

Virginia:

In the Circuit Court of the City of Richmond, John Marshall Courts Building

LEE BHM Corp., publisher)
of the *Richmond Times-Dispatch*,)
TYLER LAYNE,)
SCRIPPS MEDIA, INC. T/A WTVR,)
Petitioners,)
and)
JOSHUA STANFIELD,)
Petitioner-Intervenor,)
v.)
SCHOOL BOARD OF THE CITY)
OF RICHMOND d/b/a Richmond)
Public Schools)
Respondent.)

CL23-5464
(consolidated with CL23-5374)

LETTER OPINION AND ORDER

On January 12, 2024, the parties came, by counsel, on Petitioner Lee BHM Corp., publisher of the *Richmond Times-Dispatch*'s (the "Newspaper") Petition for Writ of Mandamus Freedom of Information Act, Petitioners Tyler Layne and Scripps Media, Inc. t/a WTVR's Verified Petition for Mandamus, and Count I of Petitioner-Intervenor Joshua Stanfield's Petition in Intervention for Mandamus and Declaratory Relief. Petitioners and Petitioner-Intervenor (hereinafter "Petitioners") seek mandamus against the School Board of the City of Richmond for the release of a third-party report (hereinafter the "Report") prepared by the law firm Sands Anderson, P.C. concerning the shooting following the Huguenot High School graduation ceremony on June 6, 2023. Evidence was presented and oral arguments were made. The Court took the matter under advisement. The Court determined that an *in camera* review was appropriate and ordered that the

third-party report be provided to the Court for an *in camera* review under seal. The Court now issues this Letter Opinion and Order.

FACTS

On June 6, 2023, a shooting occurred in Monroe Park following Huguenot High School's graduation ceremony in Altria Theater. Following the shooting, the school administration prepared an internal investigative report that described certain events surrounding the incident and made a handful of recommended changes to the School System's policies and procedures. *See* Ex. 19, "Monroe Park Shooting Report (7-20-23)." On August 14, 2023, School Board member Dr. Shonda Harris-Muhammed moved for the adoption of the following resolution:

[A]uthorize the Superintendent to present for review and for approval two options of companies that can complete a third-party investigation of the June 6, 2023 School Mass Shooting by October 1, 2023 to investigate the following and have the findings by our second meeting in October: (a) Report all findings to the School Board that include graduation day operations from set up, to break down, and to include process and procedures for entrance of all students and guests, (b) To report to the School Board any findings that include written statements from RPS Division staff and HHS staff involved with the June 6 graduations preparations of all graduations on June 6, and (c) include in the third-party review, the breakdown of our homebound process and procedures that directly impact grading.

Id., Ex. 10, 08/14/2023 Meeting Minutes at § 6.01; *see also* Ex. 12, 8/14/2023 Meeting Video at 1:21:41–1:24:04. The motion was seconded, and discussion ensued. *See generally*, Ex. 12, 8/14/2023 Meeting Video at 1:21:41–1:44:46.

Board member Nicole Jones asked, "Is there any legal or legality issues that we should also incorporate legal in any of these motions?" *See id.* at 1:32:19–1:34:29 (emphasis added). No motion was made to "also incorporate" any legal issues into the investigation. *See id.* The School Board passed Dr. Harris-Muhammed's motion and adopted the resolution without any amendments. *See id.* at 1:43:25–1:44:16; *see also* Ex. 10, 08/14/2023 Meeting Minutes at § 6.01.

In accordance with the Board's August 14, 2023 resolution, on October 2, 2023, Superintendent Kamras presented to the Board two "companies" to conduct the investigation, including the Sands Anderson law firm. *See* Ex. 13, 10/02/2023 Meeting Video at 3:06:48–3:07:59. School Board member Jonathan Young moved to authorize Superintendent Kamras to contract with Sands Anderson for the "third-party audit" of the shooting. *See id.* at 3:08:00–3:08:15. The motion was seconded, and discussion ensued. *See generally, id.* at 3:06:48–3:19:35.

During discussion on the motion, Board member Dr. Harris-Muhammed explained that the investigation "has everything to do with Richmond Public Schools' operations," and that "this is about Richmond Public Schools' operations, not anything outside of this." *Id.* at 3:08:43–3:12:26. Another Board member asked how the third-party investigation would differ from the Richmond Police Department's investigation. Superintendent Kamras explained that "as Dr. Harris-Muhammed has articulated, this [the investigation] would be a review of internal RPS [Richmond Public Schools] operations," whereas the RPD's investigation focuses on determining criminal culpability." *Id.* at 3:15:00–3:15:45. Mr. Young's motion passed.

