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APPELLATE COURT
OF THE
STATE OF CONNECTICUT

A.C. 45885

TOWN OF AVON AND
BRANDON ROBERTSON
v.
JOSEPH SASTRE AND
THE FREEDOM OF INFORMATION COMMISSION

BRIEF OF DEFENDANT-APPELLEE JOSEPH SASTRE

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Counterstatement of Issues

1. Whether the superior court correctly held that a municipal employee's log–used by the town to make employment decisions about its police chief–comprises a 'public record' under the Freedom of Information Act.

2. Whether the superior court correctly held that the log is not an attorney-client privileged communication because it was not created to obtain legal advice, or at the behest of counsel, or kept private.

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The Nature of the Proceedings and the Relevant Facts

The public hearing testimony and *in camera* examination by the Commission create the following administrative record. As Plaintiffs-Appellants Town of Avon and Brandon Robertson (together, "Avon") concede on appeal, the "material facts in this case were not disputed." Avon Br. at 7.

Between June 2018 and October 25, 2019, a town employee made ongoing notes (also referred to as a log) on the behavior and "underlying incidents" of then-police chief Mark Rinaldo. Avon App. at 260 ¶ 12. The resulting document is typed. *Id*. at 121:19. It is eleven pages long and includes "multiple dated entries" and at least one photograph. *Id*. at 260 ¶ 18.

In early November 2019, the note-taking employee met with the town's manager, Plaintiff-Appellant Brandon Robertson, to discuss the incidents and concerns noted and obtain "guidance on how to deal with" Rinaldo given what "the employee had observed." *Id*. at 259 ¶ 10; *see also id*. at 106:11-14; 133:16-18. Importantly, Mr. Robertson is not an attorney, and the employee did not meet with him for the purpose of obtaining legal advice. *Id*. at 259 ¶ 10; 155:11-13; 160:12-15. (In fact, the employee never discussed the log with the town's attorney. *Id*. at 259-60 ¶ 10-13.) The employee did not bring any documents to the meeting with Mr. Robertson. *Id*. at 107:9-25-108:1; 260 ¶ 12.

Based on the information that he learned in that meeting, Mr. Robertson decided to contact the town's counsel, Michael Harrington, about what the employee reported. *Id*. 106:18-20. Mr. Harrington asked Mr. Robertson to inquire if the employee had any documentation of the incidents involving the chief. *Id*. at 260 ¶ 11. Mr. Robertson asked the employee for the log, so that he could give it to Mr. Harrington. *Id*. 107:21-23; 155:11-18; 156:1-7. Soon after, the employee

"showed" Mr. Robertson the log. *Id*. 121:8-16. Mr. Robertson read it "carefully," noting it reflected the incidents and concerns he previously discussed with the employee. *Id*. 122:5; 137:25-138:2; 157:3-16. He then gave the log to Mr. Harrington to make a copy. *Id*. at 244 ¶ 3.

After Mr. Robertson gave the document to Mr. Harrington and consulted with him, the town put Rinaldo on paid administrative leave. *Id*. at 108:14-17. On November 11, 2019, Rinaldo and the town reached an agreement by which Rinaldo would retire immediately and be paid severance. *Id*. at 260 ¶ 15; 110:3-6.

In addition to providing the town advice about how to deal with Rinaldo, Mr. Harrington acted as its litigation counsel in this dispute. At the Commission hearing, Mr. Harrington elected to waive the attorney-client privilege over some of his communications with the town by narrating how the employee's log came to be used by the town in its decision-making. Although he phrased the revelations in the passively voiced third person, Mr. Harrington was repeating into the record the conversation he had with his client's representative, Mr. Robertson:

> [Robertson] then reached out to legal counsel who as he will testify *happens to be me* . . . And part of *in giving him legal advice* [Robertson] was asked to ask that individual if they had any personal notes . . . [t]hose notes were provided to counsel. They were given to [Robertson,] who immediately passed them on to counsel. A copy of those notes was then returned to that individual. Those notes were provided solely in order to allow the Town's counsel

to provide legal advice.[1]

Id. at 101:11-24 (emphasis added).

In February 2020, Defendant-Appellee Joseph Sastre requested copies of records relating to the accusations against Rinaldo. *Id*. at 258 ¶ 2. Although it provided Mr. Sastre with copies of the memorandum putting Rinaldo on leave and its severance agreement with him, Avon did not produce the log. *Id*. at ¶ 3. The log is therefore the only record in dispute here. *Id*. at 117:8-15.

In March 2020, Mr. Sastre appealed Avon's withholding to the Commission. *Id*. at 259 ¶ 5. In November 2020, the Commission held a public hearing via videoconference. *Id*. at 82. At that hearing, Avon asserted just one basis for withholding the log: attorney-client privilege, via Exemption 10. *See* Conn. Gen. Stat. § 1-210(b)(10). When asked directly, Avon expressly disclaimed any other basis for withholding:

> [Hearing Officer]: And so the exemption being claimed, just so I understand, attorney-client privilege. There's no other exemption being claimed, Attorney Harrington?
>
> Mr. Harrington: Yes. No, no other exemptions.

Id. at 132:15-20.

Avon produced just one witness at the hearing, Mr. Robertson. *Id*. at 84. Avon elected not to introduce testimony from the log's author, about the author's identity, *id*. at 104:8-9; 104:15-17; or

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[1] Mr. Harrington chose to reveal—or elicit—the contents of his conversations with his client again at 103:15-24 (repeating what the town manager asked of Harrington, and his reply) and 107:9-20 (town manager's testimony about what he did to follow counsel's instructions).

reflecting the author's 'intentions' – particularly if the intent was to communicate the log's contents to an attorney and remain private. *Id*. at 119:18-23; 163:11-12; 137:9-12. Avon also presented no evidence about the contents of the log, deciding instead to repeatedly refer to whatever was inside it as "notes."

On September 21, 2021, the Hearing Officer issued a proposed final decision reflecting that Avon contended only that "the . . . records . . . are exempt from disclosure pursuant to § 1-210(b)(10), G[eneral] S[tatutes]." Avon App. at 199-200 ¶ 19. The proposed decision made no mention of any other statutory exemption from the Freedom of Information Act's (FOIA) disclosure mandate. It concluded that the log could not be withheld under Exemption 10 because it was created prior to the town seeking legal advice and was not prepared for the purpose of obtaining that advice. *Id*. at 201 ¶ 29.

Avon filed a four-page objection to the proposed final decision. *Id*. at 203-06. In it, Avon rehashed its contention that the log was "given to [Mr. Harrington] for the sole purposes of providing legal advice," and was therefore privileged. *Id*. at 205. Avon then added a second argument for the first time: that the log was not a "public record" for purposes of FOIA. *Id*. at 203. In so doing, Avon did not cite the term's definition at Conn. Gen. Stat. § 1-200(5) or its interpretive case law, but relied instead on out-of-state and federal decisions.

Notably, Avon's objection did not claim the personal privacy exemption—much less cite its statutory basis at Conn. Gen. Stat. § 1-210(b)(2), mention the familiar two-part test for withholding under it,[2]

[2] Information may be withheld under Exemption 2 "only when [it] does not pertain to legitimate matters of public concern and is highly offensive to a reasonable person." *Perkins v. Freedom of Info. Comm'n*, 228 Conn. 158, 175 (1993).

or cite a single case addressing it.

The Commission considered the proposed final decision at its October 2021 meeting. Avon App. at 209. There, Mr. Harrington set forth Avon's two bases for objection:

> [F]irst because these were personal notes that were not retained by the Town or used by the Town for a counter position but exclusively by Town Counsel, they were not a public record. But to the extent they were . . .[,] they would be privileged very similar to the investigation notes that were conducted in [*Shew v. Freedom of Info. Comm'n*, 245 Conn. 149 (1998)].

Id. at 212:11-20.

Following Mr. Harrington's brief argument, the Hearing Officer addressed the Commission and reiterated that only one exemption was at issue. "I specifically asked that Respondents at the hearing if they were raising any other exemption other than the attorney-client privilege and they said that they were not. So I just want that to be clear." *Id*. at 219:23-220:4.

On rebuttal, Mr. Harrington did not controvert the Hearing Officer's statement and claim any new exemption, perhaps because the Uniform Administrative Procedure Act (UAPA) and the Commission's rules of practice both require public agencies to do so well ahead of a

full Commission hearing on the adoption of a proposed decision.[3] Instead, he repeated the Avon's argument that the log drafter's 'intent' made the document something other than a "public record" for FOIA purposes, *id*. at 223:22-225:13, even though Avon introduced no such evidence at the September contested case hearing.[4]

At the request of Commissioner Streeter—who would have otherwise voted against the Hearing Officer's report—the Commission voted to inspect the log *in camera*. *Id*. at 233:1-4; 238:11-239:12. After doing so, the Commission re-noticed the same proposed final decision, without changes, for adoption at its November 2021 meeting. *Id*. at 242. At that meeting, all Commissioners were in unanimous agreement with the Hearing Officer's report, with Commissioner Hankins noting that the log was "not even close to any type of attorney-client privilege[d]" material. *Id*. at 252:21-253:6; 252:13-18.

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[3] *See* Conn. Gen. Stat. § 4-179(a) (requiring the agency afford contested case parties "to file exceptions and present briefs" in advance of a final agency meeting to avoid surprise); Conn. Agencies Regs. § 1-21j-40(b) ("[N]o party . . . shall present any argument at the commission meeting . . . unless such argument has been raised (1) at the hearing in the contested case; or (2) in a . . . brief filed . . . on or before . . . the week immediately prior to the meeting at which the proposed final decision is scheduled to be discussed . . .; or (3) in the proposed final decision itself.").

[4] Once again, Avon waived any disagreement with the state of the record when Commissioner Fuzesi expressly inquired whether "there [i]s anything in the record from the person who made these notes that indicated a request for privacy or *if a privacy issue had been raised*." The Hearing Officer responded "[n]o," and Mr. Harrington remained silent. Avon App. at 235:6-13 (emphasis added).

Avon appealed to the superior court on December 9, 2021. In its appeal, it reprised its two arguments that the log was not a public record, and that it was at any rate privileged. But for the first time, Avon raised a new issue: that the Commission's order "[f]ailed to exempt from disclosure the names of individuals mentioned in" the log. Clerk's App. at 14 ¶ 18(c). Nine months later, the superior court affirmed the Commission's decision, turning aside both of Avon's arguments and correctly noting that Avon's "passing mention" of privacy in its briefing could not rectify the fact that Exemption 2 "was not raised by [Avon] in the administrative proceeding below and cannot now properly be raised with this court on appeal for the first time." *Id*. at 31 n.13.

Avon appealed to this Court on February 24, 2023.

Legal Argument

While Avon attempts to dress up this case in fancy packaging, it covers familiar ground. What a public record is under Conn. Gen. Stat. § 1-200(5), and what attorney-client privilege is in our statutory and common law, are not new concepts for Connecticut's appellate courts. This appeal is a standard dispute over a withholding that fails to meet a FOIA exemption under the relevant Connecticut statutes and caselaw. The Commission correctly held in 2021 that the log is a public record, and that it is not privileged. The superior court agreed. This Court should affirm, and order disclosure.

1. Standard of Review

A party appealing a decision from the Commission must do so in accordance with the UAPA. Conn. Gen. Stat. § 1-206(d). For questions of fact, the scope of judicial review is "very restricted." *City of New Haven v. Freedom of Info. Comm'n*, 205 Conn. 767, 773 (1988) (internal

citations and quotations removed). "Neither [the appellate court] nor the trial court may retry the case or substitute its own judgment for that of the [administrative agency]." *Aronow v. Freedom of Info. Comm'n*, 189 Conn. App. 842, 858 (2019) (internal citations and quotations removed). Accordingly, an "agency's factual determination must be sustained if it is reasonably supported by substantial evidence in the record taken as a whole." *Rocque v. Freedom of Info. Comm'n*, 255 Conn. 651, 659–60 (2001).

Under the UAPA, judicial review of legal conclusions is also "limited." *City of New Haven*, 205 Conn. at 773–74. Courts are tasked with deciding whether, "in light of the evidence, the [agency] has acted unreasonably, arbitrarily, illegally, or in abuse of its discretion." *Aronow*, 189 Conn. at 858. If a court determines that an agency's conclusion of law resulted from a "correct application of the law to the facts found and could reasonably and logically follow form such facts," such conclusion must stand. *Id*.

In this case, Avon attempts to cast its two issues on appeal as questions of first impression meriting *de novo* review by this Court. *See* Avon Br. 15. But this case is not novel. It "involves applying the well settled meaning[s]" of the term 'public record' as defined by Conn. Gen. Stat. § 1-200(5), and the scope of the attorney-client privilege, to the facts of this matter. *Rocque*, 255 Conn. at 659. Therefore, the appropriate standard of review is "whether the commission's factual determinations are reasonably supported by substantial evidence in the record taken as a whole." *Id*. at 659-60. On this standard, the decision of the Commission (affirmed by the superior court) should be affirmed.

Even if this Court were to apply plenary review, the result would not be different. As described below, Avon has not shown and cannot show that the log is not a "public record" for FOIA purposes.

Conn. Gen. Stat. § 1-200(5). And Avon has not shown and cannot show that the log is privileged.

2. Disclosure is the default, and Avon has failed to meet its burden to show that the record may be withheld.

Connecticut's Freedom of Information Act ("FOIA") states, "[e]xcept as otherwise provided by any federal law or state statute, all records maintained or kept on file by any public agency … *shall be public records*." Conn. Gen. Stat. § 1-210(a) (emphasis added). The legislative policy of FOIA "is one that favors the open conduct of government and free public access to government records." *Clerk of Common Council v. Freedom of Info. Comm'n*, 215 Conn. App. 404, 413 (2022). As such, courts have consistently held that "the general rule under [FOIA] is disclosure with the exceptions to this rule being narrowly construed." *City of New Haven*, 205 Conn. at 775; *see also Perkins v. Freedom of Info. Comm'n*, 288 Conn. 158, 167 (1993).

