

IN THE SUPERIOR COURT FOR THE STATE OF ALASKA

THIRD JUDICIAL DISTRICT AT ANCHORAGE

ANCHORAGE MUNICIPAL
ASSEMBLY,

Appellant,

v.

MUNICIPALITY OF ANCHORAGE,

Appellee.

Case No. 3AN-23-05260 CI

DECISION ON APPEAL

This is an appeal of a final administrative order by Mayor Bronson denying a records request by the Anchorage Municipal Assembly under the provisions of Anchorage Municipal Code (AMC) chapter 3.90 *Access to Public Records*, and AS 40.25 et seq. *Public Records Disclosures*. Under AS 40.25.124, a person may appeal to the superior court from a final administrative order issued by any “public agency” under AS 40.25.110-140. “Public agencies” include a “political subdivision” and any other “instrumentality of . . . a municipality.” AS 40.25.220(2).

I. BACKGROUND FACTS

In this case the Anchorage Municipal Assembly (“Assembly”) has appealed the Mayor’s decision to deny the release of two records that the Assembly requested under AMC 3.90. The Municipality claims the records are privileged and exempt from disclosure. Pursuant to the July 26, 2023 “Order Re Procedure for *In Camera* Review,” on August 3, 2023 the Municipality made an *ex parte* production to the court of the two documents. Both records have been submitted

in camera along with a privilege log.¹ Both are 3-page memorandums prepared by Jared Goecker, Human Resources Deputy Director for the Municipality. The first memorandum, dated September 6, 2022, is directed to Deputy Municipal Attorney Blair Christensen. The second record, dated January 13, 2023, is directed to Kent Kholhase, Acting Municipal Manager. Both memos are labelled “Confidential” in the subject line, in a footer, and in a diagonal watermark across pages 2 and 3.

Both records concern an investigation conducted by the Municipality into the hiring of Joe Gerace. Mr. Gerace is an individual appointed by Mayor Bronson to lead the Anchorage Health Department. Mr. Gerace was hired in September 2021 and confirmed in November 2021. He resigned in August 2022 after allegations surfaced in the media that he misrepresented some of his qualifications and credentials. The day after Mr. Gerace’s resignation, Mayor Bronson issued a press release announcing he had ordered the Anchorage Municipal Manager’s Office and Human Resource Department to conduct an investigation into Mr. Gerace’s hiring.

The Municipality’s privilege log asserts the January 13, 2023 memorandum is exempt from disclosure under AMC 3.90.040B, AMC 3.30.016D, and because disclosure would constitute an “unwarranted invasion of privacy.” The same grounds are relied upon as justification for withholding the September 6, 2022 memorandum except the Municipality adds that the memorandum constitutes a privileged attorney-client communication.

II. STANDARD OF REVIEW

A four-part standard of review applies in appeals from the administrative decisions of public agencies: “(1) the ‘substantial evidence test’ for questions of fact, (2) the ‘reasonable basis test’ for questions of law involving agency expertise, (3) the ‘substitution of judgment’ test for questions of law involving no agency

¹ “*In camera*” means they have been given to the court in a confidential envelope but not filed. Although they can be reviewed by the court, the records are not yet part of the court file.

expertise, and (4) the ‘reasonable and not arbitrary test’ for review of administrative regulations.” *ConocoPhillips Alaska, Inc. v. State, Dep’t of Nat. Res.*, 109 P.3d 914, 919 (Alaska 2005).

The issues presented in this appeal represent questions of law that do not involve agency expertise.² The court will, therefore, apply the “substitution of judgment” test and review the administrative decision *de novo*, “adopt[ing] the rule of law that is most persuasive in light of precent, reason, and policy.” *Oels v. Anchorage Police Dept. Employees Ass’n*, 279 P.3d 589, 595 (Alaska 2012).

III. ANALYSIS

The court will consider the merits of grounds for non-disclosure listed by the Municipality in its privilege log.

