Subject: Appeal of Response City of Malden # 2021-0067
Date: Tuesday, March 23, 2021 at 1:30:57 PM Eastern Daylight Time
From: Bruce Friedman
To: pre@sec.state.ma.us, Puccini, Angela M (SEC)
CC: sdorai@maldenps.org, Greg Lucey, Kathryn M. Fallon, Felicia S. Vasudevan
Priority: High
Attachments: 2017-Guide-with-ed-materials-revised-1-30-18.pdf, exhibit 1 - Original Request.pdf, exhibit 2 - Fee Petition.pdf, exhibit 3 - OML 2019-140.pdf, exhibit 4 - SPR21-0464.pdf, google_privacy_policy_en_us.pdf, google_terms_of_service_en.pdf, MX Record maldenpsorg.pdf

Greetings:

I am hereby appealing the response (attached hereto as exhibit #2) of the Malden Public Schools received on March 10, 2021, and presented to your office as a fee petition under SPR 21/0589.

On February 24, 2021 I served the following verbatim request (attached hereto as exhibit #1) upon the Malden Public Schools RAO via the Official FOIA website: "Please provide any emails between any members of the School Committee where the recipients (to, carbon copy, and/or blind carbon copy) of the email would create a quorum from January 2019 through the date you answer this request. These emails are to be provided in the electronic form which they are regularly maintained and must include all email metadata."

The facts regarding this request are as follows:

1. The request specifically and only seeks electronic mail (email).
2. The request specifically and only seeks email from the accounts of elected officials, operating in their official capacity as members of the Malden Public Schools School Committee.
3. The request specifically and only seeks email where the elected officials are communicating with a simple majority or quorum of School Committee members, including sub-committees.
4. The entire Malden Public Schools School Committee members (excluding the Chair who is also the Mayor) are up for re-election in 2021.
5. The City of Malden has a significant history of violating Open Meetings Laws as determined by the Attorney General of the Commonwealth.
6. This request is extremely time sensitive and urgent as the Candidates for School Committee are currently announcing their intentions to run or re-run for office during the pendency of this request. These records could significantly affect the outcome of the election.

In an effort to solve the immediate problem, I the requestor propose the following solutions:

1. I will receive all 1785 identified emails and sort through them myself to exclude any emails that do not constitute a quorum or simple majority of the Committee as a whole or any sub-committee.
2. I will receive all emails from the accounts of all the School Committee members for the time period in the original request and exclude any emails that do not constitute a quorum or simple majority of the Committee as a whole or any sub-committee myself.

If neither of the above solutions are acceptable, the RAO should be ordered by your office to release all

1785 responsive records to this request, without delay, and without fees or charges for the following reasons:

The City/School District and RAO have specific and heavy burdens to meet:

The fees requested are incorrect, abusive and without any legal merit. In determining the RAO's ability to charge fees for this public records request, your office must examine, weigh and undertake the following: "In rendering such a decision, the Supervisor is required to consider the following: a) the public interest served by limiting the cost of public access to the records; b) the financial ability of the requestor to pay the additional or increased fees; and c) any other relevant extenuating circumstances. Id."

1. The public interest herein is to allow inspection of records which are publicly unavailable through any other means besides this request as of today.
2. The public interest is served by allowing the voters to determine if the School Committee is deliberating in secret or in public as required by the Commonwealth's Open Meetings Laws during an election year, and as these records may or may not influence decisions regarding School Committee Member retention.
3. The public interest is served by allowing members of the public to refer potential Open Meetings Law violations to the Attorney General for a determination if evidence of deliberating the School Committee's business with a quorum of School Committee members through email is found in the responses to this public records request.
4. The public interest is served because responsive records will be published publicly via https://openmalden.com as this appeal currently is.
5. The City as a whole and the School District specifically have an abhorrent record with your office, the public and many public records requestors for subverting public records requests. The RAO in this case uses the fee process to create a financial firewall to prevent access to this request and many others. This financial firewall has a chilling effect on requestors behavior seeking public records, and the fees requested in the instant case could not be borne by the average citizen of Malden.
6. This request is extremely time sensitive and urgent as the Candidates for School Committee are currently announcing their intentions to run or re-run for office during the pendency of this request. These records could significantly affect the outcome of the election.
7. The secrecy of the documents responsive to these requests should only be allowed in the most extreme of circumstances, where the risks posed by public exposure clearly outweighs the rights of the public.
8. The public has the right to scrutinize the work product of our elected officials.
9. The RAO wants the requestor to pay for time to read every email, to protect disclosure of potentially damaging communications.
10. The fees are not properly calculated.
11. The RAO failed to produce the sample set of documents, the single record identified and deemed responsive (which ironically was not identified as protected), and/or any privilege log for the sample set.
12. The Sample set pulled is statistically not relevant. 179 emails (10%) is the minimum sample set required to be statistically relevant.

