



Municipality of Anchorage

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Anchorage Assembly Leadership

August 18, 2023

Mayor Dave Bronson
632 W. 6th Ave., Suite 850
Anchorage, AK 99501

Sent via email only

Re: Public records request— *April 11 Election Complaint and Creation of ITD Policy Statement Regarding Removable Storage Devices*

Mayor Bronson:

As you know the Assembly recently held a Worksession on July 21, 2023 to address the creation and internal posting of an ITD Policy Statement and the apparent role it played in an April 11, 2023 election complaint filed by Ms. Sami Graham. We regret that you were unable to attend.

Prior to the Worksession, Assembly Chair Constant submitted a public records request to the Department of Law requesting, among other things, communications pertaining to the development of this policy statement. In response, we received more than 130 pages of responsive documents. Of these documents, several particularly relevant documents had been redacted. Specifically:

- An email dtd January 10, 2023 from Mark Merchant to Marc Dahl, Subject "FW: Policy - 28-10" and its attachment P&P 28-10, Subject: Protection of Personal or Confidential Information"
- An email dtd January 18, 2023 from Mark Merchant to Marc Dahl, Subject "Draft Round 2" and its attachment, P&P 28-41, Subject: Minimum security requirements for internet and system connectivity.
- An email dtd April 11, 2023, sent at 9:30am, from Mark Merchant to Marc Dahl, Subject "RE: Draft Round 2"
- An email dtd April 11, 2023, sent at 10:09am from Marc Dahl to Mark Merchant, Subject "RE: Draft Round 2"
- An email dtd April 11, 2023, sent at 10:14am, from Mark Merchant to Marc Dahl, Subject "RE: Draft Round 2"
- An email dtd April 11, 2023, sent at 10:42am from Marc Dahl to Mark Merchant, Subject "RE: Draft Round 2"

It is our understanding that the Department of Law did not have time to consult with the IT Department prior to providing these documents to the Chair, and they made

these redactions out of an abundance of caution, and not, necessarily, because your Administration wished to unequivocally assert the deliberative process privilege.

As discussed at the July 21st Worksession, these emails immediately preceded the posting of an ITD Policy Statement “Regarding Removable Storage Devices” to the Municipality’s internal sharepoint site at approximately 1:318 p.m on April 11th. The text of that policy statement appears to have been emailed by Mr. Dahl to Ms. Graham at 2:37 p.m. who, in turn, at 3:47p.m, filed a complaint in the April 4, 2023 regular municipal election. This complaint alleged a “clear violation of the MOA ITD USB Policy Statement” by the Clerk’s Office and that it was “completely possible that the USB Device[used by elections officials to retrieve data from municipal voting equipment was] depositing or altering data, intentionally or unintentionally, not simply retrieving data, thereby nullifying the results of the election.”

Chief of Staff Mario Bird addressed the creation of this ITD Policy Statement at our Worksession, describing your office as not having “any knowledge of the development of this policy, unless and until it became part of the public record and it was reported upon. . . we were unaware of the ITD policy statement until the scrutiny that was levied by the media.”¹ Mr. Bird also explained the Administration’s established process for creation of Municipal Policy, which is found in Policy & Procedure 1-1, stating that “Policies and Procedure that run through the Administration are required to go through a process that begins with OMB [Office of Management and Budget] and involves all the relevant departments and then at the conclusion of that discussion, OMB finalizes what that last policy should look like, and the Mayor signs off. . . So, when this came to our attention, one of the first things our OMB Director said, ‘if this is accurate, what’s being reported in the paper, this is not a policy that went through our policy for policies,’ if you’ll forgive the term.”²

In light of these facts, the Assembly Leadership does not see any appropriate foundation for the assertion of the deliberative process privilege and requests your office release the previously redacted emails as public records under Alaska Statute 40.25.110.

The Deliberative Process Privilege

The deliberative process privilege “protects internal communications ‘which reflect advisory opinions, recommendations, and deliberations comprising part of the process by which governmental decisions and policies are formulated.’”³ The basis of

¹ Worksession re April 11 Election Complaint and Creation of ITD Policy re Removable Storage Devices available at <https://www.youtube.com/live/yrejN64cMJM> at 14:02.

² *Id.* at 14:50.

³ 1992 Inf. Op Att’y Gen (Nov. 5; 221-92-0553)(citing *Dowd v. Calabrese*, 101 F.R.D. 427, 430 (D.C. Cir. 1984)). While the Alaska Supreme Court has issued several significant opinions governing the application of the deliberative process privilege, the bulk of precedent has been generated by the federal courts. As a result, both the state judiciary and Attorney-General look to this body of precedent in determining how

the privilege lies in the government's important interest in protecting the mental processes of its decisionmakers from unreasonable interference. To determine whether disclosure would interfere with that process, courts have required those asserting the privilege "show as a threshold matter that the communication is both 'predecisional' and 'deliberative.'"⁴

The Predecisional Element

The predecisional element, as the term implies, requires the communication be made "before the deliberative process was completed."⁵ Implicit in this requirement, is that a deliberative process be actually initiated at some point. This prerequisite is reflected in the relevant Alaskan caselaw governing the privilege, all of which involve communications addressing specific issues and being sent to, or within the office of, the relevant decisionmaker.⁶ In contrast, these redacted records relate to a policy statement which was created, published, and shared with public prior to you even being made aware of its existence. Far from being "prepared in order to assist [you] in arriving at [a] decision"⁷, these communications and documents appear to have been either inadvertently or deliberately withheld from you, your office, and OMB. In light of these facts, these records would be better characterized "extra-decisional" as opposed to "predecisional," and a court would be unlikely to stretch the predecisional element so far as to encompass them.