(1) AMC 3.90.040B

The first basis for non-disclosure that the Municipality relies upon in its privilege log is section 3.90.040B of the Anchorage Municipal Code (AMC 3.90.040B). The ordinance provides: “Personnel, payroll or medical files, equal rights commission files or other files which reveal the financial or medical status of any specific individual, the release of which would constitute an unwarranted invasion of privacy.”

The interpretation of laws in Alaska, including laws relating to public disclosure of government records, is broadly governed by the following standard:

² The Municipality argues that the deferential “reasonable basis test” applies on the theory that the interpretation of the statute, regulations and ordinances at issue implicates its expertise. This court disagrees. As the custodian of the records, the Municipality must perform the initial task of determining whether employee records are exempt from public disclosure, but this does not imbue its decisions with presumptive validity. Here, there is no provision entitling the Municipality’s determinations to deference. In contrast, for example, in *North Slope Borough v. State*, 484 P.3d 106, 114 (Alaska 2021), “[t]he language of the regulation makes clear that it requires deference to the Department’s decision . . .” Furthermore, the issues at bar do not involve the type of complex tax, economic regulation, or resource allocation issues that typically receive deferential review by Alaska courts. The adjudication of competing claims for privacy against the public’s right to know falls squarely within the wheelhouse of the courts.

We interpret statutes according to reason, practicality, and common sense, taking into account the plain meaning and purpose of the law as well as the intent of the drafters.” We begin by examining the text. We apply a sliding scale approach to statutory interpretation, and “[t]he plainer the statutory language is, the more convincing the evidence of contrary legislative purpose or intent must be” to overcome that plain meaning.

Baisey v. Dep’t of Public Safety, 462 P.3d 529, 535 (Alaska 2020)(citations omitted).

The plain language of AMC 3.90.040B sets out requirements that must be met in order to shield a record from production. Three elements must be shown. First, the record must constitute either a “personnel, payroll or medical file,” an equal rights commission file, or some other file which would “reveal the financial or medical status of [a] specific individual.” Second, the release of such a record must “constitute an . . . invasion of privacy.” Third, *if* an invasion of privacy exists, it must be “unwarranted.” The third element necessitates a balancing of the harm to privacy against the public’s general right to know. *See Jones v. Jennings*, 788 P.2d 732, 736-37 (Alaska 1990).

The records at issue do not involve payroll, medical files, equal rights commission files or “other files which reveal the financial or medical status of any specific individual.” But because they relate to the employment of Mr. Gerace, the memoranda arguably fall within the scope of a “personel file,” which would satisfy the first element of AMC 3.90.040B.³ The court must, therefore, consider whether the memoranda meet the second element of the ordinance.

³ Appellant challenges the claim that the records constitute part of a “personnel file.” Ap.Br. at 20-23. Appellant argues that because the records relate to the circumstances of Mr. Gerace’s hiring, which predate his employment, and do not reflect on his job performance, they do not fall within the scope of a “personnel file” as used in AMC 3.30.016A. The argument appears plausible but it is not necessary for the court to decide the issue.

The second element shields disclosures that “constitute an . . . invasion of privacy.” Here, the memoranda relate to the veracity of some of the written representations Gerace made in obtaining employment with the Municipality, specifically representations concerning his education, work experience and other credentials.

Information proffered by a job applicant in order to demonstrate his or her qualifications, in general, would not seem to be the type of information sought to be protected by the ordinance. One may imagine a situation in which a prospective employee interviewing for a job discloses a personal experience or event, such as a past trauma or health condition, that relates to the individual’s ability to perform the job. But this is not such a case. This case is not about some deeply personal, highly-sensitive disclosure Mr. Gerace made in the course of applying to the Municipality. Mr. Gerace is alleged to have falsified certain material credentials listed on his resume. The issue, under AMC 3.90.040B, is whether Mr. Gerace’s alleged behavior—lying on his resume—gave rise to protected privacy interest.