On or about October 3, 2023, on behalf of the School Board, Superintendent Kamras entered into a Client Engagement Agreement with Sands Anderson. *See* Ex. 15. The Client Engagement Agreement defined the scope of the engagement by expressly stating that its services would be "in accordance with the Client's resolution of August 14, 2023 and the vote of October 2, 2023." Exhibit 15.

Sands Anderson generated the Report with exhibits memorializing its investigation. During its meeting on November 6, 2023, Board member Mr. Young moved that the School Board release the Report to the public by end of day November 21, 2023. *See* Ex. 14, 11/20/2023 Meeting Video

at 3:42:08–3:43:08. The motion was seconded, and discussion ensued. *See generally, id.* at 3:42:08–4:12:16. Ultimately, the motion failed, and the Report was not disclosed.

ISSUE

There is no dispute that Petitioners submitted valid requests to the School Board under the Virginia Freedom of Information Act (“VFOIA”) for the Report, and that the School Board denied each request based solely on the attorney-client privilege exemption in Virginia Code § 2.2–3705.1(2). *See* Exs. 1-9. The central issue to be decided is whether the Report is protected by the attorney-client privilege and, therefore, exempt from the mandatory disclosure requirements of VFOIA. Additionally, if the Report does contain privileged information, the Court must decide the extent to which the Report must be redacted and produced pursuant to Virginia Code § 2.2–3704.01.

LAW

Pursuant to the express terms of VFOIA, the burden is on the School Board to establish, by a preponderance of the evidence, that the Report is protected by the attorney-client privilege. *See* Va. Code § 2.2–3713(E); *see also Walton v. Mid-Atl. Spine Specialists, P.C.*, 280 Va. 113, 122–123 (2010) The proponent of the privilege, the School Board, has the burden to establish that the attorney-client relationship exists, that the communication under consideration is privileged, and that the privilege was not waived. *Walton*, 280 Va. at 122–123. In assessing whether the School Board has satisfied its burden, the Court must be mindful of VFOIA’s express directive to apply exemptions narrowly and its “heavy interpretative thumb on the scale” in favor of disclosure. *Gloss v. Wheeler*, 887 S.E.2d 11, at 21 (Va. 2023) (quoting *Fitzgerald v. Loudoun Cnty. Sheriff’s Off.*, 289 Va. 499, 505 (2015)); *see also* Va. Code § 2–2-3700(B).

To satisfy its burden that the communication is privileged, the School Board must establish that it hired Sands Anderson for the purpose of obtaining legal advice, as opposed to investigating factual information. *Chevalier-Seawell v. Mangum*, 90 Va. Cir. 420, 426 (Norfolk Cir. Ct. Aug. 3, 2015); see, e.g., *Virginia Elec. & Power v. Westmoreland-LG & E Partners*, 259 Va. 319, 325 (2000) (citing *Robertson v. Commonwealth*, 181 Va. 520, 539–40 (1943)). “Factual investigations by themselves do not constitute the rendering of legal advice or assistance.” 1 Paul R. Rice, *et al.*, *Attorney-Client Privilege in the U.S.* § 7:1 (Dec. 2023). Furthermore, the privilege does not apply simply because a factual investigation might be relevant to legal advice requested in the future. See, e.g., *In re Chase Bank USA, N.A. Check Loan Cont. Litig.*, 2011 WL 3268091, *2 (N.D. Cal. July 28, 2011).

If the Court finds that the Report contains information exempt from disclosure pursuant to the attorney-client privilege, VFOIA provides a “right of redaction,” pursuant to which any privileged portions of the Report must be redacted and the non-exempt portions produced. See *Hawkins v. Town of S. Hill*, 301 Va. 416, 428 (2022); Va. Code § 2–2-3704.01. In 2016, in direct response to the Virginia Supreme Court’s decision in *Virginia Dep’t of Corr. v. Surovell*, 290 Va. 255 (2015), the General Assembly amended VFOIA to include a “right of redaction.” See *Hawkins v. Town of S. Hill*, 301 Va. 416, 428 (2022). VFOIA now provides that:

No provision of this chapter is intended, nor shall it be construed or applied, to authorize a public body to withhold a public record in its entirety on the grounds that some portion of the public record is excluded from disclosure by this chapter or by any other provision of law. A public record may be withheld from disclosure in its entirety only to the extent that an exclusion from disclosure under this chapter or other provision of law applies to the entire content of the public record. Otherwise, only those portions of the public record containing information subject to an exclusion under this chapter or other provision of law may be withheld, and all portions of the public record that are not so excluded shall be disclosed.