The RAO is only seeking attorney-client privilege in their response (exhibit #2) using the following verbiage :"The City is filing this request only to the extent that some of the redactions encompass attorney-client privilege and under Exemption (c). It is not seeking approval for redactions subject to

student records law as outlined in its fee estimate."

The RAO cannot charge, segregate or redact from the responsive records for the following reasons:

1. An RAO may not recover fees associated with record organization.
2. The RAO has not even validated that any exemption does in fact apply. No records were provided, no privilege log was provided, no evidence of attorney-client privilege was provided, just words "To comply with the request, Malden will need to redact the records as it expects that some of the emails will be school committee members soliciting advice from the attorney for Malden." The operative word used in their response is expect. They ***expect*** that ***some*** of the emails might be exempted by attorney-client privilege, without contemplating any of the legal requirements. They failed to provide any examples.
3. There is no attorney-client privilege exception to the Open Meeting Law per the following AGO decision OML 2019-140 (exhibit #3):
    a. The determination is unmistakable: "Therefore, communication between counsel and a quorum of a public body may occur only during a properly posted open meeting or during a valid executive session." "However, there is no attorney-client privilege exception to the Open Meeting Law. Quite to the contrary, the Supreme Judicial Court has ruled that the Open Meeting Law constitutes a "statutory public waiver of any possible privilege of the public client in meetings of governmental bodies except in the narrow circumstances stated in the [Open Meeting Law]. " District Attorney for the Plymouth Dist. v. Selectmen of Middleborough, 395 Mass. 629, 634 (1985).
    b. My request was VERY specific: "Please provide any emails between any members of the School Committee where the recipients (to, carbon copy, and/or blind carbon copy) of the email would create a quorum from January 2019 through the date you answer this request. These emails are to be provided in the electronic form which they are regularly maintained and must include all email metadata."
    c. I have also hereto attached the current and operative AGO OML guide and definitions for your reference. In this please find the following:
        "These four questions will help determine whether a communication constitutes a meeting subject to the law:
        1) is the communication between or among members of a public body;
        2) if so, does the communication constitute a deliberation;
        3) does the communication involve a matter within the body's jurisdiction; and
        4) if so, does the communication fall within an exception listed in the law?"
    d. "The Open Meeting Law defines deliberation as "an oral or written communication through any medium, including electronic mail, between or among a quorum of a public body on any public business within its jurisdiction."
    e. "To be a deliberation, the communication must involve a quorum of the public body. A quorum is usually a simple majority of the members of a public body. Thus, a communication among less than a quorum of the members of a public body will not be a deliberation, unless there are multiple communications among the members of the public body that together constitute communication among a quorum of members. Courts have held that the Open Meeting Law applies when members of a public body communicate in a serial manner in order to evade the application of the law."
    f. "Note that the expression of an opinion on matters within the body's jurisdiction to a quorum of a public body is a deliberation, even if no other public body member responds. For example, if a member of a public body sends an email to a quorum of a public body expressing her opinion on a matter that could come before that body, this communication

violates the law even if none of the recipients responds."

g. "The Open Meeting Law applies only to the discussion of any "matter within the body's jurisdiction." The law does not specifically define "jurisdiction." As a general rule, any matter of public business on which a quorum of the public body may make a decision or recommendation is considered a matter within the jurisdiction of the public body. Certain discussions regarding procedural or administrative matters may also relate to public business within a body's jurisdiction, such as where the discussion involves the organization and leadership of the public body, committee assignments, or rules or bylaws for the body. Statements made for political purposes, such as where a public body's members characterize their own past achievements, generally are not considered communications on public business within the jurisdiction of the public body."

h. "There are five exceptions to the definition of a meeting under the Open Meeting Law.

1. Members of a public body may conduct an on-site inspection of a project or program; however, they may not deliberate at such gatherings;
2. Members of a public body may attend a conference, training program or event; however, they may not deliberate at such gatherings;
3. Members of a public body may attend a meeting of another public body provided that they communicate only by open participation; however, they may not deliberate at such gatherings;
4. Meetings of quasi-judicial boards or commissions held solely to make decisions in an adjudicatory proceeding are not subject to the Open Meeting Law; and
5. Town Meetings, which are subject to other legal requirements, are not governed by the Open Meeting Law. See, e.g. G.L. c. 39, §§ 9, 10 (establishing procedures for Town Meeting)."