As a starting point, Mr. Gerace’s right to privacy does not shield the resume itself from public disclosure. AMC 3.30.016D makes clear that the resumes and job applications of Municipality executive appointees constitute public records.⁴ In doing so, the code distinguishes executive appointees from other rank and file workers. The apparent reason for doing so is the public interest in knowing the backgrounds and qualifications of senior municipal appointees.

The next question is more problematic: Given the fact that the information Mr. Gerace provided as part of his job application is public, does he have a protected privacy interest when the Municipality conducts an internal investigation into the accuracy of that information? The mere fact that information may be highly embarrassing does not render it private. There is no question that the Municipality’s investigation may yield information highly embarrassing to Mr. Gerace. It may also be embarrassing to public officials responsible for vetting Mr.

Gerace. But, as embarrassing as it may be, from the standpoint of the citizens' right to know how their government is functioning the result of the Municipality's investigation would be highly informative. The health of a representative democracy depends on accountability, and without public knowledge, there can be no accountability.⁵

Having published the resume for the purpose of circulating it to potential employers, it is eminently sensible that the ordinance would regard Mr. Gerace as having relinquished any privacy interest in its content. The Municipality's argument to the contrary relies on the theory that the reports involve employment factfinding and investigation. But the cases it cites, including *Jones v. Jennings*, involve investigation of employee behavior and job performance, as opposed to *pre-employment* representations about a job applicant's qualifications. Certainly, a job applicant has a much lower expectation of privacy than an established employee. Yet even in the case of established police officers, *Jones v. Jennings* held that AMC 03.90.040 permitted disclosure of personnel records and internal investigations of citizen complaints, albeit with some restrictions. *Jones*, 788 P.2d at 737.

There is no dispute that Mr. Gerace sought a highly important executive office during a critical time period. There is no dispute that his qualifications to perform the position would be highly material to the Municipality's hiring decision. There is no dispute that Mr. Gerace provided his resume as part of his job application and that it was proffered in order to induce the Municipality to hire him. Under these circumstances, the court must conclude Mr. Gerace has no privacy interest in an investigation into the accuracy of resume or in the outcome of that investigation. Indeed, to recognize such an interest would be tantamount to

⁴ The Municipality concedes this point at page 18 of Appellee's Brief.

⁵ *Jones v. Jennings*, 788 P.2d 732, 735 (Alaska 1990) ("The cornerstone of democracy is the ability of the people to question, investigate and monitor the government. Free access to public records is a central building block of our constitutional framework enabling citizen participation in monitoring the machinations of the republic.")

recognizing that Mr. Gerace was privileged to supply false information for public consumption when he applied with the Municipality, and to block the true facts from becoming widely known.

Because the Municipality cannot show disclosure would constitute an invasion of privacy, the records are not privileged from disclosure under AMC 3.90.040B. It is not necessary for the court to decide whether the public's right to know outweighs Mr. Gerace's privacy interest, inasmuch as he has none. Assuming, however, that he retained some expectation of privacy in the veracity of his resume, the court finds it is substantially outweighed by the public interest in free access to government records. The importance of the qualifications of an individual appointed to head the Anchorage Health Department, particularly in the midst of the Covid 19 crisis, weighs strongly in favor of disclosure.⁶ In addition, the care with which Municipality officials vetted and hired Mr. Gerace would be a reasonable and relevant consideration to any citizen of the Municipality.

