be prosecuted with malice and without probable cause." The Notice of Claim further alleges that the Prosecutor's Office "committed retaliatory criminal prosecution against Mr. Mellen for his participation in the City Weekly article ... when it, through its employees, delayed dismissal of his case or continued prosecution of his case to retaliate against Mr. Mellen for speaking out against their office." The Notice of Claim also alleges that the Prosecutor's Office, "through two or more of their employees, have conspired to violate Mr. Mellen's fourth amendment's proscription against unreasonable seizure and the

² The Notice of Claim is attached as Exhibit E to SLC's Motion for Summary Judgment. At trial, SLC represented that the Notice of Claim had not been withdrawn and the threat of litigation remained.

Fourteenth Amendment requirement of due process of law when they conspired to have [Mr. Mellen] prosecuted or continued to be prosecuted with malice and without probable cause.” Finally, the Notice of Claim alleges that that the Prosecutor’s Office, “through two or more of their employees, have also conspired to violate Mr. Mellen’s First Amendment Rights by delaying dismissal or continuing prosecution of Mr. Mellen’s case, as a retaliatory criminal prosecution, for Mr. Mellen’s participation in the City Weekly article.”

20. The Notice of Claim asserts damages that “will include, but may not be limited to, legal expenses incurred in defending the charges alleged against [Mr. Mellen] (attorney fees and expert fees), lost wages, pain and suffering (emotional and physical), [and] the inability to have the arrest expunged because the dismissal is without prejudice, resulting from violation of [Mr. Mellen’s] rights.”

21. The Notice of Claim states that it is being brought against SLC and the following individual employees: Padma Veeru-Collings, Steve Newton, Paige Williamson, and Scott Fisher.³

22. ULC contends that the Prosecutor’s Office pursued the Criminal Case as a means of “getting even for the [City Weekly Article] and the letters [Mr. Mellen’s] family had written protesting [his] treatment.” (Mr. Mellen Decl. at ¶ 32.)

³ Although the Prosecutor’s Office maintains that individual prosecutors have immunity for exercising their prosecutorial discretion, that has not deterred Mr. Mellen from filing a Notice of Claim against them. Furthermore, even if Mr. Mellen is not successful in his threatened civil litigation against the prosecutors, that does ameliorate the chilling effect of releasing attorney-to-attorney communications that reveal prosecutors’ mental impressions and core work product where the party seeking disclosure has a stated intention to use the records against the very attorneys involved in the communications.

23. The Prosecutor's Office maintains an open file policy. Thus, the Court finds that Mr. Mellen was able to obtain any evidence the Prosecutor's Office has relating to his Criminal Case. To the extent the Prosecutor's Office pursued the Criminal Case without probable cause, it should be apparent from the information—or lack of information—already in Mr. Mellen's possession.

24. In January 2016, ULC filed a request for records under the Government Records Access and Management Act (GRAMA), Utah Code Ann. §§ 63G-2-101, *et seq.* The request sought from SLC: "Any and all emails sent or received by any of the following: a) Padma Veeru-Collings, b) Steve Newton, c) any other employee or agent of the Salt Lake City Prosecutor's office and/or d) Ryan Richards from July 1, 2013 until today that reference i) Trenton Mellen ii) his case 13143190, and/or iii) de novo case 141907940." (Pet. for Judicial Review of Final Agency Action Ex. 1.)

25. In response to ULC's GRAMA request, SLC provided some documents to ULC, but denied access to other documents after classifying them as non-public records under GRAMA. SLC took the position that the non-public records were either protected by the attorney-client privilege or as records prepared in anticipation of litigation.

26. Ultimately, the State Records Committee sided with SLC. In a Decision and Order entered July 26, 2016, the State Records Committee found that SLC "properly classified the records as protected records pursuant to [GRAMA]" and, therefore, denied ULC's appeal.

27. In August 2016, Mr. Mellen initiated the instant action by filing the pending Petition. Mr. Mellen alleges that the withheld documents are not protected and, even if they

were, “the public interest in the disclosure of these documents heavily outweighs the restriction.”
(Petition at 5.)

28. At the bench trial in this matter, the Court accepted affidavits in lieu of direct testimony from Mr. Mellen, Barbara Mellen and Scott Fisher. Each of these witnesses was available for cross examination. Ryan Richards testified at the bench trial.⁴ The Court also accepted a series of joint trial exhibits that were stipulated to by the parties.