4. The specific responsive emails I requested are either non-deliberative, and as a result could not possibly infringe on any of the exemptions posed by the RAO/City because they were not about any matter of public business on which a quorum of the public body may make a decision or recommendation, thus no need for any of the exemptions cited by the RAO/City and/or Ms. Vasudevan, OR the email communications were in fact a matter of public business on which a quorum of the public body may make a decision or recommendation and they violated the Open Meetings Law and as such are not afforded any of the protections of privilege cited by the RAO/City and/or Ms. Vasudevan. Either way, the responsive emails sought could not possibly qualify for the exemptions sought, thus the RAO is barred from charging for search, segregation and redaction.
5. The City/School District/RAO does not enjoy attorney client privilege regarding the current request.
    a. The City/District/RAO incorrectly assume that, regardless of content all communications to and from the Legal Department and or the "attorney for Malden" are privileged and confidential. Further, no privilege log was provided. This scenario is very similar to another decision released from the Secretary's office this week, SPR21/0464 (exhibit #4) which is hereto attached.
    b. In its March 10th response, the City/District/RAO has claimed that the communications to and from the Legal Department/attorney for Malden are privileged and confidential under the common law attorney-client privilege as recognized by Suffolk Constr. Co., Inc. v. DCAM, 449 Mass. 444 (2008).
    c. There is an implicit assumption that a governmental entity "may assert attorney-client privilege to protect documents against disclosure where they contain communications between lawyer and client for purpose of obtaining legal advice." Brossard v. University of

Massachusetts, 9 Mass. L. Rep. 471 (1998), referencing Judge Rotenberg Educ. Center, Inc., v. Comm'r of the Dept. of Mental Retardation (No. 1), 424 Mass. 430 (1997).

d. The issue of whether this privilege extends to governmental entities was discussed in the affirmative by the Massachusetts Supreme Judicial Court (Court). Suffolk Constr. Co., Inc., 449 Mass. 444. The Court found that the privilege applies in the public realm. The Supervisor has the authority to determine whether records may be withheld as privileged. See Hull Mun. Lighting Plant v. Massachusetts Mun. Wholesale Elec. Co., 414 Mass. 609, 614-615 (1993).
e. The Court affirmed the "general rule" that when matters are "communicated by a client to his attorney, in professional confidence, the attorney shall not be at any time afterwards called upon or permitted to disclose in testimony." Suffolk Constr. Co., Inc., 449 Mass. at 448, quoting Foster v. Hall, 12 Pick. 89, 93 (1831). The Court, however, admonished that a governmental entity has the burden of proving the existence of the attorney-client privilege. Id. The Court requires governmental custodians to satisfy a three-step test to claim not only that an attorney client relationship exists, but that, with respect to the privileged materials: (1) the communications were received from a client during the course of the client's search for legal advice from the attorney in his or her capacity as such; (2) the communications were made in confidence; and (3) the privilege as to these communications has not been waived.
f. Suffolk Constr. Co., 449 Mass. 450, fn9, citing Matter of the Reorganization of Elec. Mut. Liab. Ins. Co. Ltd. (Bermuda), 425 Mass. 419, 421 (1997); see also Hanover Ins. Co. v. Rapo & Jepsen Ins. Servs., 449 Mass. 609, 619 (2007) (stating that the party seeking the attorney-client privilege has the burden to show the privilege applies).
g. The City/District/RAO have failed the second and third prongs of their burden, the Malden Public Schools does not enjoy privilege, because the privilege has been summarily waived. The City/School District/RAO has failed to properly secure its electronic mail and its electronic mail system from third persons who are not providing professional legal services to the City/District/RAO, nor are they reasonably necessary for the transmission of the communication. The Malden Public Schools uses google mail, and/or gmail for all email addressed to @maldenps.org, which is the email responsive to this request and response/fee request. The attached MX record will validate this.
h. In Massachusetts a communication is "confidential" if it is not intended to be disclosed to third persons other than those to whom disclosure is made to obtain or provide professional legal services to the client, and those reasonably necessary for the transmission of the communication.
i. See also: Commissioner of Revenue v. Comcast Corp. , 453 Mass. 293 (2009), and DaRosa v. City of New Bedford , 471 Mass. 446 (2015). In general, "information contained within a communication need not itself be confidential for the communication to be deemed privileged; rather the communication must be made in confidence—that is, with the expectation that the communication will not be divulged." Commissioner of Revenue v. Comcast Corp., 453 Mass. at 305. Thus, "[c]ommunications between an attorney and his client are not privileged, though made privately, if it is understood that the information communicated is to be conveyed to others." Peters v. Wallach , 366 Mass. 622, 627 (1975).
j. Google Mail requires users of their system to read and agree to the attached Google Terms of Service (Hereinafter "GToS") and the attached Google Privacy Policy.
k. In the attached GToS and Privacy Policy, under the "Things you create or provide to us" heading you will find: "We also collect the content you create, upload, or receive from others when using our services. This includes things like ***email you write and receive***,

photos and videos you save, docs and spreadsheets you create, and comments you make on YouTube videos."