(2) AMC 3.30.016D

The second basis for non-disclosure that the Municipality relies upon in its privilege log is AMC 3.30.016D. AMC 3.30.016D provides:

Records. Notwithstanding chapter 3.90, all records maintained by the department of human resources shall be confidential to the extent that they include an analysis, evaluation or critique of an employee's performance, or their disclosure may reveal personal information about an employee or his dependents, such as telephone numbers and addresses, or otherwise constitute an unwarranted invasion of privacy. *Employment applications, except those of executive employees, and examination materials are confidential and not open to public inspection.* However, an applicant for municipal employment who appeals an examination score may review written examination questions relating to the examination unless the questions are to be used in future examinations. The director may authorize municipal employees, agents and contractors to review these records and may make such records of a compelling public

⁶ The court observes that AMC 3.30.016D permits the Municipality to consider the harm that disclosure may cause to an employee's privacy interest, but says nothing about the employee's reputational interest.

interest available to others upon order of a court of competent jurisdiction. [Emphasis added.]

Neither memorandum includes an “analysis, evaluation or critique of an employee’s performance.” Their focus is entirely on Mr. Gerace’s pre-employment behavior and the accuracy of his resume. Neither memorandum includes “personal information” of the type described in the code section, such as telephone numbers and addresses, whose disclosure would constitute an unwarranted invasion of privacy. As noted in Part (2) above, the code provides that employment applications of executive employees are *not* confidential. In any event, the memos at issue are not a job application.

The court concludes that AMC 3.30.016D does not shield the memoranda from disclosure.

(3) UNWARRANTED INVASION OF PRIVACY

The third basis for non-disclosure relied upon by the Municipality is the general claim that the records would cause an “unwarranted invasion of privacy.” The court does not view this as a basis for nondisclosure standing alone. Rather, it is one of several elements that the Municipality must establish in order to withhold records on the basis of AMC 3.90.040B, which the court has already addressed above.

Insofar as the Municipality is arguing that Mr. Gerace has a constitutional right of privacy that protects against disclosure, the court disagrees. Having already found Mr. Gerace has no expectation of privacy with respect to the contents and accuracy of his resume, the court concludes that public disclosure does not present an “unwarranted invasion of privacy.” Furthermore, whatever limited privacy interest Mr. Gerace may have, it is outweighed by the public’s interest in knowing what *Jones v. Jennings* referred to as “the machinations of the republic.” *Jones*, 788 P.2d at 735.

(4) ATTORNEY-CLIENT PRIVILEGE

The final basis for non-disclosure relied upon by the Municipality is the attorney-client privilege. The Municipality asserts the privilege only with respect to the September 2022 memorandum, and not the January 2023 memorandum.

Evidence Rule 503(b) sets out the elements of the attorney-client privilege in Alaska. In general, “[a] client has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications made for the purpose of facilitating the rendition of professional legal services to the client.” The commentary to the rule expands upon the meaning of “confidential communications”: “The requisite confidentiality of communication is defined in terms of intent. A communication made in public or meant to be relayed to outsiders or which is divulged by the client to third persons can scarcely be considered confidential.” (Citations omitted.)

In the case of the September 2022 memorandum, the elements of the attorney-client privilege are met. First, the memorandum constitutes a communication made between a senior Municipality executive and the Municipal Attorney, pursuant to direction from the mayor. [R.9] The three-page memo is authored by Mr. Goecker, the Human Resources Deputy Director, and directed to Blair Christensen, Deputy Municipal Attorney. The memo indicates that it is prepared by the Human Resources Department in collaboration with the Municipal Manager’s Office and the Municipal Attorney’s Office. In general terms, the memorandum addresses an internal review of the circumstances surrounding Mr. Gerace’s hiring and verification of the experience and qualifications he listed on his resume.

Second, the subject line of the memo makes clear that the communication is intended to be confidential. This intent is reinforced in the document’s footer and in a large watermark placed diagonally across all but the first page. Furthermore, the Municipality has consistently declined to disclose the memorandum to persons

outside the “control group” involved in its preparation. There is no indication on the face of the document that the attorney-client privilege has been waived.