29. In addition to the evidence presented at trial, the Court reviewed the subject documents *in camera*.⁵

30. The Court determines that each of the subject documents either falls under the attorney-client privilege or was prepared in anticipation of litigation.⁶ With respect to the documents prepared in anticipation of litigation, the Court determines that some were prepared in connection with the Criminal Case and others were prepared in anticipation of the threatened

⁴ At trial, ULC attempted to elicit testimony from Mr. Richards that would be protected under the work product doctrine. SLC, as the client in the Criminal Case, objected to the disclosure of testimony protected by the work product doctrine and the Court sustained the objection. *See Salt Lake Legal Defender Ass’n v. Uno*, 932 P.2d 589, 590 (Utah 1997) (“Unlike the attorney-client privilege, which belongs to the client and therefore may be unilaterally waived by the client, the work product doctrine has consistently recognized the interests of both the client and the attorney. The majority rule is that both may assert work product immunity.”). ULC acknowledged that if the subject documents are produced in this case that it may operate as a waiver of the work product protection in any subsequent civil litigation.

⁵ Both parties agreed at trial that the Court was not to consider the content of the subject documents when engaging in the balancing of whether restriction of access to the subject documents in this case outweighs the public interest favoring access.

⁶ ULC’s counsel conceded in the argument portion of the bench trial that based on the privilege log produced by SLC, that many of the subject documents appeared to fall within the scope of the work product protection.

civil litigation by the Mellens.⁷ With respect to documents protected by the attorney-client privilege, the Court determines that that these are privileged communications where an employee of SLC is seeking legal advice. Thus, the Court finds that SLC properly classified the subject documents as “protected” under Utah Code Ann. § 63G-2-305(17) and (18).

31. The vast majority of the protected documents are e-mail communications between attorneys in the Prosecutor’s Office. These e-mails largely reflect the exercise of the attorneys’ prosecutorial discretion in the underlying Criminal Case or seeking legal advice related to the threatened litigation. A small number of the e-mails relate to scheduling issues that involve non-attorneys. Although these e-mails present a more difficult decision for the Court, the Court finds that they fall within the parameters of section 63G-2-305(18) and are, therefore, protected.

32. The Court finds that the impetus for ULC’s records request is to obtain evidence to use in Mr. Mellen’s threatened civil litigation. Thus, the records request is largely an end run around the discovery rules and the protection of the attorney-client and work product privileges that would apply in the civil litigation. The also Court finds that ULC’s motivation for the records request is to question the Prosecutor’s Office’s exercise of its prosecutorial discretion in the Criminal Case. In other words, the Court finds that ULC’s stated public interest is secondary to Mr. Mellen’s personal interest in the records.

33. ULC’s allegations against the Prosecutor’s Office center directly on Padma Veeru-Collings and her decisions in the Criminal Case. There are no allegations that the

⁷ As stated above, the Court finds that by June 2014 SLC was aware of threatened litigation. As set forth in the privilege log, and as argued by SLC at trial, all of the attorney-client communications listed on the privilege log that deal with the threatened litigation occur after Barbara Mellen’s June 2014 communication.

Prosecutor's Office is currently engaged in the type of conduct described in the City Weekly Article or that believed to have occurred in the Criminal Case. The fact that Padma Veeru-Collings is no longer with the Prosecutor's Office weighs against the public's interest in disclosure.

34. ULC does not allege widespread corruption by public officials. Although there is some suggestion in the City Weekly Article that the Prosecutor's Office did not always act in the interests of justice, ULC's allegations are mainly limited to the Criminal Case.

35. Although the Criminal Case is over, the fact that a civil action against SLC has been threatened weighs heavily in favor of the interest favoring restriction of access, especially where the content of the protected documents—the prosecutors' exercise of their prosecutorial discretion—is at the heart of the threatened civil litigation.

36. The Court finds credible the testimony of Mr. Fisher in this case that the disclosure of the internal attorney-to-attorney email communications that reveal the exercise of prosecutorial discretion, as well as thoughts, mental impressions or conclusions about this Criminal Case, would seriously hamper the ability of the Prosecutor's Office to function in on-going matters as it would chill written communication in the office knowing that the attorneys' thoughts, mental impressions and conclusions about a case could later serve as the basis for a civil suit against them.

37. The Court finds that in this case releasing attorney-to-attorney communications that reveal prosecutors' mental impressions and core work product in the Criminal Case would be particularly chilling where the party seeking disclosure (Mr. Mellen) intends to use the records against the very attorneys (and their client) involved in the communications.

38. All things considered, the Court finds that the interest favoring restriction of access to the subject documents in this case outweighs the public interest favoring access.