The Deliberative Element

The deliberative element, requires the communication "reflect a 'give-and-take' of the decisionmaking process and contain opinions, recommendations, or advice about agency policies. Purely factual material is not protected unless the selection process or presentation would reveal the decisionmaking process, or if the facts are inextricably intertwined with that process."⁸ While Alaska courts have yet to embrace a strict test for determining the deliberative nature of policy drafts, both the Second and DC Circuits have explicitly required the such a disputed record be "related to the process by which policies are formulated."⁹ More recently the D.C. Circuit Court of Appeals has imposed an upfront burden on any "agency invoking the deliberative-process privilege [to]. . . 'establish what deliberative process is involved, and the role played by the documents

and when the deliberative process privilege may apply. *See id.*; *see also Griswold v. Homer City Council*, 428 P.3d 180, 187 (2018).

⁴ *Gwich'in Steering Committee v. State, Office of the Governor*, 10 P.3d 572, 579 (2000).

⁵ *Griswold supra* note 3 at 188.

⁶ *See id.* at 581 (discussing the application of the privilege to documents sent to the Office of the Governor and internal emails within the Office of the Governor); *see also Griswold supra* note 3 at 188-89 (discussing the application of the privilege to advice and draft documents sent from the advising attorney to the Homer Board of Adjustment); *see also Fuller v. City of Homer*, 75 P.3d 1059, 1060 (Alaska 2003) (discussing the application of the privilege to communications from Department Heads to the city manager).

⁷ *Grand Cent. Partnership, Inc. v. Cuomo*, 166 F.3d 473, 482 (2d Cir. 1999).

⁸ *Gwich'in supra* note 4 at 583.

⁹ *Hopkins v. United States Dep't of housing and Urban Development*, 929 F.2d 81, 84 (2d Cir. 1991).

in issue in the course of that process.”¹⁰ Here, your IT department bypassed your “process by which policies are formulated”¹¹ as established in P&P 1-1, and, at present, there appears to be no other legitimate process in which these draft documents played any role. In the analogous case of *Bonner v. CIA*, the D.C. District Court ruled that a draft CIA report was not exempt from disclosure under the Freedom of Information Act precisely because the government “fail[ed] to identify any agency decision-making process in connection with which the document was created.” Simply arguing that these were communications were policy drafts is not enough, these documents must have been part of your deliberative process to claim the privilege.

Public Interest

Finally, even assuming, without conceding, these documents actually do meet the threshold to claim the deliberative process privilege, you must still balance what interest your Administration has in maintaining this secrecy, with the public’s significant interest in transparency.¹² Given that the very purpose of the deliberative process privilege is to “protect the executive’s decisionmaking process, its consultative functions, and the quality of its decisions,”¹³ we are confident you will agree that your Administration cannot honestly claim a legitimate interest in protecting the documents at issue when they appear to be created for the benefit of Ms. Graham, and not your office, nor the Municipality.

Conclusion

In short, the evidence we have seen indicates authors of these emails worked expediently and not deliberatively; they engaged in an improvisation, not a process; and they produced an illegitimate and invalid policy statement that served only to assist a private citizen’s attempt to call a valid municipal election into question, and not to assist you in protecting the Municipality’s technical infrastructure. Based on the facts presented to the Assembly and the body of relevant caselaw, we fail to see a rational argument for the application of deliberative process privilege to the emails preceding the publication of the ITD Policy Statement at issue. We are confident any court will agree. In the interest of transparency and confidence in our government, we respectfully request you release the previously redacted documents by 12:00 p.m., August 22, 2023.

¹⁰ *Citizens for Resp. & Ethics in Washington v. United States Dep’t of Just.*, 45 F.4th 963, 973 (D.C. Cir. 2022) (quoting *Senate of the Commonwealth of Puerto Rico ex rel. Judiciary Comm. v. Dep’t of Just.*, 823 F.2d 574, 585–86 (D.C. Cir. 1987)).

¹¹ *Hopkins supra* note 9.

¹² See *Gwich’in, supra* note 4 at 583-84.

¹³ *Id.* at 578 (citing *Capital Info. Group v. State, Office of the Governor*, 923 P.2d 29, 33(1996).

Thank you for your attention to this matter. If you have any questions, we would be happy to discuss.

Sincerely,



Christopher Constant, Assembly Chair



Meg Zaletel, Assembly Vice Chair

Cc: Anne Helzer-Municipal Attorney
Kent Kohlhasse - Municipal Manager
Mario Bird - Chief of Staff
Assembly members