l. In the attached GToS and Privacy Policy under the heading "Permission to use your content" section the following is stated: "Your Content" is defined by Google as: "Things that you write, upload, submit, store, send, receive, or share with Google using our services, such as: Docs, Sheets, and Slides you create - blog posts you upload through Blogger - reviews you submit through Maps - videos you store in Drive - ***emails you send and receive*** - pictures you share with friends through Photos - travel itineraries that you share with Google. This is publicly available at: https://policies.google.com/terms#footnote-your-content

m. In the attached GToS and Privacy Policy under the heading "Rights" section the following is stated: "Rights ***This license allows Google to: host, reproduce, distribute, communicate, and use your content*** — for example, to save your content on our systems and make it accessible from anywhere you go publish, publicly perform, or publicly display your content, if you've made it visible to others modify and create derivative works based on your content, such as reformatting or translating it sublicense these rights to: other users to allow the services to work as designed, such as enabling you to share photos with people you choose our contractors…"

n. Pursuant to the Public Records Law, in assessing whether a records custodian has properly withheld records based on the claim of attorney-client privilege the Supervisor, "shall require, as part of the decision-making process, that the agency or municipality provide a detailed description of the record, including the names of the author and recipients, the date, the substance of such record, and the grounds upon which the attorney-client privilege is being claimed." G. L. c. 66, § 10A(a). No privilege log has been provided.

o. In the attached GToS and Privacy Policy, under the "When Google shares your information" heading you will find: "With domain administrators If you're a student or work for an organization that uses Google services, your domain administrator and resellers who manage your account will have access to your Google Account. They may be able to access and retain information stored in your account, like your email…"

p. The School District has not and cannot demonstrate the expertise, personnel, or that they are able to exercise the proper controls, processes and that they have documented procedures to administer a proper separation of duties and least permission required policy. With unknown permissions, with no viable separation of duties, with no least permission required practice, there is no producible chain of custody nor can the City/District/RAO prove that privilege was not waived inadvertently or intentionally through the interactions granted by whomever has access, including Google.

q. In there is nothing confidential or private about the City/District/RAO's maldenps.org email and email system. By the very usage of google mail they have knowingly and willingly waived privilege because their email is exposed to and viewed by anonymous third parties through license and use of the system.

6. The RAO states "Out of the sample, one of the ten emails was responsive. Each email must be reviewed as they may contain attorney-client privilege, student record information or private personal information under Exemption (C).", This is Segregation, not search.
7. The RAO states that it will take 2 minutes to search per email, by reading each email ("Malden spent three hours locating the emails. Malden took a sample of ten emails. It took 20 minutes to review the emails to determine which ones are responsive to the request, as some of the emails had multiple emails in a chain."). (1785 emails X 2 minutes each = 59.5 hours. The emails do not need to be read to determine if they are responsive. There are 1,785 emails where the sender

is a member of the public body and is emailing at least one other member of the public body. Then she says that one of 10 from a sample produced a single responsive email, this took 20 minutes. All that is required to search for responsive records, even if it is a manual process is to read the remaining fields in the header of the email, To:, Cc:, Bcc: (we already have the From: field). If the sum of people in these fields are members of the specific group of nine total people representing the public body are a simple majority of the body, the record is responsive, if not, it is not.

8. I myself am an industry expert on email and email systems with over 25 experience. I have also consulted with several other industry experts all of whom believe a standard query can be electronically prepared and applied to reduce the entire email set into only responsive documents with about 30-45 minutes of preparation, validation and testing. However, they all stated that if they were forced to manually search the To:, Cc:, and Bcc: fields for a quorum, it would take less than 2 seconds per email on average. 2 X 1785 = 3750 / 60 = 59.5 minutes.

Therefore ask you order the RAO to release all 1785 emails without delay, without charge and if any records are withheld, or redacted, a privilege log be created and provided so that any such redactions or withholding can be properly challenged and overcome.

Regards,

Bruce Friedman