CONCLUSIONS OF LAW

A. The Court has jurisdiction over this proceeding pursuant to Utah Code Ann. § 63G-2-404.

B. On a petition for judicial review of a State Records Committee decision, the Court shall “(a) make its decision de novo, but, for a petition seeking judicial review of a records committee order, allow introduction of evidence presented to the records committee; (b) determine all questions of fact and law without a jury; and (c) decide the issue at the earliest practical opportunity.” Utah Code Ann. § 63G-2-404(6).

C. Under GRAMA, “[a] record is public unless otherwise expressly provided by statute.” Utah Code Ann. § 63G-2-201(2). Non-public records are classified as either “private,” “protected,” or “controlled” and access to these records is generally limited to specific individuals identified in the statute. Utah Code Ann. § 63G-2-202.

D. Relevant to the instant action, records that are protected include: “records that are subject to the attorney client privilege” and “records prepared for or by an attorney, consultant, surety, indemnitor, insurer, employee, or agent of a governmental entity for, or in anticipation of, litigation or a judicial, quasi-judicial, or administrative proceeding[.]” Utah Code Ann. § 63G-2-305(17), (18).

E. “The attorney-client privilege protects information given by a client to an attorney that is necessary to obtain informed legal advice—which might not have been made absent the

privilege. In addition, the communication must be confidential. And, the mere existence of an attorney-client relationship does not ipso facto make all communications between them confidential. Thus to rely on the attorney-client privilege, a party must establish: (1) an attorney-client relationship, (2) the transfer of confidential information, and (3) the purpose of the transfer was to obtain legal advice.” *Southern Utah Wilderness All. v. Automated Geographic Reference Ctr., Div. of Info. Tech.*, 2008 UT 88, ¶ 33, 200 P.3d 643 (internal citations and quotations omitted).

F. The protection for records prepared “in anticipation of litigation” is similar to that afforded to attorney work product. “The work product privilege derives from dual policy goals aimed at ‘preserving the adversary system’ and ‘providing attorneys with a zone of privacy permitting effective client advocacy[.]’” *Featherstone v. Schaerrer*, 2001 UT 86, ¶ 33, 34 P.3d 194 (citation omitted). Importantly, “[t]he work product doctrine, although most frequently asserted as a bar to discovery in civil litigation, *applies with equal, if not greater, force in criminal prosecutions.*” *People v. Dist. Court*, 790 P.2d 332, 335 (Colo. 1990) (citing *U.S. v. Nobles*, 422 U.S. 225, 236, 95 S.Ct. 2160 (1975)) (emphasis added).⁸ The United States Supreme Court has explained that “[w]ere [work product] open to opposing counsel on mere demand, much of what is now put down in writing would remain unwritten. An attorney’s thoughts, heretofore inviolate, would not be his own. Inefficiency, unfairness and sharp practices would inevitably develop in the giving of legal advice and in the preparation of cases for trial. The effect on the legal profession would be demoralizing. And the interests of the clients and the

⁸ Although ULC originally took the position that the work product privilege did not apply in criminal cases, at trial ULC conceded that the work product privilege was applicable in criminal cases.

cause of justice would be poorly served.” *Hickman v. Taylor*, 329 U.S. 495, 511, 67 S.Ct. 385 (1947).

G. Although not critical to the Court’s resolution of this case, the Court notes that the current iteration of the “in anticipation of litigation” protection found in section 63G-2-305(18) is even broader than previous versions and it appears to offer greater protection than the traditional work product privilege. But because the Court determines that the documents would be protected even under the traditional work product privilege, the Court need not determine the exact limits of the new language.

H. Under GRAMA, a governmental entity has no obligation to disclose a record classified as protected under Utah Code Ann. § 63G-2-305(17) or (18). Nevertheless, the district court may order disclosure, but “only if the person or party seeking disclosure of the record has established, by a preponderance of the evidence, that the public interest favoring access is equal to or greater than the interest favoring restriction of access.” Utah Code Ann. § 63G-2-406(1).

I. “[B]alancing competing interests is a fact-intensive and ‘inherently discretionary task[.]’” *Schroeder v. Utah Attorney General’s Office*, 2015 UT 77, ¶ 17, 358 P.3d 1075.

J. “[T]he balancing analysis under GRAMA must be tethered to the specific interests of the parties and the particularized application of the relevant public policies at issue.” *Id.* at ¶ 51. Stated differently, “GRAMA directs district courts to focus on *particularized* ‘interests and public policies pertinent to the classification and disclosure ... of information,’ not a general analysis of competing public policies.” *Id.* at ¶ 57 (emphasis and alteration in original) (internal citation omitted).