Because disclosure is the default, "[t]he burden of establishing the applicability of an exemption clearly rests upon the party claiming the exemption." *Perkins*, 288 Conn. at 167; *see also PSE Consulting, Inc. v. Frank Mercede & Sons, Inc.*, 267 Conn. 279, 330 (2004) ("The burden of proving each element of [attorney-client] privilege, by a fair preponderance of the evidence, rests with . . . the party seeking to assert the privilege."). Any party attempting to conceal public records must provide "more than conclusory language, generalized allegations or mere arguments of counsel." *City of New Haven*, 205 Conn. at 776. Instead, it must create a "sufficiently detailed record" that proves an exemption's applicability. *Id*.

As the record below makes clear, Avon has failed to meet this burden. Avon has failed to establish either that the log is not a public

record, or that it is privileged. And any last-ditch attempt to raise new exemptions—or worse, suggest new evidence—on this appeal, especially those Avon explicitly disclaimed below, should be soundly rejected by this Court as flouting both administrative exhaustion and the appellate mandate.

3. As the superior court correctly affirmed, the log is a public record.

The log is a public record. Contrary to Avon's contentions, the statutory definition of "public record," and Connecticut caselaw, controls.

"Public record" is a term of art under FOIA. Conn. Gen. Stat. § 1-200(5). It means documents "relating to the conduct of the public's business prepared, owned, used, received or retained by" a public agency. *Id.*

This definition of "public record" is extremely broad. Over the years, Connecticut appellate courts have affirmed that public records under FOIA include everything from a school psychologist's sick leave records, *Perkins*, 228 Conn. at 177, to "computerized aerial photographic images of sites within the state and associated data that are owned and copyrighted by" a corporation, *Pictometry Int'l Corp. v. Freedom of Info. Comm'n*, 307 Conn. 648, 652 (2013), to internal affairs investigations by the Hartford Police Department, *Chief of Police, Hartford Police Dep't v. Freedom of Info. Comm'n*, 252 Conn. 377, 386 (2000), to personal journals seized as part of a search warrant, *Comm'r of Emergency Servs. & Pub. Prot. v. Freedom of Info. Comm'n*, 330 Conn. 372, 400 (2018).

The reason for this broad interpretation is simple. "[I]t is well established that the general rule under the Freedom of Information Act [FOIA] is disclosure, and any exception to that rule will be

narrowly construed in light of the general policy of openness expressed in the FOIA legislation." *Carpenter v. Freedom of Info. Comm'n*, 59 Conn. App. 20, 23 (2000) (affirming disclosure) (internal citation omitted).

The log at issue here is a public record. First, a log detailing "concerns" about a police chief—concerns that led to his immediate departure—indisputably "relat[es] to the public's business." Second, the log was both "used," "received," and "retained" by Avon.

a. The log "relates to the conduct of the public's business."

First, the log "relat[es] to the conduct of the public's business." Conn. Gen. Stat. § 1-200(5). It reflects an employee's observations of the town's police chief, and it led to the town putting the chief on leave and negotiating an end to his employment.

As a general matter, "[t]he public has a right to know not only who their public employees are, but also when their public employees are and are not performing their duties." *Perkins*, 228 Conn. at 177. (affirming disclosure of employee's attendance and sick leave records under FOIA). The town's police chief is a public employee who heads a 46-member department, serves as a member of the Town's Management Team, and reports directly to the Town Manager.[5] He is a "servant of and accountable to the public," and his conduct in his high-ranking public job necessarily implicates the public's business. *Id.* at 177.

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[5] *See* Town of Avon, Connecticut Recruitment Announcement: Chief of Police (Dec. 20, 2012), available at https://www.avonct.gov/sites/g/files/vyhlif151/f/uploads/chief_of_police_brochure_12-20-21.pdf).

Moreover, as our Supreme Court has affirmed, how police conduct themselves is of immense importance to the public. *Hartford v. Freedom of Info. Comm'n*, 201 Conn. 421, 435 (1986). In *Hartford*, the Supreme Court considered the separate-but-related question of whether internal investigation records regarding complaints of police misconduct are exempt from disclosure under § 1-210(b)(2). Under that standard, so long as a record is a medical or personnel file or "similar," an agency may claim an exemption if they show that disclosure of the record "would constitute an invasion of [] personal privacy"—that is, that "the information [1] does not pertain to legitimate matters of public concern and [2] is highly offensive to a reasonable person." *Perkins*, 228 Conn. at 168. In *Hartford*, the Supreme Court held that the public has a "legitimate interest" in police misconduct and affirmed disclosure of investigative records. 201 Conn. at 435.

In the decades that followed, countless Commission and appellate decisions have cemented the public interest in police conduct. For example, in *Burgin v. Town of East Hampton*, the Commission considered whether a police sergeant's sexually harassing personal emails were public records. It ruled that they were, because the emails helped the public understand police misconduct triggering town intervention:

> It is found that these records will facilitate the public's understanding of what occurred, and thereby permit a more thorough evaluation of the respondent town's investigative process, decision-making and overall handling of an important matter involving a public employee. Accordingly, it is found that such records pertain to legitimate matters of public concern.

Burgin v. Town of East Hampton, Docket #FIC 2011-704 ¶ 26 (July

11, 2012) ("*Burgin* I").

In a similar case before this Court—involving a police lieutenant who had "demonstrate[d] improper off duty conduct" in personal instant message conversations and other personal interactions—the Court agreed that these records were public records, and that they pertained to legitimate matters of public concern. *Tompkins v. Freedom of Info. Comm'n*, 136 Conn. App. 496, 500 (2012). In doing so, this Court affirmed the Commission's reasoning that disclosure would help the public understand the department's "handling of an important matter involving a fellow police officer." *Id* at 509. (internal citation omitted). After all, the instant message conversations at issue "contain[ed] the information which formed the basis for and triggered the internal affairs investigation in this case." *Id.* Finally, this Court affirmed the Commission's rationale that "the more egregious the specific behavior, the more a finding of legitimate public concern is

warranted." *Id.* (internal quotation marks omitted).[6]

Avon offers this Court zero basis on which to hold that a *police chief's misconduct* is not a matter that "relates to the conduct of the public's business" under Conn. Gen. Stat. § 1-200(5). Nor could it. Instead, it devotes pages to irrelevant out-of-state cases with easily distinguishable facts. *See* Avon. Br. at 19-20 (discussing a case from Michigan, Ohio, S.D.N.Y., and Indiana). For example, Avon cites to a Michigan case holding that an individual town board member's meeting notes were not public records under Michigan's Freedom of Information law. *Hopkins v. Duncan Twp.*, 812 N.W.2d 27, 36 (Mich. 2011). In that case, the meeting notes were never disclosed to or shared with anyone else; were never used by the town; and were "retained or destroyed at [the board member's] sole discretion." *Id.* Unsurprisingly, the Michigan court agreed they did not meet the

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[6] In a related analysis, regarding what constitutes "matters of public concern" under the First Amendment, courts uniformly hold that how police conduct themselves is of *utmost* public concern. *Schnabel v. Tyler*, 230 Conn. 735, 756 (1994) (ruling, as a matter of law, that speech about police misconduct addresses matter of public concern). *See also Jackler v. Byrne*, 658 F.3d 225, 237 (2d. Cir. 2011) ("police malfeasance" is of paramount public concern); *Mandell v. Suffolk Cnty.*, 316 F.3d 368, 383 (2d Cir. 2003) (same for police department's "systemic racism and anti-Semitism"); *Morris v. Lindau*, 196 F.3d 102, 111 (2d Cir. 1999) (same for "crime rates, police staffing, equipment shortages and related budgetary matters"), *abrogated on other grounds, Lore v. City of Syracuse*, 670 F.3d 127 (2d Cir. 1999); *Piesco v. City of New York*, 933 F.2d 1149, 1157 (2d Cir. 1991) (same for "competency required to become a police officer"), *abrogated on other grounds, Jeffries v. Harleston*, 52 F.3d 9, 12 (2d Cir. 1995).

Michigan definition of public records. *Id.* In fact, Connecticut's FOIC agrees that meeting notes that are never disclosed to or shared with anyone else, and that an agency has no legal right to, are memory aids rather than public records. *See, e.g.*, *Lynn Ezzo v. Berlin Public Schools*, Docket FIC #2018-0012 (Oct. 10, 2018). Yet none of this has anything to do with the present context, where the log at issue was shared with the town manager and town attorney, and was impetus for the police chief's separation from his employment.

In a footnote, Avon finally acknowledges the statutory definition of public record—"relat[es] to the conduct of the public's business," Conn. Gen. Stat. § 1-200(5)—and cites two Connecticut cases. Avon Br. at 20 n.6. The first is an FOIC decision from 1977 stating that a patient could not, via FOI request, demand his own health records from a stay at a state hospital. *Bilodeau v. Norwich Hospital*, Docket #FIC 77-93 (June 2, 1977). Much has changed in the nearly 50 years since this decision, including that state law entitles a person in Connecticut to their own health records, *see* Conn. Gen. Stat. § 20-7c.[7] Regardless, the Commission's conclusion that a person's individual medical record does not unilaterally "relate to the conduct of the public business," *Bilodeau* at 3, does not say anything about whether "concerns" about the on-the-job conduct of a town's police chief implicate the "conduct of the public's business."

The second case Avon cites is more recent, but no more helpful: *Burgin v. Town of East Hampton*, Docket #FIC 2012-089 (Dec. 12, 2012) ("*Burgin* II"). In *Burgin* II, the FOIC held that certain emails (though not all) written by a police chief were not public records. *Id.* at

[7] In fact, notwithstanding its conclusion, the FOIC "strongly urge[d]" the hospital to allow the complainant access to his medical record. *Bilodeau* at 3.

¶¶ 13, 26. Unlike those in *Burgin* I, above—which were sexually harassing, and which the FOIC found must be disclosed so that the public could understand the misconduct at issue and the town's response to it—the emails in *Burgin* II were routine, generic messages that did not contain any evidence of misconduct, "relate to the officer's public position," or otherwise implicate his work in any way. *Id.* at ¶ 13. Thus, *Burgin* II is of no help to Avon, particularly when contrasted with the Commission's on-point decision regarding police records evidencing misconduct in *Burgin* I.[8]

In Avon's view, anything it summarily deems "personal" or "private" is immune from disclosure. *See* Avon Br. at 19-20. Avon goes so far as to suggest that no case in Connecticut exists "wherein a person's private notes were required to be disclosed under Act." *Id.* As noted earlier, this is wrong. *See, e.g.*, *Tompkins*, 136 Conn. at 509 (police employee's private instant messages were public records subject to disclosure); *Burgin I*, Docket #FIC 2011-704 ¶ 26 (police employee's private emails were public records subject to disclosure, and further did not meet exemption). Regardless, Avon ducks and weaves around the actual issue at hand: whether a log of "concerning" police chief conduct relates to the conduct of the public's business. It does.

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[8] Avon later cites to a similar case, *Comm'r of Dep't of Correction v. Freedom of Info. Comm'n*, No. HHBCV196053190, 2020 WL 5606842, at *4 (Conn. Super. Ct. July 30, 2020). In that case, a superior court concluded that DOC employees' text messages on personal cell phones were not public records. Yet the crucial distinction remains—the *Comm'r* request was a demand for a search of all text messages on multiple employees' personal phones, not a targeted request for a specific message that implicated agency or employee conduct.

b. The log was "used," "received," and "retained" by a public agency.

Not only does the log relate to the conduct of the public's business, but it was also "used, received or retained by" Avon, Conn. Gen. Stat. § 1-200(5).

This portion of the definition of public record is disjunctive: A document is a public record if it is "prepared, owned, used, received *or* retained by" a public agency. Conn. Gen. Stat. § 1-200(5) (emphasis added). Any one of these circumstances will suffice.

Here, the log was used by the town to separate from its police chief. It was received by the town manager, Mr. Robertson, and the town's agent, Mr. Harrington. And it continues to be retained by Mr. Harrington. For all three reasons, the log meets the definition of public record.

First, the log was used by the town. The log was an integral part of the series of events that started with an employee raising serious concerns about police chief misconduct and ended shortly thereafter with the police chief heading out the door. As Mr. Robertson testified, he had a "discussion" with a managerial employee and "concerns were raised" as to the police chief, Mark Rinaldo. Avon App. at 133:16-18. The concerns were evidently so serious that Mr. Robertson went to the town's attorney. *Id*. at 106:18-20. Shortly thereafter, the employee "showed" Mr. Robertson the log. *Id*. at 121:8-16. Mr. Robertson "read it carefully." *Id*. at 122:5. He then gave it to Mr. Harrington to make a copy. *Id*. at 244 ¶3. Afterward, Mr. Robertson had a meeting with the chief "and placed him on administrative leave, paid" pending an investigation. *Id*. at 108:14-17. Ultimately, no investigation was done, but only because the chief "very shortly thereafter agreed to retire." *Id*. at 110:3-6. As this series of events makes plain, the police chief's departure was intimately associated with the log.

In response, Avon attempts to minimize the log's role. It argues that the log was not used for an investigation, since none was conducted, and that it may or may not have been used by Mr. Harrington in giving advice about the police chief's exit. Avon's argument misses the forest for the trees. Clearly, the town and town counsel "used" the log to facilitate the chief's departure. When asked, Mr. Robertson readily agreed:

> [Mr. Sastre]: Do you understand this document to be responsive to my open request and that it contains allegations made against Mark Rinaldo which led to you placing [him] on administrative leave?
>
> [Mr. Robertson]: Yes, I do.
>
> *Id*. at 117:8-12.

