

3125 Tecumseh River Rd
Lansing, MI 48906
July 28, 2018

FOIA Coordinator
Office of the City Attorney
124 W. Michigan Avenue, 5th Floor
Lansing, MI 48893

Re: Appeal of Denial of FOIA Request 19-012

FOIA Coordinator:

I would like to appeal the July 24, 2018 denial of my July 16 FOIA request.

In my request, I asked for the March 28, 2015 memo from City Attorney Janene McIntyre to Mayor Bernero on the subject of retiree health care, along with all the attachments.

The reason given for the denial was:

[B]ecause the records requested are attorney work product, are subject to attorney-client privilege because the records contain confidential communication between a client and an attorney for the purpose of obtaining legal advice, and the memorandum contains frank communications that are preliminary to a final agency determination. As such, the records that you requested are exempt from disclosure under MCL 15.243(1)(g), (h) and (m).

MCL 15.243 deals with exemptions to the FOIA.

MCL 15.243 (1)(g) is "information or records subject to the attorney-client privilege."

You can't claim attorney-client privilege simply because an attorney participated in the communication. There are very strict guidelines. This is from the site Leagle.com (<https://www.leagle.com/decision/1975762401fsupp3611715>):

The privilege applies only if (1) the asserted holder of the privilege is or sought to become a client; (2) the person to whom the communication was made (a) is a member of the bar of a court, or his subordinate and (b) in connection with this communication is acting as a lawyer; (3) the communication relates to a fact of which the attorney was informed (a) by his client (b) without the presence of strangers (c) for the purpose of securing primarily either (i) an opinion on law or (ii) legal services or (iii) assistance in some legal proceeding, and not (d) for the purpose of committing a crime or tort; and (4) the privilege has been (a) claimed and (b) not waived by the client.

Attorney-client privilege doesn't apply in this case because it applies only to communications from the client to the attorney. In addition, the privilege must be asserted by the client. The assertion of privilege here comes not from Virg Bernero, but the City Attorney's Office.

MCL 15.243 (1)(h) is "information or records subject to the physician-patient privilege, the psychologist-patient privilege, the minister, priest, or Christian Science practitioner privilege, or other privilege recognized by statute or court rule."

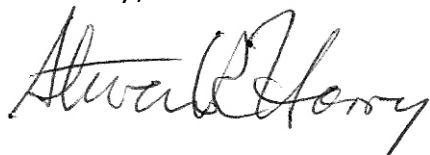
Unless the privilege claimed here is (again) attorney-client, it doesn't seem to apply at all and was apparently cited in error by the City Attorney's Office.

MCL 15.243 (1)(m) is "communications and notes within a public body or between public bodies of an advisory nature to the extent that they cover other than purely factual materials and are preliminary to a final agency determination of policy or action. This exemption does not apply unless the public body shows that in the particular instance the public interest in encouraging frank communication between officials and employees of public bodies clearly outweighs the public interest in disclosure."

The question here is, would City officials and employees feel reluctant to communicate frankly as a result of the release of this three year old memo from then-City Attorney McIntyre to then-Mayor Bernero on the subject of retiree health care? And is that possibility so great that Teamsters 580 retirees and the people of Lansing cannot be allowed to see the memo?

I would hope that the workplace atmosphere created by the current administration encourages communication that is frank and at the same time open to the public.

Sincerely,

A handwritten signature in cursive script that reads "Steven R. Harry". The signature is written in black ink and is positioned below the word "Sincerely,".

Steven R. Harry
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