Third, memorandum contains a task description indicating that it was intended, at least in part, for the purpose of informing legal counsel. The absence of any ongoing litigation or legal dispute is irrelevant to the existence of the privilege. All that is necessary is that the communication is made for the purpose of facilitating the rendition of legal services. Here, the possibility that Mr. Gerace made false statements on his resume would give rise to a number of legal concerns, including (a) the legal effect on Mr. Gerace’s employment; (b) the need to avoid defamatory statements by personnel having to respond to inquiries about Mr. Gerace, and (c) the development of legal recommendations and guidelines for vetting future appointments. All of these goals would reasonably necessitate involvement and collaboration between the Municipal Attorney’s office and Human Resources, which is what occurred.

Appellants urge the court to apply the attorney-client privilege “narrowly” in this case, citing *Griswold v. Homer City Council*, 428 P.3d 180, 188 (Alaska 2018). They suggest the court should engage in a process of differentiating privileged parts of the communication from non-privileged parts, and redact only the former. Such parsing can be an appropriate approach when dealing with attorney work product. In *In re Mendel*, 897 P.2d 68, 75 (Alaska 1995), for example, the court held that the trial court should conduct an *in camera* review of attorney billing records and “redact the attorney’s mental impressions, conclusions, opinions or legal theories.” The supreme court ordered the same *in camera* document review in *Griswold v. Homer City Council*, 428 P.3d 180, 189 (Alaska 2018), but *Griswold* also involved disclosure of attorney invoices.

In the case of attorney-client communications, parsing and redaction are appropriate when dealing with documents that contain both confidential and non-confidential information. Here again, attorney billing records provide the classic example. In addition to containing work product, attorney invoices frequently

include the specific details concerning written or oral communications with clients. In such instances, the fact that a lawyer wrote a “letter to client” would not reveal a confidential communication. A general description of the subject of the letter would *probably* also not reveal a confidential communication (although the time entry may still be confidential if it reveals a legal strategy). A detailed description of the content of the letter would clearly, however, reveal a confidential communication. The *Griswold* admonition to “narrowly” construe the privilege may simply mean that only the third example is exempt from public disclosure.

Unlike multiple entries in a legal bill, however, the September 2022 memorandum represents a single communication. All of it deals with the same confidential subject matter; at no point, for example, does the author digress and discuss sports, the weather, or favorite fishing holes. Parsing and redaction are inappropriate in such a circumstance. The individual sentences only make sense insofar as they comprise a single communication. The memorandum cannot be parsed and redacted. To suggest that the court break up the memo into its constituent sentences and determine whether each sentence constitutes a privileged communication would destroy the privilege.

Thus, the core elements necessary to establish the attorney-client privilege are here met, and no waiver has been shown. The September 2022 memorandum is, therefore, exempt from disclosure.

IV. CONCLUSION

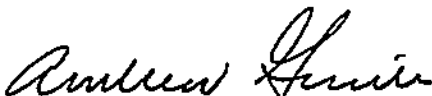
Having considered the parties’ briefs, legal authorities, and reviewed the records submitted *in camera*, the court has concluded the following:

- (1) Neither AMC 3.90.040B nor AMC 3.30.016D exempt either memorandum from public disclosure, and their disclosure would not constitute an “unwarranted invasion of privacy.”

(2) However, the September 2022 memorandum, in its totality, constitutes a confidential attorney-client communication protected by the attorney-client privilege.

The parties shall have ten days to file a motion for reconsideration if they wish to challenge the court's determination. For the time being, the Clerk of Court will file the records submitted *in camera* under seal, meaning that they cannot be inspected by anyone without an order of the court. As such, they will be available to the supreme court in the event of an appeal. Whether or when either record will be ordered unsealed and provided to Appellants will depend on the outcome of any motion for reconsideration and whether an appeal is taken from the court's ruling.

ORDERED this February 8, 2024, at Anchorage, Alaska.


ANDREW GUIDI
Superior Court Judge

I certify that on 2/8/24
a copy of the above was mailed to
each of the following at their
addresses of record:

Forsyth / Hart / Willoughby

Chelsea Phelps, Law Clerk
At-Douti, Judicial Assistant.