Va. Code § 2.2-3704.01.

“[E]ven where the predominant purpose of a document or communication is business, that is, non-legal, such a document can also contain legal advice, which can be redacted on the basis of the attorney-client privilege.” *In re Currency Conversion Antitrust Litig.*, No. 7116, 2010 WL 4365548, *4 (S.D.N.Y. Nov. 3, 2010) (citing *In re Cnty. of Erie*, 473 F.3d 413, 421 n.8 (2d Cir. 2007)); see also *In re Polaris, Inc., supra*, 967 N.W.2d 397, 412 (2021) (“On remand, the district court must identify the portions of the Report that contain legal advice, which should be redacted.”).

A non-privileged document does not somehow become privileged simply because it includes information the owner would prefer not to disclose. See *In re Grand Jury Subpoena*, 204 F.3d 516, 523 (4th Cir. 2000) (“A client may not ‘buy’ a privilege by retaining an attorney to do something that a non-lawyer could do just as well.”) (quoting 2 Saltzburg et al., *Federal Rules of Evidence Manual* 698 (7th Ed. 1998)). Indeed, when considering after-the-fact claims of privilege, “courts analyze such *ex post facto* evidence with some skepticism.” 1 Thomas E. Spahn, *The Attorney-Client Privilege and the Work Product Doctrine: A Practitioner’s Guide*, § 22.6, p. 538 (Va. Law Foundation, 2013).

Further, “[n]ot every communication between attorney and client falls within the [attorney-client] privilege.” *Ullmann v. State*, 647 A.2d 324, 332 (Conn. 1994); accord *United States v. Evans*, 113 F.3d 1457, 1463 (7th Cir. 1997) (“A communication is not privileged simply because it is made by or to a person who happens to be a lawyer.”) (quoting *Diversified Indus., Inc. v. Meredith*, 572 F.2d 596, 602 (8th Cir. 1977)). “[T]he privilege does not protect documents and other communications simply because they result from an attorney-client relationship.” *S.E.C. v. Microtune, Inc.*, 258 F.R.D. 310, 315 (N.D. Tex. 2009) (citing *Navigant Consulting, Inc. v. Wilkinson*, 220 F.R.D 467, 477 (N.D. Tex. 2004)).

The purpose of the privilege is to encourage full and frank communication between attorneys and their clients, “thereby enabling attorneys to provide informed and thorough legal advice.” *Walton*, 280 Va. at 122 (emphasis added) (citing *Upjohn Co. v. United States*, 449 U.S. 383, 389 (1981)). It follows that the privilege “protects only those disclosures necessary to obtain informed legal advice which might not have been made absent the privilege.” *Fisher v. United States*, 425 U.S. 391, 403 (1976) (emphasis added) (citations omitted). As this Court explained years ago:

The attorney-client privilege has a lengthy history, deriving from a belief that confidentiality is necessary in communications between attorneys and clients so that the former can receive candid and complete information in order to provide the latter with accurate and complete legal advice and assistance.

In re Bryant, 27 Va. Cir. 414, 418 (Richmond Cir. Ct. May 1, 1992) (Harris, J.); *accord Chevalier*, 90 Va. Cir. at 426 (“For the privilege to apply, the communication must be made for the purpose of ‘procuring or providing legal advice.’”) (quoting *SNC-Lavalin A.M, Inc. v. Alliant Techsystems, Inc.*, 2011 WL 4716225, *1 (W.D. Va. Oct 6, 2011)); *In re Polaris, Inc.*, 967 N.W.2d 397, 408 n.1 (Minn. 2021) (“Because we apply the attorney-client privilege narrowly, we agree with the overwhelming majority of state courts that have adopted the predominant purpose test and conclude that legal advice must be the primary purpose of the communication.”) (citations omitted); Spahn, § 13.1, p. 245 (“The privilege only protects communications primarily motivated by legal advice[.]”).

The legal-advice requirement extends to investigations conducted by lawyers. As Thomas E. Spahn, Esquire – “Virginia’s own guru on the attorney-client privilege,” *Brownfield v. Hodous*, 82 Va. Cir. 315, 320 (Va. Cir. Ct. Mar. 3, 2011) – explains:

The basic rule is fairly easy to state. The privilege only protects communications relating to a client’s request for, or a lawyer’s providing of, legal advice.

There are many more negative implications flowing from this basic rule, for example:

- The privilege does not apply simply because clients and lawyers communicate in connection with an internal corporate investigation;
- Communications involved in an internal corporate investigation do not deserve privilege protection simply because a lawyer ordered, oversaw or participated in the investigation;
- A lawyer acting primarily as an investigator rather than as a legal advisor does not deserve privilege protection when he or she communicates with a client in connection with an internal corporate investigation

Spahn at § 22.5, p. 534.