Second, the log was received by both Mr. Robertson and Mr. Harrington. The definition of "receive" is "to acquire or get something." Black's Law Dictionary (11th ed. 2019). Mr. Robertson was the town manager. He acquired the log from the employee, upon which he "read it carefully." Avon App. at 122:5. *See also id.* at 137:25-138:2 (Mr. Robertson recalling multiple details about it, such as whether it was typed and that it included a photograph).

Avon tries to bypass Mr. Robertson entirely. In doing so, Avon interjects new standards into the statutory definition, asserting that "received" must mean "given to a public agency for the agency's retention." Avon Br. at 19. Avon cites no authority for its assertion. And since the statute already denotes retention as a separate basis—"prepared, owned, used, received or retained by" a public agency—Avon's suggestion that "received" means "retained" also contradicts a "basic tenet of statutory construction." *Remax Right Choice v. Aryeh*, 100 Conn. App. 373, 382 (2007) ("Every word and phrase [in a statute] is presumed to have meaning, and we do not construe statutes so as to

render certain words and phrases surplusage."). Avon's duplicative read should be set aside.[9]

And finally, Mr. Harrington, too, "received" the log: No one disputes that he acquired it from Mr. Robertson. He then "retained" it, and concedes that he continues to retain it.

Avon's argument is that Mr. Harrington does not count. *See* Avon Br. at 19 (arguing that the log was not "retained" by the town because "the only copy was retained by counsel"). But it is immaterial that Mr. Harrington is employed by a law firm retained by the town, and not a municipal employee himself. Whoever the town hires as its lawyer becomes an agent of the town. *Ackerman v. Sobol Family P'ship, LLP*, 298 Conn. 495, 509 (2010) (dictating that rules of agency "apply to the relationship between attorneys and their clients").

As an agent *and* as the town's lawyer, Mr. Harrington is doubly bound to give Avon the log upon its request. An agent must "give his principal information which is relevant to affairs entrusted to him and which, as the agent has notice, the principal would desire to have." Restatement (Second) of Agency § 381. Similarly, a lawyer "must allow a client or former client to inspect and copy any document possessed by the lawyer relating to the representation," Restatement (Third) of the Law Governing Lawyers § 46(2). Accordingly, "anything in a client's

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[9] Avon continues to interject new requirements into the remainder of Conn. Gen. Stat. § 1-200(5). It claims that "prepared" requires a document to be "prepared by a public employee as part of their duties or at the direction of the public agency." Avon Br. at 16. It further claims that a "used" means but "used for a public purpose." *Id.* at 18. Avon gives no basis for these. And, since the statute already contains a requirement that the record "relat[e] to the public's business," Avon's interpretation runs into the same redundancy issue.

file, which is in the hands of the client's attorney, belongs to the client, with the exception only of the attorney's notes or work product." *Womack Newspapers v. Town of Kitty Hawk*, 639 S.E.2d 96, 104 (N.C. Ct. App. 2007) (affirming judgment that contracts were public records to be obtained from the town's lawyer and furnished to the requester). If the town asked Mr. Harrington for the log, he would have no choice but to hand it over.

In other words: Avon may not pretend the file is not "retained" by the town simply by physically storing it at its counsel's office. *Fox v. Perroni*, 188 S.W.3d 881, 888 (Ark. 2004) (holding that "[a]lthough the records were in the possession of outside counsel, we held they were not exempt from disclosure and the City was required to produce the documents"); *see also First Selectman, Town of Columbia v. Freedom of Info. Comm'n*, No. CV000501055, 2000 WL 1862558, at *3 (Conn. Super. Ct. Nov. 28, 2000) (holding that municipalities should not be allowed "to circumvent their statutory obligations relating to disclosure of 'public records' by simply delivering the records to their attorney," and further, that outside counsel was agent for the town). As the Commission has explained, if an agency could "avoid disclosure of a public record merely by avoiding physical possession of such record," it vitiates the entire point of FOIA. *Muir v. Chief, Police Department, City of Hartford; Police Department, City of Hartford; and City of Hartford*, Docket #FIC 2015-323 (Jan. 13, 2016). Instead, where an agency is "legally entitled" to access a record, it must do so—and then produce it. *Fromer v. New London Director of Law*, Docket #FIC 92-71 (Feb. 24, 1993).

None of Avon's contentions about what "used," "received," or "retained" means has support in statute or caselaw, and Avon offers none. Nor do the cases Avon cites help its argument, since they are readily distinguishable. This case does not involve a broad-based

search of public employees' personal text messages that had no relevance to their public duties, department, or office. *Cf. Comm'r of Dep't of Correction*, 2020 WL 5606842 at *4. This case does not involve an audio recording of a town meeting taken (and destroyed) by an independent contractor with no obligation to provide a copy to the town. *Cf. William Comerford v. Town of Wallingford*, Docket #FIC 2009-103 (Sept. 23, 2009).[10] And this case certainly does not involve documents that were *written by* attorneys representing a town in the course of their legal representation. *Cf. Bruce Kaz v. Suffield*, Docket #FIC 1999-575 (Jan. 23, 2002); *Town of Windham v. Freedom of Info. Comm'n*, 48 Conn. App. 522 (1998).[11]

Finally, Avon suggests as a general matter that the log cannot be a public record "because [it was] created by a private individual and not the department." *Comm'r of Emergency Servs. & Pub. Prot.* at 397. Not true. *Id.* at 398-99. As our Supreme Court recently held, "documents that are not created by an agency, but come into its possession" are still public records, even if they are "owned by someone

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[10] In *Comerford*, the Wallingford Housing Authority hired an independent contractor to take meeting minutes. *Comerford v. Town of Wallingford*, Docket #FIC 2009-103 at para. 11. Neither contract nor policy governed her employment. *Id.* at 12. She decided to tape a January 22 meeting to help her write minutes. *Id.* at 13. She never shared the tape with the town, and destroyed it four days later. *Id.* at 17. The FOIC held that the recording was not a public record. Unlike the present context, the record was neither created by a town employee nor was the town entitled to it.

[11] In *Kaz* and *Windham*, attorneys for the respective towns themselves drafted notes and affidavits as part of their representation. These facts do not control here, where Mr. Harrington is not the author of the log.

else." *Id.*

Contrary to Avon's argument, the statutory definitions of "public record" govern. Because the log contains information "relating to the conduct of the public's business," and because it was at the very least "used," "received," and "retained" by Avon, it is a public record under Conn. Gen. Stat. § 1-200(5).

c. Avon's counsel's suggestions about the drafter's wishes are not record evidence—and in any case, intent does not govern disclosure.

In arguing that the log is not a public record, Avon suggests in passing that the employee who wrote it might have wished to keep it private. *See, e.g.*, Avon Br. at 22. This whispered argument, such as it is, suffers from three flaws.

First, Avon chose not to provide the Commission with any evidence whatsoever about the log drafter's wishes. To the contrary, Avon decided *not* to raise a privacy exemption at the Commission. On appeal, Avon merely provides the argument of counsel suggesting that the drafter may not have wished it to be revealed. That is insufficient, and "necessarily fatal" to Avon's argument. *Comm'r of Emergency Servs. and Pub. Protection,* at 396. As described infra at pp. 39-42 , Avon lost its chance: absent any evidence on the subject, this Court may not speculate. *Id.*

Second, a writer's intent in writing a document does not govern disclosure under FOIA. Documents are often composed for reasons having nothing to do with whether they will ever see the light of day. *See, e.g.*, *Tompkins*, 136 Conn. App. at 509 (police lieutenant's improper instant messages); *Burgin I*, Docket #FIC 2011-704 ¶ 26 (police sergeant's sexually harassing e-mails). What matters is the use of the document, not its source, author, or author's understanding of

what its use would be. Making intent the standard would also be impossibly tricky: An author may have one intent at the time of drafting, and another once the document is requested by a member of the public. Regardless, Avon has provided zero authority or argument meeting its burden to overrule the governing case law.

Third, Avon's persistent use of loose terms like "personal" and "private" to describe the log makes a mishmash of the law. Whether a record is a public record in the first place is distinct from whether a public record may nonetheless be exempt from disclosure if it is a particular type of file *and* contains information that would constitute an invasion of personal privacy. *See* Conn. Gen. Stat. § 1-210(b)(2). Even if Avon had properly raised the so-called privacy exemption at any point in the below proceedings—which it did not—and even if that exemption were met—which it is not—Avon is putting the cart before the horse. The record is still a public record; the question would be whether it was nonetheless exempt from disclosure.

In sum, Avon cannot redefine "public record" in this appeal merely by throwing around the words "personal" and "private." Rather, the statutory definition "is binding on our courts." *Rainforest Cafe, Inc. v. Dept. of Revenue Services*, 293 Conn. 363, 373 (2009) (calling this "axiomatic"). The longstanding statutory definition of public record is Conn. Gen. Stat. § 1-200(5). By this definition, the log is a public record.

4. The superior court correctly affirmed that the log is not exempt from disclosure under the attorney-client privilege.

Once Avon's contentions about the log not being a 'public record' are dispensed with, Avon's lone basis for withholding the log is Exemption 10. That provision permits the withholding of public

records comprising "communications privileged by the attorney-client relationship." Conn. Gen. Stat. § 1-210(b)(10). Although Connecticut has codified the elements of attorney-client privilege in a statute relating to public employees, *see* Conn. Gen. Stat. § 52-146r, the elements are the same regardless of who claims the privilege, and regardless of whether that statute or the common law is applied. *E.g.*, *Lash v. Freedom of Info. Comm'n*, 300 Conn. 511, 516 (2011). The privilege applies only to (1) communications (2) between client and attorney (3) made in confidence (4) for the purpose of seeking legal advice. *State v. Jose V.*, 157 Conn. App. 393, 407 (2015) (internal quotations omitted). As with every other FOIA exemption, the attorney-client privilege "is strictly construed," with the burden of proof resting on the person or entity asserting it. *PSE Consulting*, 267 Conn. at 329-30. The appellants here assert the privilege over just one 'communication,' the employee's log of Mark Rinaldo's behavior. Avon Br. 22. They assert that the client was the Town of Avon, and the attorney was Mr. Harrington. *Id.* 22-23.

a. Nothing in the record shows the log's author wrote it for the purpose of securing legal advice from Mr. Harrington.

Avon claims the privilege over a document—the log—rather than an oral communication. But Avon right away runs into difficulties proving that the log is privileged, because the log is not a communication to or from Mr. Harrington, such as a letter, email, or text message requesting or providing legal advice. Nor is the log a memorialization of a conversation with Mr. Harrington during which the town sought or received legal advice. Instead, the log was a preexisting document written well in advance of the town's seeking advice from Mr. Harrington about Mark Rinaldo. Avon App. at 112:2-9.

See also id. at 171:4-16 (finding that "these notes undisputedly were created before counsel was engaged and before there was a request by the Town for legal advice.").

Because preexisting documents like the log do not become privileged discussions just because a client transmitted them to a lawyer, *e.g.*, *Fisher v. United States*, 425 U.S. 391, 403 (1976), Avon is left with just one theoretical route to proving that the log was an attorney-client communication. They could succeed if they prove (1) that the log's author wrote the document "with the intent to communicate the contents to" Mr. Harrington, and, (2) that the log's author "actually communicated the contents to" him. *State v. Kosuda-Bigazzi*, 335 Conn. 327, 343 (2020). There is no dispute as to the second inquiry, but Avon has failed to prove the first.

Nothing in the record demonstrates that the log's author wrote it for the purpose of securing legal advice for him or herself from Mr. Harrington. The log, "detailing underlying incidents," Avon App. at 259 ¶ 12, was not even brought to Mr. Robertson's attention for purposes of filing a *complaint*. *Id.* at 127:11-15; 153:17-20. When asked if the log was created for counsel, Mr. Robertson demurred: "I asked for it and I was provided with the documents." *Id.* at 119:18-23. Mr. Robertson also testified that he told the log's author that the log would be used to give legal advice to the *town*. *Id.* at 107:21-23. *See also Id.* at 155:11-18 (Mr. Robertson testified, "They were told that I was asking for the notes at the request of the Town Attorney as I testified for legal advice to *me*.") (emphasis added); *id.* at 156:1-7 ("I communicated that the documents would be provided to the Town Attorney . . . For providing legal advice to the Town, *me*.") (emphasis added).

Avon's dearth of evidence closely mirrors the one in *Kosuda-Bigazzi*, where the Supreme Court held the attorney-client privilege did not apply to preexisting documents seized during the execution of a

search warrant. Turning aside Kosuda-Bigazzi's claim that the documents were authored with the intent to communicate them to her criminal defense counsel, the court rested its holding on her failure to put on any evidence "attest[ing] to when, or for what purpose, she created the documents," or explaining the relationship between multiple versions of the same documents seized during the search. *Kosuda-Bigazzi*, 335 Conn. at 349. *See also Jose V.*, 157 Conn. App. at 407 (declining to review same privilege claim over a document written by a criminal defendant and addressed to the prosecutor rather than his own counsel). The appellants here find themselves in the same situation, and their privilege claim must be identically rejected.

b. No matter what caselaw it points to, Avon cannot meet its burden to show privilege.

Sensing the result that *Kosuda-Bigazzi* compels, Avon suggests two detours around it. The first wrong turn Avon suggests lies in the *Kosuda-Bigazzi* court's mention of a "tenuous" possibility that a privilege claimant could demonstrate that it transformed a non-privileged document into a different form, with the intent of communicating to counsel for legal advice. 335 Conn. at 344. As an example of this anomalous situation, the Supreme Court cited a client's decision to distill handwritten notes into a typed compilation in order to give it to counsel and obtain legal advice. The handwritten notes would not be privileged, but the typed summary of them could be, if the client demonstrated that he created it to obtain advice. *Kosuda-Bigazzi*, 335 Conn. at 345 (citing *Angst v. Mack Trucks, Inc.*, No. 90-3274, 1991 WL 86931 at *2 (E.D. Pa. May 14, 1991)).

