MAINE SUPREME JUDICIAL COURT

Reporter of Decisions
Decision No. Mem 19-11
Docket No. Cum-18-260

CHRISTOPHER A. BOND

v.

TOWN OF WINDHAM

Submitted on Briefs January 17, 2019
Decided January 29, 2019

Panel: ALEXANDER, MEAD, GORMAN, JABAR, and HJELM, JJ.

MEMORANDUM OF DECISION

Christopher A. Bond appeals from a judgment of the Superior Court (Cumberland County, *Mills, J.*) determining that the Town of Windham had just and proper cause to deny Bond access to certain records pursuant to the Freedom of Access Act (FOAA), *see* 1 M.R.S. §§ 400-414 (2017), because the requested records are protected by the work-product privilege, *see* 1 M.R.S. § 402(3)(B); M.R. Civ. P. 26(b)(3); *Springfield Terminal Ry. Co. v. Dep't of Transp.*, 2000 ME 126, ¶¶ 13-19, 754 A.2d 353 (discussing work-product privilege). Bond asserts that the court erred in that determination.[1] We review de novo both the "legal issues regarding the nature and scope of privileges," *Dubois v. Dep't of Envtl. Prot.*, 2017 ME 224, ¶ 13, 174 A.3d 314, and "the trial court's

[1] Bond does not argue that, if the records are protected by the work-product privilege, exceptions to that privilege give him the right to inspect them nonetheless. *See* M.R. Civ. P. 26(b)(3) (stating that work-product material may be discoverable "upon a showing that the party seeking discovery has substantial need of the materials . . . [and] is unable without undue hardship to obtain the substantial equivalent of the materials by other means," although, even with such a showing, the requesting party is not entitled to disclosure of "mental impressions, conclusions, opinions, or legal theories" of an attorney concerning the litigation and contained in the work-product material).

interpretation of . . . FOAA," *Dubois v. Office of the Att'y Gen.*, 2018 ME 67, ¶ 15, 185 A.3d 734 (quotation marks omitted).

Contrary to Bond's contention, the records at issue are work-product material as defined by Maine Rule of Civil Procedure 26(b)(3), and are therefore not a "public record" subject to disclosure pursuant to FOAA, *see* 1 M.R.S. §§ 402(3)(B), 408-A. The records comprise a number of emails, with some accompanying attachments, between Town officials and the Town's attorneys and were created during the pendency of litigation related to a land use dispute between the Town and Bond. That litigation resulted in a judgment for the Town, which we affirmed. *See Town of Windham v. Bond*, No. CV-16-94, 2016 Me. Super. LEXIS 108 (July 13, 2016), *aff'd*, Mem-17-46 (May 9, 2017). Three days after the Town notified Bond that he had not complied with the judgment, Bond requested that the Town make the records available for inspection. Because at that time there remained the prospect of litigation regarding the subject matter of the records, the records fall within the work-product-privilege exception to "public records." *See* 1 M.R.S. § 402(3)(B). On this basis, the Town had just and proper cause when it refused Bond's FOAA request, *see* 1 M.R.S. § 409(1), and we do not reach the Town's alternative assertion that the records are also protected by the attorney-client privilege, *see* M.R. Evid. 502(d)(6) (codifying a qualified attorney-client privilege for communications between a public agency or its officers and its lawyers).

The entry is:

Judgment affirmed.

Christopher A. Bond, appellant pro se

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