HEARING OFFICER, CAREER SERVICE BOARD
CITY AND COUNTY OF DENVER, COLORADO
Appeal No. 30-15

ORDER 8-21-15

IN THE MATTER OF THE APPEAL OF:

DANIEL STECKMAN, Appellant,

vs.

DENVER SHERIFF'S DEPARTMENT,
and the City and County of Denver, a municipal corporation, Agency.

This Order addresses the following motions, responses, and replies: Agency's Motion to Quash Subpoena Duces Tecum; Appellant's Response in Opposition to Motion to Quash Subpoena Duces Tecum; Office of Independent Monitor's Reply in Support of Motion to Quash Subpoena Duces Tecum; Appellant's Motion for In *Camera* Review; Agency's Response in Opposition to Appellant's Motion for *in Camera* Review; Agency's Motion to Amend its Response and Objections to Appellant's Motion for Discovery; and Appellant's Response to Agency's Motion to Amend its Response and Objections to Appellant's Motion for Discovery.

1. Chronology, general observations, and forthwith order.

The current round of filings began with Appellant's Motion for discovery from Respondent (the Agency). That filing included a request for "(a)ll records involving this case, including, without limitation, interviews and records of the Office of the Independent Monitor, including notes, recordings, emails, and correspondence related to DSD IAB #S2014-0152." (Appellant Motion p.2 @3.d. After the Agency objected, based on deliberative process privilege, (Agency's Response p. 2 @ 1.d., an order issued requiring the Agency to Produce a so-called *Vaughn Index* regarding the allegedly protected documents. In the mean time, the Agency filed its "Agency's Motion for Reconsideration of Order on Appellant's Motion for Discovery," followed by Appellant's response which, in turn, prompted the "Agency's Response in Opposition to Appellant's Request for a Subpoena for the Production of Documents to the Office of the Independent Monitor and Reply In Support of Motion for Reconsideration." The Agency's request to reconsider was denied on July 31, 2015 and a subpoena issued to the Office of the Independent Monitor to produce the requested documents. The Agency produced its Vaughn index on August 6, 2015, along with an affidavit of the Independent Monitor, followed the next day, August 7, 2015, by its Motion to Quash *Subpoena Duces Tecum*" to which Appellant responded in opposition with his "Response in Opposition to Motion to Quash subpoena Duces Tecum on August 12, 2015. The Agency then filed its "Reply in Support of Motion to Quash Subpoena Duces Tecum" on August 19, 2015. Despite the July 31, 2015 order denying Agency's request to reconsider, the Agency filed "Agency's Motion to Amend its Response and Objections to Appellant's Motion for Discovery" on August 11, 2015. Appellant filed "Appellant's Response to Agency's Motion to Amend its Response and Objections Appellant's Motion for Discovery on August 17, 2015.

In large measure, the above filings concern Appellant's request for information from the Office of the Independent Monitor (OIM) and the Agency's claim that OIM communications are privileged. As previously noted, little new information was produced in subsequent filings that was

helpful to a resolution of this underlying dispute. (See, e.g. Order Denying Agency's Motion to Reconsider Discovery Order...").

These motions, responses, replies, and requests to reconsider have eclipsed the intended simplified, efficient appeals process intended by the Career Service Rules. Hearing Officers are required to maintain an appeals process that is efficient as well as fair. (CSR 19-30 A.). Hearings are presumed to be set at one day, unless good cause is shown. (CSR 19-42 B.). Discovery is narrowly limited to the issues on appeal and is presumed to be limited in scope. (CSR 19-45 B.).

In consequence of the above, the parties are, forthwith, limited to a single response to a motion. Motions must be supported by good cause. Hyperbole and gratuitous descriptions of opposing counsel's filings will cease. In addition, the following findings and orders enter.

1. Deliberative Process Privilege, generally.

The parties recognize that claims and determinations under the common-law deliberative process privilege are controlled by City of Colorado Springs v. white, 967 P.2d 1042 (Colo. 1998). The main purpose of the privilege is to protect the open exchange of opinions critical to the government's decision-making process when disclosure would discourage such exchanges in the future. Id. Thus, such exchanges are protected only when the material sought to be disclosed are (1) pre-decisional and (2) deliberative. *Id.* the pre-decisional component is self-explanatory – a communication made before a decision within the ambit of the agency, or a decision was made with respect to policy. *Id.* "Deliberative" materials must truly reflect the opinions and give-and-take of the process – "the ideas and theories that go into the making of policy." Id. Those ideas and theories typically include recommendations, advisory opinions, proposals, suggestions, and other subjective documents reflecting the personal opinions of the writer, and are so candid or personal that disclosure would likely stifle future frank discussion. *Id.* Where the nature of the documents is contested, as they are here, I am obligated to make an independent determination of the extent to which the privilege applies to each of the documents by balancing the Appellant's interests in disclosure with the Agency's interests in confidentiality. The initial burden falls on the Agency, by way of a "Vaughn index," to show why non-disclosure should be maintained.