A written engagement letter between the attorney and client can help illuminate the client's intent. However, "an engagement letter cannot reclassify nonprivileged communications as 'legal services' in order to invoke the attorney-client privilege." *Buckley LLP v. Series 1 of Oxford Ins. Co. NC LLC*, No. 19 CVS 21128, 2020 WL 6696138, *8 (N.C. Super. Nov. 9, 2020), *aff'd*, 876 S.E.2d 248 (N.C. 2022) (quoting *Sandra T.E. v. Berwyn Sch. Dist. 100*, 600 F.3d 612 (620 (7th Cir. 2009)). "Accordingly[,] boiler-plate references to an attorney or legal services . . . do not suffice as indicators of the true nature of the relationship between [the attorney and the client]." *B.L. v. Schumann*, 2020 WL 6293582, *6 (W.D. Ky. Oct. 27, 2020). Hence, "[m]any courts would not give much weight to a self-serving retainer letter." Spahn at § 14.403, p. 268. Simply put, "[c]ourts look past labels or self-serving characterization when analyzing possible privilege protection" and instead "examine the content of the communication when assessing privilege protection." *Id.* at § 15.202, p. 282. "[M]arking a document 'confidential' or 'attorney work product' is not enough to confer privilege without analysis of the document's actual contents." *In re Chase Bank, supra*, 2011 WL 3268091 at *2 (citing *Carlton Investments v. TLC Beatrice Int'l Holdings*, No. 139501996 WL 132983, *9 (Del. Ch. 1996)).

Further, expectations, or even promises, of privilege protection do not suffice to invoke the privilege. Agreeing with the Eighth Circuit, the Fourth Circuit observed that “we know of no authority . . . holding that a client’s beliefs, subjective or objective, about the law of privilege can transform an otherwise unprivileged conversation into a privileged one.” *In re Grand Jury Subpoena*, 204 F.3d at 523 (quoting (quoting *In re Grand Jury Subpoena Duces Tecum*, 112 F.3d 910, 923 (8th Cir. 1997))).

At the School Board’s meeting on November 20, 2023, the Board’s counsel mentioned unspecified “insurance coverage issues” that might arise if the Report is publicly disclosed, and a Board member cautioned that disclosing the Report might “open[] up ourselves to litigation,” while another Board member suggested that disclosure could adversely impact the “ongoing criminal case” arising from the shooting. *See* Ex. 14, 11/20/2023 Meeting Video at 3:56:46–3:57:30. The test for determining whether the Report is privileged, set forth above, does not include potential, or even actual, consequences that might flow from the disclosure. Any potential consequences of publicly disclosing the Report are not a basis to exempt the Report from mandatory disclosure.

ANALYSIS

Regarding the threshold issue of whether the Report was procured for the purpose of obtaining legal advice, as opposed to investigatory factual information, the Court finds the following evidence to be persuasive.

The 8/14/2023 resolution defines the scope of the work for which Sands Anderson was hired. Superintendent Kamras so testified by acknowledging that the scope is defined in the Client Engagement Agreement (Exhibit 15) by reference to the 8/14/2023 resolution of Dr. Harris-Muhammed and the vote of 10/2/2023. Superintendent Kamras further testified that he did *not*

engage Sands Anderson to do more than set out in the 8/14/2023 resolution, and his job was to carry out the Board's order. Additionally, the outline of the work Sands Anderson agreed to perform is set out in Exhibit 22, items marked thereon as I, II, and III, but *not* IV. Those outlined areas mirror exactly the language of the 8/14/2023 resolution. Further, the lead investigator and attorney for Sands Anderson, Pamela Y. O'Berry, Esq., testified that the scope of Sands Anderson's work was defined by the 8/14/2023 resolution, and she was instructed by Superintendent Kamras to refer to the four corners of that resolution to determine any uncertainties about the scope of work. O'Berry further testified that she had also seen Exhibit 28 (PowerPoint Presentation by Superintendent Kamras), which set out on page 2 the exact language of the 8/14/2023 resolution, and the rationale for the resolution's request for a third-party investigation, as had been articulated by Dr. Harris-Muhammed at the motion for the resolution on 8/14/2023. She testified that the scope of the work "was made very clear to us." O'Berry acknowledged that nothing in the Client Engagement Agreement (Exhibit 15) references legal advice or research. O'Berry further testified that because Sands Anderson had no subpoena power, the attorneys believed and represented to interviewees that their communications would be confidential, because she felt she would not be able to obtain information from the interviewees without the appearance of confidentiality. The court attributes no bad faith on the part of O'Berry or the other investigating attorneys in this regard, as they represented only what they believed.