Avon cites this possibility in passing, Avon Br. 23-24, but does not mention the obvious: the log at issue was never transformed into a different form. Mr. Robertson simply took the log from its author and

gave it to Mr. Harrington. Mr. Robertson's first meeting with the log's author was in November 2019. Avon App. at 101:6-8. The author brought no documents to that meeting. *Id*. at 107:9-25-108:1; *Id*. at 258 ¶ 12. After Mr. Robertson later got the log from its author, he "eyeballed" it and concluded that the log was "generally . . . like we discussed but there was just more detail." *Id*. at 157:3-16. Mr. Robertson thereafter passed the log on to Harrington. *Id*. at 260 ¶ 13. So, the usual result obtains. A "preexisting document does not become privileged merely because it is 'transferred to or routed through an attorney.'" *Kosuda-Bigazzi*, 355 Conn. at 345, *quoting Resolution Trust Corp. v. Diamond*, 773 F. Supp. 597, 600 (S.D.N.Y. 1991).

Avon tries a second dodge by relying heavily on *Shew v. Freedom of Info. Comm'n*, 245 Conn. 149 (1998). *Shew* stands for the unremarkable proposition that "the attorney-client privilege protects communications . . . where the client is a corporate or municipal entity, rather than an individual," and its holding did not narrow or eliminate any of the four elements that a privilege claimant must prove. *Id.* at 158.

Shew also did not involve a claim of privilege over a preexisting document. The records at issue there—"summaries of [employee] interviews," affidavits based on those interviews, and "a preliminary draft report" based on the lawyer's investigation—were all generated by counsel following the lawyer's engagement to investigate and advise the town on alleged misconduct by the police chief. 245 Conn. at 153. Middletown hired the lawyer for the express purpose of providing it legal advice, and made its employees available to the lawyer for interviews because it wanted the lawyer to question them before providing advice on the town's potential liability for the chief's misconduct. *Id.* at 160.

Here, by contrast, Mr. Robertson is not an attorney. Avon App.

at 259 ¶ 10. The communication was thus not between the employee (the author of the log) and an attorney—instead, it was between the employee and the town manager. *Id*. at 260 ¶¶ 12-13.

Second, the record confirms that the document's *author* did not seek legal advice, and did not author the log for counsel. Avon's argument that the employee's communications "relate to the legal advice sought by the agency from the attorney" is misguided. Avon Br. at 22. While the employee's log may have been utilized to assist the *town*, it was not used for any legal matter on behalf of the *employee*. On at least two occasions, Mr. Robertson unambiguously stated that the employee did not come to him for legal advice. Avon App. at 155:11-13 (when asked if the employee came to him seeking legal advice, Mr. Robertson responded, "[n]o."); *Id*. at 160:12-15 (on another occasion, Mr. Robertson answered "[a]bsolutely not" to the same question).

While Avon argues that the document was given to town counsel and therefore is protected by attorney-client privilege, this claim inevitably fails because the author of the log did not seek any legal advice. *See Kent Literary Club v. Wesleyan Univ.*, No. CV156013185, 2016 WL 2602274, at *4 (Conn. Super. Ct. Apr. 12, 2016) ("The document must still be prepared by or for an attorney for a client with a view towards pending or anticipated litigation in which that client is a party."); *Harrington v. Freedom of Info. Comm'n*, 323 Conn. 1, 16 (2016), *citing Valente v. Lincoln Nat. Corp.*, No. 3:09CV693 MRK, 2010 WL 3522495, at *1 (D. Conn. Sept. 2, 2010) (holding that "it is not enough for the party invoking the privilege to show that a communication to legal counsel relayed information that "might become relevant to the future rendering of legal advice. Instead, the communication must also either explicitly or implicitly *seek specific legal advice about the factual information*") (emphasis added).

Even leaving aside the question of the log author's intent to seek

legal advice—and there is none in the record—the contents of the log merely catalog facts. "A communication from attorney to client solely regarding a matter of fact would not ordinarily be privileged, unless it were shown to be inextricably linked to the giving of legal advice." *Ullmann v. State*, 230 Conn. 698, 332 (1993). *See also Clerk of Middletown Common Council v. Freedom of Info. Comm'n*, 215 Conn. App. 404, 420 (2022) (explaining that factual information in attorney invoices is not privileged unless it reveals "the motive of the client in seeking representation, litigation strategy, or the specific nature of the services provided") (internal quotations omitted); *Kent Literary Club*, 2016 WL 2602274, at *2 (holding that "information an attorney receives from a non-privileged source does not become privileged when communicated to a client"). Because nothing in the record shows that the employee created or communicated the log for legal advice, the document is one of fact. Therefore, the employee giving the document to the town manager, to then give to the town attorney, does not make it privileged.

Third, and last, Avon fails to establish that the employee's communications were made in confidence. Notwithstanding that the employee gave the document at issue to Mr. Robertson, a non-attorney, nothing in the record reveals that the employee meant for the document to remain confidential. The document was not marked "confidential," labeled as "attorney-client communication," cautioned "do not disclose," or noted in any other way that it is confidential. *See Lash*, 300 Conn. at 519. Here, there is no evidence that the document included a caption to remain private. Even Attorney Harrington could not answer whether the author meant for the log to remain a secret. Avon App. at 137:9-12 ("I mean that sort of asks for the state of mind of a third person."). While Avon attempts to characterize the communications between the town manager and the employee as

confidential, ultimately, there is nothing in the record that substantiates this claim. Even if Attorney Harrington or Mr. Robertson allude to the employee's intent that the record not be shared widely, they cannot testify on behalf of the employee, and their contentions do not meet the requisite threshold for asserting attorney-client privilege.

The only authority other than *Shew* that Avon cites to support its attorney-client privilege analysis under this test misses the mark. Avon Br. at 23-24. In *Bates v. City of Bristol*, Docket #FIC 2015-855 (Nov. 16, 2016), the hearing officer concluded that notes related to a fact-finding investigation of the mayor were public records under FOIA, but, that they were exempt from disclosure as "[p]reliminary drafts or notes" where "the public interest in withholding . . . clearly outweighs the public interest in disclosure." *Id.* at ¶ 9; Conn. Gen. Stat. § 1-210(b)(1). The hearing officer relied on an exemption that is not claimed in this case—Avon has never asserted that the employee's log is a preliminary draft. And, while Avon uses this decision to bolster its argument for attorney-client privilege, attorney-client privilege was not even in dispute in *Bates*. Lastly, the facts in this decision differ significantly from the case at issue. In *Bates*, respondents' notes were derived from conversations with employees—including interviews with the complainant and another respondent employee—to help the agency decide its course of action "*as a result of the complainant's allegations*." *Id*. at ¶ 11 (emphasis added). In the instant matter, the employee's log was not created in response to any complaints, it does not contain any interview notes, and, even if it may have been used to determine the agency's proper course of action with respect to the chief of police, it was not drafted to do so.

In sum, Avon does not meet its burden to establish attorney-client privilege.

5. Avon is barred from raising new exemptions at this late stage of appeal.

Finally, to the extent Avon attempts to raise a privacy exemption under Conn. Gen. Stat. § 1-210(b)(2) on appeal, it may not do so.

Municipal agencies like Avon bear the burden of proof as to withholdings. *See*, *e.g., Comm'r of Emergency Servs. and Pub. Protection v. Freedom of Info. Comm'n*, 330 Conn. 372, 396 (2018). And the Commission is, in turn, obligated to base its decision on "reliable, probative, and substantial evidence," Conn. Gen. Stat. § 4-183(j)(5), differently stated as "a substantial basis of fact from which the fact in issue can be reasonably inferred." *Murphy v. Comm'r of Motor Vehicles*, 254 Conn. 333, 343 (2000) (internal quotation omitted).

Accordingly, if Avon intended to make an exemption argument under Conn. Gen. Stat. § 1-210(b)(2), the time to do it was before the hearing officer, or at the very least, at the Commission. *Comm'r of Emergency Servs. and Pub. Protection v. Freedom of Info. Comm'n*, 330 Conn. 372, 396 (2018) (holding that litigant had opportunity raise exemption argument at Commission but "declined to do so," and thus could not be heard on appeal); *Tompkins*, 136 Conn. App. At 510–11 (similar); *Lewin v. Freedom of Info. Comm'n*, 91 Conn. App. 521, 525 (2005) (similar). Indeed, if the log contained private information akin to some data which might be contained within a personnel or medical record, Avon should have notified the drafter of Mr. Sastre's request and noted their objection—if any—to disclosure.[12] Conn. Gen. Stat. § 1-214(b)(1). Avon did not do that. Instead, when asked explicitly by the

[12] Notably, if Avon was concerned about revealing the employee's identity, it could have raised the exemption on behalf of the employee without the employee appearing or disclosing the employee's name.

Hearing Officer whether it was raising any exemption to disclosure other than attorney-client privilege, it said no:

> Hearing Officer: . . . And so the exemption being claimed, just so I understand, is attorney-client privilege. There's no other exemption being claimed, Attorney Harrington?
>
> Mr. Harrington: Yes. No, no other exemptions.

November 19, 2020 transcript, 84:15-21.

Avon's foreclosed opportunity is a part of a long line of cases holding that appellate courts are limited to review only the claims that are distinctly raised at the trial level. *State v. Hampton*, 293 Conn. 435, 442 (2009). *See also State v. Fagan*, 280 Conn. 69, 85–89 (2006) (declining to review claim not preserved at trial). "The reason for the rule is obvious: to permit a party to raise a claim on appeal that has not been raised at trial—after it is too late for the trial court or the opposing party to address the claim—would encourage trial by ambuscade, which is unfair to both the trial court and the opposing party." *State v. Dalzell*, 282 Conn. 709, 720 (2007). Only in the "most exceptional circumstances" can an appellate court consider an issue not raised earlier. *Blumberg Assocs. Worldwide, Inc. v. Brown & Brown of Connecticut*, 311 Conn. 123, 143–44 (2014).

This is doubly true in the context of an administrative appeal like this one. A litigant may appeal a final decision of an administrative agency only if they have exhausted all administrative remedies. Conn. Gen. Stat. § 4-183; Conn. Gen. Stat. § 1-206(d) (applying § 4-183 procedure to FOIC decisions). It is a well-settled principle of administrative law that "if an administrative remedy exists, it must be exhausted before the Superior Court will obtain jurisdiction to act in the matter." *Lucarelli v. Freedom of Info. Comm'n*, 29 Conn. App. 547, 551 (1992); *Piteau v. Bd. of Educ. of City of Hartford*, 300 Conn. 667, 678-79 (2011) (determining that plaintiff

must exhaust administrative remedies before judicial review even where a statutory requirement of exhaustion was not explicit).

In demanding exhaustion of administrative remedies, courts recognize the legislative intent to delegate authority to the "coordinate branches of government," and that "agencies, not the courts, ought to have primary responsibility for the programs that [the legislature] has charged them." *Stepney, LLC v. Town of Fairfield*, 263 Conn. 558, 564 (2003). Appellate courts have "grudgingly carved" some limited exceptions to the exhaustion doctrine, *Hunt v. Prior*, 236 Conn. 421, 432 (1996) but they apply "infrequently and only for narrowly defined purposes." *Id.* For example, one of the limited exceptions to the exhaustion rule arises when recourse to administrative remedies would be "demonstrably futile or inadequate." *Godbout v. Attanasio*, 199 Conn. App. 88, 97–98 (2020) (no exhaustion necessary where agency lacked authority to provide type of relief). This is plainly not the case here.

Avon had the opportunity to assert the privacy exemption before both the hearing officer and the Commission, but failed to do so—even when directly prompted. *See* Avon App. at 132:15-20 (answering no to question of whether any other exemption, aside from privilege, was being claimed); *see also* Avon App. at 235:6-13 (staying silent when Commissioner asked if anyone had raised privacy exemption). Even now, on appeal from the superior court, Avon barely breathes life into the privacy exemption—it simply utters the word "privacy" at various points in its argument. Avon "cannot be allowed to participate fully at hearings and then, on appeal, raise claims that were not asserted before the board." *Dragan v. Conn. Med. Examining Bd.,* 223 Conn. 618, 632 (1992). Any belated attempt to raise a new exemption must be set aside.

6. Conclusion

For the forgoing reasons, the Commission and superior court's decision should be affirmed.

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Certification

In conformance with Practice Book § 62-7, I certify that this brief complies with the applicable rules of Connecticut appellate procedure, that the copy filed with the appellate clerk is a true copy of the one filed electronically, and that it does not contain any names or other personal identifying information prohibited from disclosure by law.

I further certify that this brief contains 9,720 words according to the properties associated with Microsoft 365 and that no deviations from Practice Book § 67A-2A were requested.

I further certify that a true copy of this document was sent, via electronic transmission, on this date to the following:

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APPELLATE COURT
OF THE
STATE OF CONNECTICUT

A.C. 45885

TOWN OF AVON AND
BRANDON ROBERTSON
v.
JOSEPH SASTRE AND
THE FREEDOM OF INFORMATION COMMISSION

APPENDIX OF DEFENDANT-APPELLEE JOSEPH SASTRE

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Connecticut
Freedom of Information Commission

(/FOI)

Final Decision FIC2011-704

In the Matter of a Complaint by	FINAL DECISION
Hardie Burgin, Complainant	
against	Docket #FIC 2011-704
Chief, Police Department, Town of East Hampton; and Police Department Town of East Hampton, Respondents	July 11, 2012

The above-captioned matter was heard as a contested case on April 18, 2012, at which time the complainant and the respondents appeared, stipulated to certain facts and presented testimony, exhibits and argument on the complaint.