The *Vaughn* index should describe specifically each document which the Agency claims is protected, including the author, recipient, and subject matter of each document; should explain why each document qualifies for the privilege, including how the document played a role in the deliberative process; should, by affidavit, explain why disclosure of each document would be harmful; and should distinguish between those portions of the document which may be disclosed and those that are allegedly privileged. *Id.*

The Agency's Vaughn index identifies each document by author, recipient and date. Unfortunately, the key component, the description, used exactly the same, generic words for each of 15 emails, or email strings between the OIM and the recipient or sender: "predecisional email communication between OIM and IAB regarding investigation and interview considerations." Such description is inadequate for me to evaluate the nature of the disputed documents. The affidavit from the OIM similarly states, in conclusory fashion, that the documents under consideration are all pre-decisional and that disclosure would have a chilling effect between the OIM and command staff of the Agency. While the OIM and the Agency have a difficult task of providing sufficient information in the Vaughn index for me to make an informed decision, yet not provide so much information as to forfeit their privilege, the index provided is inadequate for me to make an informed decision as to the two components described above. "The government cannot meet these (disclosure) requirements by conclusory and generalized allegations of privilege." Id. In short, the OIM/Agency have failed to make a showing that the documents

sought to be protected from disclosure under the deliberative process privilege were both pre-decisional and deliberative, as required under White. As previous orders have already determined the relevance of Appellant's requests, then the following orders enter.

2. Agency's motion to quash subpoena to produce to the OIM. The Agency advanced the following arguments in support of its motion.

a. OIM records are irrelevant. As the relevance of Appellant's request was already established, in previous orders, this claim is denied.

b. The OIM subpoena duces tecum is overbroad and burdensome. There were several arguments under this heading. The first repeated the relevance argument cited above. For the same reasons as stated above, that argument is rejected. Next, the Agency agued the subpoena is overbroad in that it encompasses records in the investigation of two other deputies. This argument is moot for reasons stated below. Next, the Agency argues the OIM would be overburdened by compliance, but simply states the OIM has a lot of work for a small agency. While this may well be true, the argument fails to establish how production of emails and documents readily available to the OIM would overburden that Agency. The final argument states OIM work product is protected by City ordinance. The relevant portion of the Denver Revised Municipal Code (D.R.M.C) states:

> The monitor's office, the board, and all persons who participate in the police, sheriff, or fire department's investigative and disciplinary processes are part of the city's deliberative process regarding investigative and disciplinary procedures for uniformed personnel. Furthermore, all information learned by any of those persons or groups during the exercise of their duties shall be protected by the deliberative process privilege.

D.R.M.C. section 2-376 (c)

The ordinance is harmonious with common law deliberative process privilege and does not confer automatic privilege for any and all communications between the Agency (including the Department of Safety) and the OIM. The ordinance simply confers on that otherwise independent agency the status of membership in the group protected by deliberative process privilege. In other words, the ordinance confers status, not substantive blanket protection. As is required of any other member of the protected group, the OIM must establish why otherwise-relevant documents, properly required to be disclosed, should be excluded by the deliberative process privilege. It has not done so.

c. Not enough time. The Agency argued the OIM was required to comply with the subpoena duces tecum request within three days, and states that was insufficient time. Insofar as a continuance has since issued, this argument has become moot.

d. Deliberative Process Privilege. The Agency repeated and expanded upon its privilege arguments. Those arguments were disposed of, above. In addition the Agency, argues incongruously that the OIM does not conduct investigations, is not a part of the investigation process, and has no authority to impose discipline, yet OIM disclosures would "impair the integrity of the investigation and discipline process. The Agency included another sub-claim under this heading. The Agency's concern here was to protect the integrity of the disciplinary process, and the privacy rights of two other deputies apparently involved in similar misconduct. Related to that claim was the "Agency's Motion to amend its Response and objections to Appellant's Motion for Discovery, filed August 11, 2015. The Appellant responded he does not oppose withholding of

information related to the other deputies pending the final outcome of their disciplinary cases. The motion is granted with respect to withholding of information related to the two deputies identified in Agency's Motion to Amend. Consequently this claim is moot since the requested relief has been granted.

E. Hearing Officer failure to enforce CSR 19-45. Here, as well as in the following paragraph and in its section B, the Agency repeated its deliberative process claims which are rejected for reasons stated above.

3. Motion for In Camera Review.

As stated above, the Agency's *Vaughn Index* failed to meet the minimum requirements to establish protection under the deliberative process privilege. Consequently the Appellant's motion is granted. The Agency is ordered to provide the Hearing Office, on or before September 4, 2015, with those documents identified in its *Vaughn Index* for an *in camera* review.

4. Agency's Motion to Amend. The relief requested by this motion was granted, above. Consequently, this motion is moot.

DONE August 21, 2015.

Bruce A. Plotkin
Career Service Hearing Officer