Clearly nothing within the four corners of the 8/14/2023 resolution sought legal advice.

The resolution is very straightforward in what the School Board wanted from the investigation, and legal advice was *not* included. In fact, at the time of discussing the motion for the resolution, Board member Nicole Jones asked whether any "legal issues" should be incorporated into the motion for the resolution, to which the Board attorney equivocated and indicated that any

discussion of that issue would need to be in closed session. However, that never took place, and nothing further was discussed about inclusion of “legal issues,” and the resolution passed without any amendments.

At the time of consideration of the motion for the resolution, Dr. Harris-Muhammed stated multiple times that the third-party investigation would be about “operations” of RPS and not about any particular family, the Commonwealth attorney, or RPD. She reiterated that it had nothing to do with the criminal case. Superintendent Kamras explicitly and expressly agreed. In fact, Superintendent Kamras stated that the third-party investigation would be a review of RPS operations and RPD would separately handle the criminal investigation.

CONCLUSION

For all the reasons set out above, the Court **FINDS** that the School Board has failed to carry its burden to prove by a preponderance of the evidence that the entire Report and its Exhibits are protected from disclosure under the attorney-client privilege as established by Virginia Code § 2.2-3705.1(2). The Report, taken as a whole, was not created for the primary purpose of providing legal advice, and the express terms of the resolution, upon which the Report is based, are very clear in that regard. As stated above, while there was an attorney-client relationship between the School Board and Sands Anderson, “not every communication between attorney and client is protected by attorney-client privilege.” *Ullmann v. State*, 647 A.2d at 332 (Conn. 1994); accord *United States v. Evans*, 113 F.3d at 1463 (7th Cir. 1997) (“A communication is not privileged simply because it is made by or to a person who happens to be a lawyer.”) (quoting *Diversified Indus., Inc. v. Meredith*, 572 F.2d 596, 602 (8th Cir. 1977)). The privilege does not protect documents and other communications simply because they result from an attorney-client

relationship. *Id.* The privilege protects only those disclosures necessary to obtain informed legal advice which might not have been made absent the privilege.

However, while the entire Report taken as a whole has not been proven to be exempt, there are several minimal parts of the Report that do constitute legal advice. As courts have observed, “even where the predominant purpose of a document or communication is business, that is, non-legal, such a document can also contain legal advice, which can be redacted on the basis of the attorney-client privilege.” *In re Currency Conversion Antitrust Litig.*, No. 05 CIV 7116, 2010 WL 4365548, *4 (citing *In re Cnty. of Erie*, 473 F.3d 413, 421 n.8). Virginia Code § 2.2-3704.01 provides for such redaction, and the Court will Order that certain portions of the Report be redacted by the School Board prior to release of the Report. Those parts to be redacted are set out in the referenced Confidential Addendum, which Addendum shall be filed under seal with the Clerk’s Office herein. To the extent the Court has found that certain minimal parts of the Report are attorney-client privileged communications, the Court also finds that there has been no waiver of that privilege in regard thereto.

ORDER

It is hereby **ORDERED** that the Petitions for Mandamus against the School Board for the City of Richmond seeking release of the third-party report of Sands Anderson law firm concerning the June 6, 2023 shooting following the Huguenot High School graduation ceremony are hereby **GRANTED** but with certain Ordered redactions.

The Court hereby **ORDERS** certain redactions be made to the Report, as set out in the Confidential Addendum filed with this Letter Opinion and Order; and further that said Addendum be sealed and shall so remain unless and until Ordered to be unsealed by this or another Court of

competent foundation. This Addendum shall be revealed only to the attorneys for the School Board so that the proper redactions can be made to the Report prior to its release.

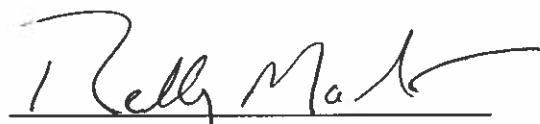
It is further **ORDERED** that the School Board shall comply with the VFOIA requests by releasing the Report with redactions by 1:00 p.m. on January 17, 2024.

Pursuant to Rule 1:13 of the Supreme Court of Virginia, the Court dispenses with the parties' endorsement of this Order.

The Clerk is directed to forward a certified copy of this Order to all the parties.

It is so ORDERED.

ENTER: 1/16/24



W. Reilly Marchant, Judge