After consideration of the entire record, the following facts are found and conclusions of law are reached:

1. The respondents are public agencies within the meaning of §1-200(1), G.S.

2. It is found that, by letter dated November 28, 2011, the complainant made a request to the respondents for the following: "A COMPLETE copy of the internal affairs investigation conducted by you and/or someone directed by you on Sgt. Garritt Kelly in which he was disciplined by suspension for several days for 'Misuse of the E Mail System.' This would include any and all e-mails (correspondence and Sgt. Kelly's communication with married female), correspondence (handwritten or typed) taped or written statements."

3. It is found that, by letter dated November 29, 2011, the respondents acknowledged the complainant's request. It is further found that, in their acknowledgement, the respondents informed the complainant that they would provide him with all existing non-exempt public records.

4. By letter dated and filed December 28, 2011, the complainant appealed to this Commission, alleging that the respondents violated the Freedom of Information ("FOI") Act by denying his request for a copy of the records described in paragraph 2, above. In his complaint, the complainant stated that, since receiving the November 29, 2011 acknowledgment letter, he had not received any records from the respondents.

5. Section 1-200(5), G.S., provides:

"Public records or files" means any recorded data or information relating to the conduct of the public's business prepared, owned, used, received or retained by a public agency, or to which a public agency is entitled to receive a copy by law or contract under section 1-218, whether such data or information be handwritten, typed, tape-recorded, printed, photostated, photographed or recorded by any other method.

6. Section 1-210(a), G.S., provides in relevant part that:

Except as otherwise provided by any federal law or state statute, all records maintained or kept on file by any public agency, whether or not such records are required by any law or by any rule or regulation, shall be public records and every person shall have the right to (1) inspect such records promptly during regular office or business hours, (2) copy such records in accordance with subsection (g) of section 1-212, or (3) receive a copy of such records in accordance with section 1-212. (Emphasis supplied).

7. Section 1-212(a), G.S., provides in relevant part that "[a]ny person applying in writing shall receive, promptly upon request, a plain, facsimile, electronic or certified copy of any public record."

8. At the hearing on this matter, the respondents contended that because the e-mail records do not pertain to the public's business they are not public records as such phrase is defined by §1-200(5), G.S.

9. It is found that the respondents maintain the records described in paragraph 2, above. It is further found that the conduct revealed in the records occurred during the time when the officer was working as a law enforcement officer. It is found that the officer used town equipment to send and receive these communications. Finally, it is found that the records reveal an inappropriate mixing of the officer's professional and private life. Therefore, it is found that these records relate to the officer's public position. For all of these reasons, it is therefore concluded that the subject records are "public records" within the meaning of §§ 1-200(5) and 1-210(a), G.S.

10. It is found that, under cover of letter dated January 9, 2012, the respondents provided the complainant with a copy of a Settlement Agreement between the Town of East Hampton, the International Brotherhood of Police Officers Local 524 and Garritt Kelly (the "officer"). It is found that the respondents informed the complainant that no internal affairs investigation report existed. It is further found that the respondents informed the complainant that there were approximately 84 e-mail communications and that such communications were sent from and received on Town computers and equipment.

11. It is found that, by letter dated January 11, 2012, the respondents supplemented their disclosure by providing the complainant with two sworn witness statements. It is found that one such statement provides, in part, as follows: "myself and several members of my staff were involved with some e-mail conversations with Sgt. Kelly of the East Hampton Police Department. These e-mails were meant as a joke and nothing more." It is found that the respondents redacted the name of this affiant from the record prior to disclosing it.

12. It is found that, by letter dated January 13, 2012, the respondents again supplemented their disclosure, this time providing the complainant with an anonymous complaint concerning the e-mail activity between the officer and the private citizen, a newspaper article about a different incident involving this officer, and an interoffice memorandum between the chief of police and the town manager, detailing, in part, the officer's work schedule during March 2010.

13. Because the subject of the records did not appear at the contested case hearing, and because there was no indication in the record of whether he wanted to be heard on the issue of disclosure, on May 16, 2012, the Commission issued an order directing counsel for the respondents to notify the officer of the following: the hearing officer had presided over the April 18, 2012 contested case hearing and would now issue a recommendation to the Commission on whether the requested records should be disclosed. The respondents were further instructed to inform the officer that if he wanted to be heard prior to the issuance of the recommendation, he had to inform the Commission, in writing, by May 25, 2012 of such desire.

14. By letter dated May 21, 2012 and filed May 23, 2012, the officer informed the Commission that he objected to the disclosure of the requested records, but did not wish to be heard on the matter.

15. The respondents contend that the requested records are exempt from disclosure pursuant to §1-210(b)(2), G.S. In support of this argument the respondents raised Rocque v. FOIC, 255 Conn. 651 (2001) (holding, in part, that the identity of a sexual harassment complainant and sexually explicit information are exempt from disclosure

pursuant to §1-210(b)(2), G.S.).

16. Section 1-210(b)(2), G.S., provides in relevant part that nothing in the FOI Act shall require disclosure of ". . . personnel or medical files and similar files the disclosure of which would constitute an invasion of personal privacy . . . ."

17. The Supreme Court set forth the test for the exemption contained in §1-210(b)(2), G.S., in Perkins v. Freedom of Information Commission, 228 Conn. 158, 175 (1993). The claimant must first establish that the files in question are personnel, medical or similar files. Second, the claimant must show that disclosure of the records would constitute an invasion of personal privacy. In determining whether disclosure would constitute an invasion of personal privacy, the claimant must establish both of two elements: first, that the information sought does not pertain to legitimate matters of public concern, and second, that such information is highly offensive to a reasonable person. The Commission takes administrative notice of the multitude of court rulings, Commission final decisions (Endnote 1), and instances of advice given by the Commission and staff members (Endnote 2), which have relied upon the Perkins test, since its release in 1993.

18. It is found that the records in question are copies of e-mail communications between the officer and a third party. It is found that the e-mail communications were sent by the officer through his personal e-mail account, which account was accessed through the town's computer system. It is found that an anonymous individual photographed the e-mails and sent the photographs and a complaint to the town manager. It is further found that the anonymous complaint, combined with a review of the e-mails, gave rise to an internal affairs investigation. It is found that the internal affairs investigation resulted in a settlement agreement between the officer and the respondents. Finally, it is found that the terms of the settlement agreement evidence that the officer was administratively disciplined for inappropriately utilizing the town's computer system.

19. It is found that all of the requested records are "personnel" files or "similar files" within the meaning of §1-210(b)(2), G.S. See Connecticut Alcohol and Drug Abuse Commission v. FOIC, 233 Conn. 28 (1995).

20. At the contested case hearing, the complainant moved that the respondents be ordered to submit the records at issue to the Commission for an in camera review. The hearing officer granted the complainant's motion. In addition, the respondents were directed to highlight in yellow the sexually explicit information that they believed should be redacted, or to which special consideration should be given, pursuant to Rocque. At this time, the complainant informed the hearing officer that he was not seeking disclosure of any private citizen's name, e-mail address, or other identifying information.

21. On April 27, 2012, the respondents submitted the records at issue to Commission for an in camera review (hereinafter the "in camera records"). The in camera records consist of 25 pages and shall be identified as IC-2011-704-1 through IC-2011-704-25.

22. The Rocque court identified two categories of records. The first category consisted of records revealing the identity of a sexual harassment complainant. Rocque, 255 Conn. 664. The second category consisted of records revealing the manner in which a public agency conducts an investigation into allegations of harassment. Id. With regard to the first category, the court held the identity of the sexual harassment complainant therein was not a legitimate matter of public concern because the disclosure of such information would do nothing to assist in the public's understanding or evaluation of a public agency's investigative process. Id. at 664. With regard to the second category of records, the court found that such records were a matter of legitimate public interest because they facilitated the public's understanding and evaluation of the public agency's investigative process. Id. at 664-65. Within this second category of records, the court found that sexually explicit detail of the harassment contained within the investigative records in that case was not a legitimate matter of public concern. Id. at 664-65.

23. After a careful review of the in camera records, it is found that no portion of in camera records IC-2011-704-01 through IC-2011-704-13, IC-2011-704-15, IC-2011-704-16 through IC-2011-704-19 can be categorized as "sexually explicit or descriptive information," such as allegations of sexual contact or sexual improprieties, or details of intimate personal relationships, which implicate the concern for salacious detail expressed by the Rocque court. Rocque, 255 Conn. at 655. However, these records do contain the e-mail address and the name of the third party with whom the officer was communicating. Because the complainant does not seek this information, the respondents may redact the third party's name and e-mail address from these records.[1]

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[1] The Commission notes that, in addition to the name and the e-mail address of the third-party communicating with the officer, IC-2011-704-16 also contains the name of an additional individual who, by all indications, is not involved in these communications. Accordingly, this name may also be redacted from this record.

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24. It is further found that the following in camera records do contain the kind of sexually explicit information that concerned the Rocque court. It is found that the language specifically identified below does not pertain to legitimate matters of public concern. It is further found that the disclosure of this information would be highly offensive to a reasonable person:

a. IC-2011-704-14: Line 13[2], words 22 and 23;

b. IC-2011-704-20: Line 3, words 12 through 14; Line 4, words 4 and 5;

c. IC-2011-704-21: Line 10, words 13 through 15, and 26; Line 16, words 4 through 6; Line 17, words 3 and 4; Line 22, words 6 through 9, 13, 26 through 29; Line 28, words 12 through 14; Line 29, words 4 and 5;

d. IC-2011-704-22: Line 11, words 2 and 3[3]; Line 22, words 26 through 28; Line 23, words 1 through 3, 6 through 9, 20 through 22, 26 through 28; Line 24, words 2 and 3; Line 29, words 5 though 7;

e. IC-2011-704-23: Line 1, word 1;

f. IC-2011-704-24: Line 14, word 1;

g. IC-2011-704-25: Line 3, words 22 and 23.

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[2] For the convenience of the parties who will be referring to the page/line/word reference in this Order, the Commission notes that the line numbers were inserted into the in camera records by counsel to the Commission. Line one is the very first line of information listed on the record, which in most instances is an e-mail address.

[3] The first reference to IC-2011-704-22 is the name of another individual who, by all indications, is not involved in these communications. Accordingly, this name may be redacted from this record.

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25. With regard to the in camera records referred to in paragraph 24, in addition to the redactions specifically identified in said paragraph, these records also contain the e-mail address and the name of the third party with whom the officer is communicating, and the respondents may redact this information from the records.

26. It is found that, other than the information specifically identified in paragraph 24a-g, above, the remainder of the records contains the information which triggered the internal affairs investigation. It is found that these records will facilitate the public's understanding of what occurred, and thereby permit a more thorough evaluation of the

respondent town's investigative process, decision-making and overall handling of an important matter involving a public employee. Accordingly, it is found that such records pertain to legitimate matters of public concern. It is further found that the disclosure of such information would not be highly offensive to a reasonable person.

27. It is found that the disclosure of the in camera records, other than those portions specifically identified in paragraph 24a-g, above, would not constitute an invasion of personal privacy, within the meaning of §1-210(b)(2), G.S. It is therefore concluded that such records are not exempt from disclosure by virtue of said provision.

28. Based on the foregoing, with the exception of those portions of the in camera records identified in paragraph 24a-g, above, and information that the complainant is not seeking, which is referred to in paragraphs 23 and 25, above, it is concluded that the respondents violated the disclosure provisions of §§1-210(a) and 1-212(a), G.S., by denying the complainant's request for a copy of the records.

The following order by the Commission is hereby recommended on the basis of the record concerning the above-captioned complaint.

1. The respondents shall forthwith provide the complainant with a copy of the records at issue, free of charge. In complying with this order, the respondents may redact from the in camera records the information specifically identified in paragraphs 23, 24 and 25 of the findings, above.

Approved by Order of the Freedom of Information Commission at its regular meeting of July 11, 2012.

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Cynthia A. Cannata
Acting Clerk of the Commission

PURSUANT TO SECTION 4-180(c), G.S., THE FOLLOWING ARE THE NAMES OF EACH PARTY AND THE MOST RECENT MAILING ADDRESS, PROVIDED TO THE FREEDOM OF INFORMATION COMMISSION, OF THE PARTIES OR THEIR AUTHORIZED REPRESENTATIVE.