K. As set forth above, the Court determines that SLC properly classified the subject records as protected under Utah Code Ann. § 63G-2-305(17) and (18).

L. The Court also determines that ULC has failed to carry its burden of proving, by a preponderance of the evidence, that the public interest favoring access is equal to or greater than the interest favoring restriction of access. Instead, the Court concludes that the specific interests of the parties and the particularized application of the relevant public policies in this case weigh in favor of restricting access to the subject records. In doing so, the Court distinguishes this case from *Schroeder v. Attorney General's Office*, 2015 UT 77, 358 P.3d 1075.

M. In *Schroeder*, the petitioner sought a summary of bank records and an investigator's handwritten notes, both of which were prepared as part of an investigation into allegations of public corruption involving a nonprofit organization known as "Envision Ogden." The Utah Supreme Court held that the summary of bank records and the investigator's notes were properly classified as attorney work product, but nevertheless determined that "the interests favoring protection are not as compelling as those favoring disclosure." *Id.* at ¶ 3. Accordingly, the appellate court ordered disclosure of the records. In reaching its decision, the Utah Supreme Court reasoned that disclosure "would serve the significant public policy interest of allowing Ogden's citizens to know whether their elected officials engaged in unethical, and potentially criminal activity," while "[o]n the other side of the ledger, the policy of protecting the attorney work product at issue is far less compelling." *Id.* at ¶¶ 58-59. The Utah Supreme Court found it significant that the underlying investigation "has now been closed for four years, and Envision Ogden no longer exists." *Id.* at ¶ 59.

N. In *Schroeder*, there was no real threat of litigation over the substance of the subject records, especially not directed at the attorneys who prepared the records. Thus, it is not surprising that the Utah Supreme Court found that “the State’s interest in protecting the mental impressions and legal theories that might be disclosed in either document” was relatively small compared to the public’s interest in exposing potential corruption in the Ogden Mayor’s Office. *Id.* at ¶ 60.

O. In contrast, the instant action involves a threat of litigation over the very substance of the subject records and is directed specifically at the attorneys who prepared the records. In the Court’s view, SLC has an important interest in protecting the mental impressions and legal theories contained in the subject records at issue in this case where ULC seeks to use that information in a suit against SLC and the very attorneys that were involved in the protected communications.

P. The public interest advanced by ULC is weak by comparison. ULC has not identified any *particularized* interest applicable to this case that would not be present any other time a criminal defendant who is dissatisfied with his prosecution seeks to unearth evidence of ill-intent by scouring the prosecutor’s e-mails. And while it is true that Mr. Mellen’s Criminal Case received some media attention, it was Mr. Mellen’s counsel who went to the media and initiated the coverage. (*See* Joint Trial Exhibit I (threatening media coverage months before the City Weekly Article was published).) Thus, the mere presence of media coverage is not all too significant in this case.

Q. Simply put, ULC has failed to meet its burden to demonstrate that the public’s interest in disclosure is at least equal to SLC’s interest in restricting access.

R. On balance, the Court concludes that SLC's interest in protecting the subject documents from disclosure outweighs the public's right to access the subject documents.

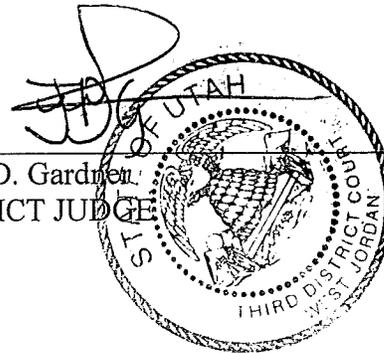
ORDER

Based on the foregoing, the Court concludes that SLC properly classified the subject records as "protected" under GRAMA and that ULC failed to establish, by a preponderance of the evidence, that the public interest favoring access is equal to or greater than the interest favoring restriction of access. Accordingly, the Petition is hereby DISMISSED WITH PREJUDICE. This is the Order of the Court and no additional order is necessary.

DATED this 30th day of March, 2017.

BY THE COURT:

James D. Gardner
DISTRICT JUDGE



CERTIFICATE OF NOTIFICATION

I certify that a copy of the attached document was sent to the following people for case 160905336 by the method and on the date specified.

MAIL: CATHERINE L BRABSON 451 S STATE ST STE 505A PO BOX 145478 SALT LAKE CITY, UT 84114

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03/30/2017

/s/ BRENDA L KLEINLEIN

Date: _____

Deputy Court Clerk