THE PARTIES TO THIS CONTESTED CASE ARE:

Hardie Burgin
26 Apple Lane
Colchester, CT 06415

Chief, Police Department, Town of
East Hampton; and Police Department
Town of East Hampton
c/o Jean M. D'Aquila, Esq.
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100 Riverview Center
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_____
Cynthia A. Cannata
Acting Clerk of the Commission
FIC/2011-704/FD/cac/7/11/2012

1. ENDNOTES

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Smith v. John P. Lange, Human Resources Director, Town of Suffield; and Department of Human Resources, Town of Suffield (July 12, 2000); Docket #FIC 1999-547; Leo F. Smith v. John P. Lange, Human Resources Director, Town of Suffield; and Department of Human Resources, Town of Suffield (July 12, 2000); Docket #FIC 1999-525; Leo F. Smith v. John P. Lange, Human Resources Director, Town of Suffield; and Department of Human Resources, Town of Suffield (July 12, 2000); Docket #FIC 2000-118; Elizabeth Ganga and Connecticut Post v. Police Department, Town of Stratford (June 28, 2000); Docket #FIC 2000-095; Ron Robillard and the Chronicle v. Chairman, Board of Education, Eastford Public Schools; and Board of Education, Eastford Public Schools (June 28, 2000); Docket #FIC 2000-093; Megan J. Bard and The Norwich Bulletin v. Chairman, Board of Education, Eastford Public Schools; and Board of Education, Eastford Public Schools (June 28, 2000); Docket #FIC 1999-575; Bruce Kaz v. Robert Skinner, First Selectman, Town of Suffield; and Ted Flanders, Building Inspector, Town of Suffield (June 28, 2000); Docket #FIC 1999-519; Robert J. Fortier v. Personnel Director, Town of East Hartford; and Mayor, Town of East Hartford (June 14, 2000); Docket #FIC1999-550; James and Susanne Milewski v. Deputy Chief, Police Department, Town of Clinton; and Police Department, Town of Clinton (May 24, 2000); Docket #FIC 2000-005; Fred B. Feins v. President and Chief Executive Officer, Granby Ambulance Association, Inc., Town of Granby (May 10, 2000); Docket #FIC1999-606; Robert L. Corraro and IBEW Local 90 v. Town Attorney, Town of Hamden; and Electrical Contractors, Inc. (May 10,

2000); Docket #FIC 1999-533; Donald J. Lanouette, Jr. v. Chief, Police Department, Town of Madison; and Police Department, Town of Madison (April 26, 2000); Docket #FIC 1999-502; Christopher Hoffman and New Haven Register v. Director of Personnel, State of Connecticut, Southern Connecticut State University; and Personnel Office, State of Connecticut, Southern Connecticut State University (April 26, 2000); Docket #FIC1999-440; Anne Hamilton and The Hartford Courant James Martino, Chief, Police Department, Town of Avon; Peter A. Agnesi, Lieutenant, Police Department, Town of Avon; and Police Department, Town of Avon (March 8, 2000); Docket #FIC1999-333; Lynn Fredricksen and New Haven Register v. Chief, Police Department, Town of Madison; and Police Department, Town of Madison (March 8, 2000); Docket #FIC 1999-289; Thomas Moran v. Director, Human Resources, Town of Simsbury; and Department of Human Resources, Town of Simsbury (Feb. 9, 2000); Docket #FIC 1999-328; Victor Zigmund v. Director, State of Connecticut, Department of Mental Health and Addiction Services, Human Resources Operations, Connecticut Valley Hospital, Whiting Forensic Division (Jan. 26, 2000); Docket #FIC 1999-100; Janice D'Arcy and The Hartford Courant v. Chief, Police Department, Town of Cheshire; Police Department, Town of Cheshire; Town Manager, Town of Cheshire; and Town of Cheshire (Jan. 26, 2000); Docket #FIC 1999-355; Wayne Mercier v. Patricia C. Washington, Director of Personnel, City of Hartford; and Department of Personnel, City of Hartford (Nov. 10, 1999); Docket #FIC 1998-391; Jonathan F. Kellogg and The Republican American v. Department of Education, City of Waterbury (Oct. 13, 1999); Docket #FIC 1999-161; Michael W. Cahill v. Chief, Police Department, Town of Hamden; and Police Department, Town of Hamden (Sept. 22, 1999); Docket #FIC 1998-294; Robert J. Bourne v. Department of Public Utilities, City of Norwich, and City of Norwich (Sept. 22, 1999); Docket #FIC 1998-293; Joseph J. Cassidy v. Department of Public Utilities, City of Norwich, and City of Norwich (Sept. 22, 1999); Docket #FIC 1999-040; Judith F. Machuga and State of Connecticut, Division of Public Defender Services, Superior Court, G.A. 13 v. Chief, Police Department, Town of East Windsor; and Police Department, Town of East Windsor (Aug. 25, 1999); Docket #FIC 1999-144; Robert H. Boone and Journal Inquirer v. William Gifford, Chief, Police Department, Town of Windsor Locks; Police Department, Town of Windsor Locks; and Windsor Locks Police Commission (July 28, 1999); Docket #FIC 1999-096; Paul Marks and The Hartford Courant v. Chief, Police Department, Town of Windsor Locks; and Police Department, Town of Windsor Locks (July 28, 1999); Docket #FIC 1999-064; Joan Coe v. First Selectman, Town of Simsbury; Director, Human Resources Department, Town of Simsbury; and Town of Simsbury (July 28, 1999); Docket #FIC 1999-150; Andrew Nargi v. Office of Corporation Counsel, City of Torrington; and City of Torrington (July 14, 1999); Docket #FIC 1999-135; Warren Woodberry, Jr. and The Hartford Courant v. Acting Town Manager, Town of Rocky Hill and Town of Rocky Hill (July 14, 1999); Docket #FIC 1999-015; Richard Manuel Rivera v. Superintendent of Schools, Torrington Public Schools; and Board of Education, Torrington Public Schools (June 9, 1999); Docket #FIC 1998-372; William C. Kaempffer and New Haven Register v. Police Department, City of New Haven; City of New Haven; and James Sorrentino (June 9, 1999); Docket #FIC 1997-361; Docket #FIC 1999-019; David K. Jaffe v. State of Connecticut, Connecticut Lottery Corporation, Human Resources; State of Connecticut, Connecticut Lottery Corporation, Security Division; and State of Connecticut, Connecticut Lottery Corporation (April 28, 1999); Docket #FIC1998-325; Virginia Groark and The Day v. Freedom of Information Officer, State of Connecticut, Department of Public Health, Office of Special Services, Communications Division; and Agency Personnel Administrator, State of Connecticut, Department of Public Health, Human Resources Division (April 28, 1999); Docket #FIC 1998-208; Thedress Campbell v. City Treasurer, City of Hartford; and City of Hartford (April 14, 1999); Docket #FIC 1998-265; Benjamin M. Wenograd and Service Employees International Union Local 760 v. John Roughan, Executive Director, East Hartford Housing Authority; and East Hartford Housing Authority, Town of East Hartford (March 24, 1999); Docket #FIC 1997-361; Dominick L. Santarsiero v. Director, Human Resources, City of Stamford (June 10, 1998); Docket #FIC 1997-363; Diana R. Raczkowski v. Mayor, Town of Naugatuck (March 11, 1998); Docket #FIC 1997-307; Krystin Bratina v. Chief, Hartford Fire Department, City of Hartford (March 11, 1998); Docket #FIC 1998-288; Christian Miller and the New Haven Register v. Superintendent, Branford Public Schools; and Board of Education, Branford Public Schools (Feb. 24, 1999); Docket #FIC 1998-255; Joan O'Rourke v. Chief, Police Department, City of Torrington; and Police Department, City of Torrington (Jan. 27, 1999); Docket #FIC 1998-251; John Ward v. Beverly L. Durante, Personnel Administrator, Housatonic Area Regional Transit; and Housatonic Area Regional Transit (Jan. 27, 1999); Docket #FIC 1998-163; Lawrence A. Butts v. Director, State of Connecticut, Department of Environmental Protection, Human Resources Division; and State of Connecticut, Department of Environmental Protection, Human Resources Division (Dec. 9, 1998); Docket #FIC 1998-162; Lawrence A. Butts Chairperson, State of Connecticut, Department of Environmental Protection, Human Resources Division; and State of Connecticut, Department of Environmental Protection, Human Resources Division (Dec. 9, 1998); Docket #FIC 1998-232; Scott Clark, Amy Kertesz, Michael Gates and the Ridgefield Police Union v. First Selectman, Town of Ridgefield; and Town of Ridgefield (Nov. 18, 1998); Docket #FIC 1998-193; Daniel P. Jones and The Hartford Courant v. Commissioner, State of Connecticut, Department of Environmental Protection; and State of Connecticut, Department of Environmental Protection (Nov. 18, 1998); Docket #FIC 1998-121; Ernie Cantwell and International Association of Firefighters, Local No. 1073 v. Director, Personnel Department, City of Middletown and Personnel Department, City of Middletown (Oct. 14, 1998); Docket #FIC 1998-120; Ernie Cantwell and International Association of Firefighters, Local No. 1073 v. Director, Personnel Department, City of Middletown (Oct. 14, 1998); Docket #FIC 1998 094; Janice D'Arcy and The Hartford Courant v. Chief, Meriden Police Department, City of Meriden and Meriden Police Department (Oct. 14, 1998); Docket #FIC 1997-422; Joseph A. Johnson, Jr. and Greenwich Time v. Chief, Greenwich Police Department, Town of Greenwich; and Greenwich Police Department, Town of Greenwich (Sept. 9, 1998); Docket #FIC 1998-023; Deborah Maynard v. Superintendent, Voluntown School District; and Principal, Voluntown Elementary School, Voluntown School District (Aug. 12, 1998); Docket #FIC 1997-298; Allan Drury and The New Haven Register v. Chief, East Haven Police Department, Town of East Haven; and Town of East Haven (June 10, 1998); Jonathan Lucas and Greenwich Times v. Director, Department of Human Resources, Town of Greenwich; and Town of Greenwich (May 27, 1998); John C. Rettman v. Meriden Police Department, Internal Affairs Division; and Paul Rowen (May 13, 1998); Docket #FIC 1997-318; Dennis Carnot v. Chief, Meriden Police Department, City of Meriden; Internal Affairs Division, Meriden Police Department, City of Meriden; Meriden Police Department, City of Meriden; and Paul Rowen (May 13, 1998); Docket #FIC 1997-175; Matthew Brown, Ken Byron and The Hartford Courant v. Superintendent of Schools, Plymouth Public Schools; and Board of Education, Town of Plymouth (February 18, 1998); Docket #FIC 1997-123; John Christoffersen and The Advocate v. Superintendent of Schools, Stamford Public Schools and Director of Personnel, Stamford Public Schools (Feb. 11, 1998); Docket #FIC 1997-088; John B. Harkins v. Acting Town Manager, Town of Tolland (Jan. 28, 1998); Docket #FIC 1997-085; Joe Johnson and Greenwich Time v. Chief of Police, Greenwich Police Department (Jan. 28, 1998); Docket #FIC 1997-142; Laura Amon v. Program Manager, Affirmative Action Division, State of Connecticut, Department of Transportation (Dec. 3, 1997); Docket #FIC 1996-572; Ken Byron and The Hartford Courant v. Chief of Police, Town of Wethersfield (Nov. 12, 1997); Docket #FIC 1997-238; Kimberley A. Thomsen and the Republican-American v. Acting Superintendent, Waterbury Police Department (Oct. 29, 1997); Docket #FIC 1997-089; Steven Edelman v. Commissioner, State of Connecticut, Department of Mental Retardation; and State of Connecticut, Department of Mental Retardation (Oct. 22, 1997); Docket #FIC 1996-551; Judith A. Amato v. Executive Director, New Britain Housing Authority; and New Britain Housing Authority (Aug. 27, 1997); Docket # FIC 1996-539; Ann Marie Derwin v. Legal Advisor, State of Connecticut, Department of Public Safety; and State of Connecticut, Department of Public Safety (Aug. 27, 1997); Docket #FIC 1996-592; Francine Karp v. Mayor, City of Bristol; Director of Personnel, City of Bristol; and Dennis Daigneault (July 23, 1997); Docket #FIC 1996-243; Joanne C. Tashjian v. Personnel Officer, State of Connecticut, Workers' Compensation Commission; and State of Connecticut, Workers' Compensation Commission (June 4, 1997); Docket #FIC 1996-322;Carolyn Moreau and The Hartford Courant v. Chief of Police, Southington Police Department; and Susan Williams (May 28, 1997); Docket #FIC 1996-465; John Gauger, Jr., Joseph Cadrain and Richard Westervelt v. Kenneth H. Kirschner, Commissioner, State of Connecticut, Department of Public Safety; Dawn Carnese, Legal Advisor, State of Connecticut, Department of Public Safety; and Lt. David Werner, Commanding Officer, Troop "B", State of Connecticut, Department of Public Safety, Division of State Police (April 9, 1997); Docket #FIC 1996-315; David W. Cummings v. Christopher Burnham, Treasurer, State of Connecticut (April 9, 1997); Docket #FIC 1996-521; Carol Butterworth v. Town Council, Town of Tolland (March 26, 1997); Docket #FIC 1996-421; John B. Harkins v. Chairman, Tolland Town Council (March 26, 1997); Docket #FIC 1996-314; David W. Cummings v. Christopher Burnham, Treasurer, State of Connecticut (April 9, 1997); Docket #FIC 1996-119; David W. Cummings v. Jesse M. Frankl, Chairman, State of Connecticut, Workers' Compensation Commission (March 26, 1997); Docket #FIC 1996-215; Alice M. Gray v. Chief of Police, Manchester Police Department, and Assistant Town Attorney, Town of Manchester (Feb. 26, 1997); Docket #FIC 1996-159; Carolyn Moreau and The Hartford Courant v. Police Chief, Southington Police Department (Jan. 22, 1997); Docket #FIC 1996-124; Donald H. Schiller, Michael Kelley and The Record-Journal Publishing Company v. Police Chief, Town of Southington Police Department, and Town of Southington Police Department (Jan. 22, 1997); Docket #FIC 1996-134; Betty Halibozek v. Superintendent of Schools, Middletown Public Schools; and Supervisor of Maintenance and Transportation, Board of Education, City of Middletown (Dec. 11, 1996); Docket #FIC1996-006; Joseph Cadrain and Richard Westervelt v. Gerald Gore, Legal Affairs Unit, State of Connecticut, Department of Public Safety; and State of Connecticut, Department of Public Safety, Division of State Police (Dec. 11, 1996); Docket #FIC 1996-153; Tracey Thomas and The Hartford Courant v. Legal Affairs Unit, State of Connecticut, Department of Public Safety (Nov. 20, 1996); Docket #FIC1995-419; Robie Irizarry v. Warden, Willard Correctional Institution, State of Connecticut,

Department of Correction (Oct. 23, 1996); Docket #FIC 1995-368; Thomas Lally v. Executive Director, State of Connecticut Board of Education and Services for the Blind, and Special Projects Coordinator, State of Connecticut, Board of Education and Services for the Blind (Oct. 9, 1996); Docket #FIC 1995-403; Jesse C. Leavenworth and The Hartford Courant v. Superintendent of Schools, Regional School District #7 (Sept. 25, 1996); Docket #FIC 1995-361; Christopher Hoffman and the New Haven Register v. James J. McGrath, Chief of Police, Ansonia Police Department and Eugene K. Baron, Brian Phipps, and Howard Tinney as members of the Ansonia Board of Police Commissioners (Sept. 25, 1996); Docket #FIC1995-358; Lyn Bixby and The Hartford Courant v. State of Connecticut, Department of Administrative Services (Sept. 25, 1996); Docket #FIC 1996-056; Francine Cimino v. Chief of Police, Glastonbury Police Department; Town Manager, Town of Glastonbury; and Town of Glastonbury (Sept. 25, 1996); Docket #FIC 1995-343; John J. Woodcock, III v. Town Manager, Town of South Windsor (July 24, 1996); Docket #FIC 1995-324; John J. Woodcock, III and Kathryn A. Hale v. Dana Whitman, Jr., Acting Town Manager, Town of South Windsor (July 24, 1996); Docket #FIC 95-251; Lyn Bixby & The Hartford Courant v. Commissioner, State of Connecticut, Department of Correction (July 10, 1996); Docket #FIC 1995-252; Valerie Finholm and The Hartford Courant v. Commissioner, State of Connecticut, Department of Children and Families (May 22, 1996); Docket #FIC 1995-193; Terence P. Sexton v. Chief of Police, Hartford Police Department (May 8, 1996); Docket #FIC 1995-125; Chris Powell and Journal Inquirer v. Commissioner, State of Connecticut, Department of Social Services (March 13, 1996); Docket #FIC 1995-081; Bruce Bellm, Kendres Lally, Philip Cater, Peter Hughes, Carol Northrop, Brad Pellissier, Todd Higgins and Bruce Garrison v. State of Connecticut, Office of Protection and Advocacy for Persons with Disabilities, Sharon Story and Marlene Fein (March 13, 1996); Docket #FIC 1995-074; Jeffrey C. Cole and WFSB/TV 3 v. James Strillacci, Chief of Police, West Hartford Police Department (Jan. 24, 1996); Docket #FIC 1995-026; Curtis R. Wood v. Director of Affirmative Action, State of Connecticut, Department of Correction (Jan. 24, 1996); Docket #FIC 1995-132; Michael A. Ingrassia v. Warden, Walker Special Management Unit, State of Connecticut Department of Correction (Dec. 27, 1995); Docket #FIC 1995-048; Jane Holfelder v. Canton Police Department (June 14, 1995); Docket #FIC 1994-351; Edward A. Peruta v. O. Paul Shew, Rocky Hill Town Manager and Director of Public Safety; Donald Unwin, Mayor of Rocky Hill, William Pacelia, Deputy Mayor of Rocky Hill; and Curt Roggi, Rocky Hill Town Attorney (May 28, 1995); Docket #FIC 1994-160; John Springer and The Bristol Press v. Chief of Police, Bristol Police Department (April 5, 1995); Docket #FIC 1994-077; Kathryn Kranhold and The Hartford Courant v. Director, New Haven Health Department (Feb. 8, 1995); Docket #FIC 1994-099; Frank Faraci, Jr. v. Middletown Police Department, Mayor of Middletown, and Middletown City Attorney (Feb. 2, 1995); Docket #FIC 1994-011; Robert Grabar, Edward Frede and The News-Times v. Superintendent of Schools, Brookfield Public Schools and Brookfield Board of Education (Aug. 24, 1994); Docket #FIC 1993-279; Jay Lewin v. New Milford Director of Finance (March 23, 1994).

2. ENDNOTES

AFFIDAVIT OF ERIC V. TURNER

Eric V. Turner, having been duly sworn, does hereby depose as follows:

1. I am over the age of eighteen (18) years and understand the obligation of an affirmation.

2. I am a member of the Connecticut Bar and am currently employed as Director of Public Education for the Connecticut Freedom of Information Commission, having first been employed
by said commission in 1996.

3. I am providing this affidavit in light of the Supreme Court decision in Director, Retirement & Benefits Services Division v. Freedom of Information Commission, 256 Conn. 764 (2001), in which the court apparently invites a reconsideration of Perkins v. Freedom of Information Commission, 228 Conn. 158 (1993). See, Director, supra at 782, fn 13, 785 (Zarella, J. concurring).

4. As part of my responsibilities as Director of Public Education for said commission, I have developed, organized and scheduled speaking engagements, seminars and programs explaining the duties and rights established under the Connecticut Freedom of Information Act.

5. Since I assumed my current position in 1996, there have been approximately 290 such speaking engagements, seminars and programs in Connecticut and I have personally lectured in approximately 80 such speaking engagements, seminars and programs.

6. As part of the presentation I have prepared for such speaking engagements, seminars and programs, the subject of the Connecticut General Statues Section 1-210(b)(2) exemption for personnel, medical and similar files the disclosure of which would constitute an invasion of personal privacy is stressed because of the great interest in that exemption and the confusion generated by a series of inconsistent and contradictory court decisions prior to Perkins, supra. See, e.g., Chairman v. Freedom of Information Commission, 217 Conn. 193 (1991) (establishing "reasonable expectation of privacy" test; query whether subjectively or objectively applied) and Board of Education v. Freedom of Information Commission, 210 Conn. 590 (1989) (confirming a "balancing" test), which was overruled by the Chairman case.

7. Since the Supreme Court ruling in Perkins, supra, all Freedom of Information Commission staff members who conduct such speaking engagements, seminars and programs discuss in detail the rulings in that case and its progeny.

8. As part of my responsibilities as Director of Public Education, I also answer telephone and other inquiries from public officials and the public. Since my employment with said commission, I have answered thousands of such inquiries, including hundreds of inquiries concerning the Connecticut General Statutes Section 1-210(b)(2) exemption. In responding to such inquiries I discuss in detail the Perkins case and its progeny.

9. Based on the foregoing experiences, it is my opinion that the Perkins decision, and its progeny, have had a beneficial effect on public officials and the public itself because they can rely on a now long-standing and clear test with respect to the Connecticut General Statutes Section 1-210(b)(2) exemption, which helps them determine whether that exemption is applicable to the practical problems they encounter with respect to personnel, medical and similar information. Indeed, the many court and Freedom of Information Commission decisions applying the Perkins test have given public officials and the public a now consistent body of law concerning that statutory exemption.

Eric V. Turner

COUNTY OF HARTFORD
ss: Hartford
STATE OF CONNECTICUT

Subscribed and attested to before me this 9th day of January, 2002.

Mitchell W. Pearlman
Commissioner of the Superior Court

FREEDOM OF INFORMATION COMMISSION
OF THE STATE OF CONNECTICUT

In the Matter of a Complaint by | FINAL DECISION

Lynn Ezzo and Gary Ezzo,

Complainants | Docket # FIC 2018-0012

against

Superintendent of Schools,
Berlin Public Schools; Principal,
Berlin High School, Berlin Public
Schools; and Berlin Public Schools,

Respondents | October 10, 2018

The above-captioned matter was heard as a contested case on March 21, 2018, at which time the complainants and respondents appeared, stipulated to certain facts and presented testimony, exhibits and argument on the complaint.

After consideration of the entire record, the following facts are found and conclusions of law are reached:

1. The respondents are public agencies within the meaning of §1-200(1), G.S.

2. It is found that, on December 18, 2017, the complainants sent the following email to the respondents:

> Our son, John Ezzo, has told us that notes were taken by school personnel when he was questioned by Kelly Maio on October 3rd, in the presence of John Carras. The contents of these notes were shared with other individuals.
>
> Under the provisions of the Family Educational Rights and Privacy Act and Connecticut Law, I wish to inspect the following education record: I would like a copy of any notes taken that contained information regarding John on and surrounding the October 3rd event that led to his suspension and were used to reveal information to others, i.e., the school resource officer, other school administrators, etc....

3. It is found that, by email sent on December 20, 2017, the respondents denied the

records request contained in the complainants' December 18, 2017 email, claiming that the personal notes of a school employee are not an educational record of a student, and are also exempt from disclosure under the Freedom of Information ("FOI") Act.

4. By letter dated January 9, 2018, the complainants appealed to this Commission, alleging that the respondents failed to provide them with copies of records responsive to their December 18th request, described in paragraph 2, above, in violation of the FOI Act.

5. Section 1-200(5), G.S., defines "public records or files" as:

> any recorded data or information relating to the conduct of the public's business prepared, owned, used, received or retained by a public agency, or to which a public agency is entitled to receive a copy by law or contract under section 1-218, whether such data or information be handwritten, typed, tape-recorded, printed, photostated, photographed or recorded by any other method.

6. Section 1-210(a), G.S., provides in relevant part that:

> Except as otherwise provided by any federal law or state statute, all records maintained or kept on file by any public agency, whether or not such records are required by any law or by any rule or regulation, shall be public records and every person shall have the right to (1) inspect such records promptly during regular office or business hours . . . (3) receive a copy of such records in accordance with section 1-212.

7. Section 1-212(a), G.S., provides in relevant part that "any person applying in writing shall receive, promptly upon request, a plain, facsimile, electronic or certified copy of any public record."

8. It is found that the records requested by the complainants are public records and must be disclosed in accordance with §§1-200(5), 1-210(a) and 1-212(a), G.S., unless they are exempt from disclosure.

9. It is found that as part of an investigation into an incident that occurred at Berlin High School on October 3, 2017, Vice Principal Kelly Maio, who serves as the high school's Safe School Climate Coordinator, interviewed various students, including the complainants' son, about the incident. It is found that during such interviews Ms. Maio took handwritten notes. It is further found that she used such notes as a personal memory aid. In addition, it is found that although Ms. Maio spoke to Berlin High School's Resource Officer about the incident immediately after interviewing the complainants' son, she did not share her notes with the Resource Officer nor any other individuals, but retained them in her sole possession.

10. At the hearing, the respondents testified that they read the records request in the

second paragraph of the December 18th email in conjunction with the statement in the first paragraph, and interpreted the complainants' December 18th request as a request for the handwritten notes prepared by Ms. Maio during her October 3, 2017 interview of only the complainants' son.

11. It is found that the respondents' interpretation of the complainants' request was reasonable.

12. On August 6, 2018, pursuant to an order of the hearing officer, the respondents submitted one page of unredacted handwritten notes to the Commission for in camera review. On the in camera index, the respondents claim that such notes are exempt from disclosure pursuant to §1-210(b)(1), G.S.

13. Section 1-210(b)(1), G.S., provides that "[n]othing in the Freedom of Information Information Act shall be construed to require disclosure of ... [p]reliminary drafts or notes provided the public agency has determined that the public interest in withholding such documents clearly outweighs the public interest in disclosure."

14. The Supreme Court ruled in Shew v. Freedom of Information Commission, that "the concept of preliminary [drafts or notes], as opposed to final [drafts or notes], should not depend upon...whether the actual documents are subject to further alteration..." but rather "[p]reliminary drafts or notes reflect that aspect of the agency's function that precede formal and informed decision making.... It is records of this preliminary, deliberative and predecisional process that...the exemption was meant to encompass." Shew v. Freedom of Information Commission, 245 Conn. 149, 165 (1998), citing Wilson v. Freedom of Information Commission, 181 Conn. 324, 332 (1989). In addition, once the underlying document is identified as a preliminary draft or note, "[i]n conducting the balancing test, the agency may not abuse its discretion in making the decision to withhold disclosure. The agency must, therefore, indicate the reasons for its determination to withhold disclosure and those reasons must not be frivolous or patently unfounded." State of Connecticut, Office of the Attorney General v. Freedom of Information Commission, 2011 WL 522872, *8 (Conn. Super. Ct. Jan. 20, 2011) (citations omitted).

15. The year following Wilson, the Connecticut legislature adopted Public Act 81-431, and added to the FOI Act the language now codified in §1-210(e)(1), G.S.

16. Accordingly, §1-210(b)(1), G.S., must be read in conjunction with §1-210(e)(1), G.S., which provides, in relevant part:

> Notwithstanding the provisions of subdivisions (1) and (16) of subsection (b) of this section, disclosure shall be required of...
>
> (1) Interagency or intra-agency memoranda or letters, advisory opinions, recommendations or any report comprising part of the process by which governmental decisions and policies are formulated, except disclosure shall not be required of a preliminary draft of a memorandum, prepared by a member of the staff of a

> public agency, which is subject to revision prior to submission to or discussion among the members of such agency….

17. Based upon a careful in camera review of the handwritten notes and the testimony provided at the hearing, it is found that such records are "preliminary drafts or notes" within the meaning of §1-210(b)(1), G.S. See Lee B. Smith v. Superintendent, Middletown Public Schools (April 14, 2014) (where the FOI Commission concluded that notes of the assistant Superintendent's interviews with witnesses during an investigation of a bullying complaint were preliminary drafts or notes within the meaning of §1-210(b)(1), G.S.).

18. It is also found that the respondents determined that the public interest in withholding the handwritten notes clearly outweighed the public interest in disclosure. Specifically, the respondents determined that the disclosure of such records would have a chilling effect on an administrator's ability to effectively conduct investigations into student matters.

19. It is further found that the handwritten notes are not interagency or intra-agency memoranda or letters, advisory opinions, recommendations or any report comprising part of the process by which governmental decisions and policies are formulated, within the meaning of §1-210(e)(1), G.S.

20. It is concluded, therefore, that the in camera records are exempt from disclosure pursuant §1-210(b)(1), G.S., and that the respondents did not violate the disclosure provisions of §§1-210(a) and 1-212(a), G.S., in this matter.

The following order by the Commission is hereby recommended on the basis of the record concerning the above-captioned complaint:

1. The complaint is hereby dismissed.

Approved by Order of the Freedom of Information Commission at its regular meeting of October 10, 2018.

Cynthia A. Cannata
Acting Clerk of the Commission

PURSUANT TO SECTION 4-180(c), G.S., THE FOLLOWING ARE THE NAMES OF EACH PARTY AND THE MOST RECENT MAILING ADDRESS, PROVIDED TO THE FREEDOM OF INFORMATION COMMISSION, OF THE PARTIES OR THEIR AUTHORIZED REPRESENTATIVE.

THE PARTIES TO THIS CONTESTED CASE ARE:

LYNN EZZO AND GARY EZZO, 163 Castlewood Drive, Berlin, CT 06037

SUPERINTENDENT OF SCHOOLS, BERLIN PUBLIC SCHOOLS; PRINCIPAL, BERLIN HIGH SCHOOL, BERLIN PUBLIC SCHOOLS; AND BERLIN PUBLIC SCHOOLS, c/o Attorney Alyce L. Alfano, and Attorney Benjamin P. FrazziniKendrick, Shipman & Goodwin LLP, One Constitution Plaza, Hartford, CT 06103

Cynthia A. Cannata
Acting Clerk of the Commission

FIC 2018-0012/FD/CAC/10/10/2018

FREEDOM OF INFORMATION COMMISSION
OF THE STATE OF CONNECTICUT

In the Matter of a Complaint by Leo J. Bilodeau, Complainant	Report of Hearing Officer
against	Docket #FIC77-93
State of Connecticut; Norwich Hospital and Superintendent of Norwich Hospital, Respondents	June 2, 1977

The above captioned matter was heard as a contested case on May 25, 1977, at which time the complainant and the respondents appeared and presented testimony, exhibits and argument on the complaint.

After consideration of the entire record, the following facts are found:

1. The respondent hospital and superintendent are public agencies within the meaning of §1-18a(a), G.S.

2. By letter dated April 12, 1977, the complainant requested of the respondent superintendent all records and correspondence concerning the complainant's confinement at the respondent hospital from August 21, 1956 through June 27, 1957.

3. Having failed to receive a response to the aforesaid letter by May 2, 1977, the complainant appealed to this Commission by letter filed herein on May 5, 1977.

4. On May 4, 1977, the assistant superintendent of the respondent hospital mailed to the complainant an abstract of a portion of the requested documents.

5. At the hearing on this matter, the respondents moved to dismiss the complaint on the ground that the documents requested are not public records within the meaning of Chapter 3, General Statutes.

6. The term "public records on files" is defined in §1-18a(d), G.S., in pertinent part, as "any recorded data or information relating to the conduct of the public's business prepared, owned, used, received or retained by a public agency ...." (Emphasis added).

7. §1-19(a), G.S, however, also states in pertinent part that "Except as otherwise provided by any federal law or state statute, all records maintained or kept on file by any public agency.. shall be public records and every person shall have the right to inspect or copy such records...." (Emphasis added).

8. While it is clear that §1-18a(d) forms part of a general definitional statute to be used in construing the Freedom of Information Act, it must be read together with §1-19(a) and the legislative policy underlying the entire Act in order to resolve any questions as to the operative definition of the term "public records".

9. Using the criteria set forth in paragraph 8, above, it is concluded that the General Assembly intended that public records must, in fact, relate to the conduct of the public's business, as stated in §1-18a(d).

10. Since every document in the custody or possession of a public agency arguably touches, in some respect, the public's business, this Commission must consider each request and complaint on its own merits and determine whether the subject documents indeed relate to the conduct of the public's business within the meaning of §1-18a(d).

11. The documents in question obviously contain information personal to the complainant only. They contain intimate details of his private life and reports of his medical and psychological health and conclusions of other persons concerning same.

12. It defies belief that the General Assembly intended that the aforesaid documents fall within the class of records to which members of the general public should have access.

13. Consequently, it is concluded that the documents herein requested do not relate to the conduct of the public's business and are therefore not public records within the meaning of the Freedom of Information Act, as codified in Chapter 3 of the General Statutes.

The following order by the Commission is hereby recommended on the basis of the record concerning the above captioned complaint:

1. The complaint is hereby dismissed since the documents requested are not public records within the meaning of the Freedom of Information Act, as codified in Chapter 3 of the General Statutes.

2. While this Commission is constrained by its understanding of the public access provisions of the Freedom of Information Act--the statute under which it must operate--to dismiss the complaint herein, the Commission strongly urges the respondents to permit the complainant to inspect or copy the complete content of his file. The Commission makes this recommendation on 3 grounds. First, the file concerns the complainant directly and exclusively. Second, the complainant has already been permitted to review a portion of that file. Finally, the Complainant should be permitted to inspect or copy his file as a matter of the public policy embodied in P.A. 76-421, which becomes effective on July 1, 1977.

Donald W. Friedman

Commissioner Donald W. Friedman

as Hearing Officer

Approved by order of the Freedom of Information Commission on June 8, 1977.

Louis J. Tapogna, as Clerk of the
Freedom of Information Commission

Connecticut
Freedom of Information Commission

(/FOI)

Final Decision FIC2012-089

In the Matter of a Complaint by	FINAL DECISION
Hardie Burgin, Complainant	
against	Docket #FIC 2012-089
Chief, Police Department, Town of East Hampton; and Police Department, Town of East Hampton, Respondents	December 12, 2012

The above-captioned matter was heard as a contested case on July 27, 2012, at which time the complainant and the respondents appeared and presented testimony, exhibits and argument on the complaint.

After consideration of the entire record, the following facts are found and conclusions of law are reached:

1. The respondents are public agencies, within the meaning of §1-200(1), G.S.

2. It is found that, by undated letter received by the respondents on January 20, 2012, the complainant made a request for (a) all emails of East Hampton Police Chief Matthew Reimondo and Sergeant Timothy Dowty, from May 15, 2011 through September 30, 2011; and (b) all written communication between Chief Reimondo or Sgt. Dowty and Dave Hebert from May 15, 2011 through September 30, 2011.

3. It is found that, by letter dated January 23, 2012, the respondents informed the complainant that they had received his request and intended to comply. It is also found that they explained that the requested records would need to be reviewed to determine whether any exemptions to disclosure applied, and that the review process would "take some time." It is further found that, by letter dated January 25, 2012, the respondents supplemented their January 23rd response by informing the complainant that there were no records responsive to the request, described in paragraph 2(b), above, with regard to Chief Reimondo. However, it is found that the respondents did not respond to the request, described in paragraph 2(b), above, with regard to Sgt. Dowty.

4. By email dated and filed February 16, 2012, the complainant appealed to this Commission, alleging that the respondents violated the Freedom of Information (FOI) Act by failing to comply with the request for records described in paragraph 2, above.

5. Section 1-200(5), G.S., provides:

"Public records or files" means any recorded data or information relating to the conduct of the public's business prepared, owned, used, received or retained by a public agency, or to which a public agency is entitled to receive a copy by law or contract under section 1-218, whether such data or information be handwritten, typed, tape-recorded, printed, photostated, photographed or recorded by any other method.

6. Section 1-210(a), G.S., provides in relevant part that:

Except as otherwise provided by any federal law or state statute, all records maintained or kept on file by any public agency, whether or not such records are required by any law or by any rule or regulation, shall be public records and every person shall have the right to (1) inspect such records promptly during regular office or business hours . . . (3) receive a copy of such records in accordance with section 1-212. (Emphasis added).

7. Section 1-212(a), G.S., provides in relevant part that "[a]ny person applying in writing shall receive, promptly upon request, a plain, facsimile, electronic or certified copy of any public record."

8. It is found that the respondents conducted a thorough search for records responsive to the request, described in paragraph 2(a), above. It is found that the respondents reviewed approximately 2000 emails in response to the request for Chief Reimondo's emails, and 281 emails in response to the request for Sgt. Dowty's emails. It is found that, on April 26, 2012, the respondents provided copies of certain of Sgt. Dowty's emails to the complainant, and that, on May 5, 2012, they provided to him copies of certain of Captain Reimondo's emails.

9. However, it is found that the respondents withheld 242 of Chief Reimondo's emails and 183 of Sgt. Dowty's emails from the complainant, claiming that they are exempt from disclosure.

10. At the hearing in this matter, the complainant requested an in camera review of the records being claimed exempt by the respondents. The hearing officer ordered that such records be submitted for in camera review on or before August 10, 2012. The respondents requested, and were granted, without objection from the complainant, an extension of time by which to submit the in camera records, and such records were submitted for in camera review on September 14, 2012.

11. It is found that the in camera records are responsive to the request, described in paragraph 2(a), above, and consist of Chief Reimondo's and Sgt. Dowty's emails (the "in camera records"). The respondents claim that Chief Reimondo's emails are exempt from disclosure pursuant to §§1-210(b)(3), 1-210(b)(10), 1-210(b)(4), 1-210(b)(9), 1-210(b)(1), G.S., and further claim that certain other emails are "personal" in nature and therefore not public records subject to disclosure. The respondents claim that Sgt. Dowty's emails are exempt from disclosure pursuant to §1-210(b)(3), G.S.

12. With regard to the emails described on the index as "personal", the respondents argued that, because such emails do not pertain to the public's business, they are not public records, as that phrase is used in §1-200(5), G.S.

13. It is found that the respondents maintain the emails, identified on the index as "personal", and that Chief Reimondo used town equipment to send and receive these emails. However, it is found that such emails do not pertain to the conduct of the public's business. Moreover, unlike the emails found by this Commission to be public records in Burgin v. Chief, Police Department, Town of East Hampton, Docket #FIC 2011-704 (July 11, 2012), the emails in the present case do not reveal "an inappropriate mixing of the officer's professional and private life", and therefore do not "relate to the officer's public position." Id. at p.2.

14. Accordingly, after careful review of the emails identified as "personal" on the index, and under the facts and circumstances of this case, it is found that such emails are not public records within the meaning of §1-200(5), G.S., and therefore are not required to be disclosed. Thus, it is concluded that the respondents did not violate the FOI Act as alleged when they withheld such records from the complainant. However, it is found that the remainder of the in camera records are public records, within the meaning of §§1-200(5) and 1-210(a), G.S.

Chief Reimondo's Emails

15. It is found that of the 242 emails submitted for in camera inspection, 106 of them are described on the index as email correspondence from CTIC ("Connecticut Intelligence Center"). The respondents contend that the CTIC emails are exempt from disclosure pursuant to §1-210(b)(3), G.S., which permits nondisclosure of:

"[r]ecords of law enforcement agencies not otherwise available to the public which records were compiled in connection with the detection or investigation of crime, if the disclosure of said records would not be in the public interest because it would result in the disclosure of (A) the identity of informants not otherwise known or the identity of witnesses not otherwise known whose safety would be endangered or who would be subject to threat or intimidation if their identity was made known, (B) signed statements of witnesses, (C) information to be used in a prospective law enforcement action if prejudicial to such action, (D) investigatory techniques not otherwise known to the general public, (E) arrest records of a juvenile, which shall also include any investigatory files, concerning the arrest of such juvenile, compiled for law enforcement purposes, (F) the name and address of the victim of a sexual assault...or injury or risk of injury, or impairing of morals...or of an attempt thereof, or (G) uncorroborated allegations subject to destruction pursuant to section 1-216;

16. It is found that CTIC was formed in response to the September 11th attacks on the World Trade Center, and that it sends periodic emails to law enforcement agencies as a method of disseminating information to such agencies about ongoing criminal investigations, tips on active arrest warrants, terrorists, etc. It is found that such information is labeled CONFIDENTIAL for law enforcement only and is not disseminated to the public.

17. By email dated October 22, 2012, the complainant stated that he no longer wished to pursue the complaint as it pertains to the records, identified on pages 4 through 13 of the index, as "correspondence from CTIC." The Commission takes administrative notice of such email.

18. Accordingly, the Commission shall not further consider the allegations with respect to such records.

19. With regard to the emails claimed exempt pursuant to §1-210(b)(10), G.S., that provision permits an agency to withhold from disclosure records of "communications privileged by the attorney-client relationship."

20. The applicability of the exemption contained in §1-210(b)(10), G.S., is governed by established Connecticut law defining the privilege. That law is well set forth in Maxwell v. FOI Commission, 260 Conn. 143 (2002). In that case, the Supreme Court stated that §52-146r, G.S., which established a statutory privilege for communications between public agencies and their attorneys, merely codifies "the common-law attorney-client privilege as this court previously had defined it." Id. at 149.

21. Section 52-146r(2), G.S., defines "confidential communications" as:

all oral and written communications transmitted in confidence between a public official or employee of a public agency acting in the performance of his or her duties or within the scope of his or her employment and a government attorney relating to legal advice sought by the public agency or a public official or employee of such public agency from that attorney, and all records prepared by the government attorney in furtherance of the rendition of such legal advice. . . .

22. The Supreme Court has also stated that "both the common-law and statutory privileges protect those communications between a public official or employee and an attorney that are confidential, made in the course of the professional relationship that exists between the attorney and his or her public agency client, and relate to legal advice sought by the agency from the attorney." Maxwell, supra at 149.

23. Recently, the Supreme Court reaffirmed that for a communication to be privileged, all four parts of a four-part test must be met: "(1) the attorney must be acting in a professional capacity for the agency, (2) the communications must be made to the attorney by current employees for the agency, (3) the communications must relate to the legal advice sought by the agency from the attorney, and (4) the communications must be made in confidence." Lash v. Freedom of Information Commission, 300 Conn. 516 (2011), citing Shew v. Freedom of Information Commission, 245 Conn. 159 (1998).

24. After careful review of the in camera records, it is found that the following emails are **exempt** from disclosure pursuant to the attorney-client privilege:

Date: 6/6/11
Received: 3:25 (59 KB) email ONLY; 3:32 (10 KB); 3:33 (13 KB); 3:33 (12 KB); 3:41 (12 KB); 3:47 (8 KB)
Date: 6/7/11
Received: 8:07 (87 (KB)
Date: 6/16/11
Received: 3:47 (135 KB)[1] ; 3:59 (27 KB) second email on the page ONLY

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[1] There are two entries on the index with the same date and time received. The emails are identical and, accordingly, both are exempt and may be withheld.

Date: 7/5/11
Received: 10:23 (5 KB); 10:26 (8 KB)
Date: 7/25/11
Received: 3:22 (27 KB); 3:29 (514 KB) email and attachment; 3:33 (154 KB) email and attachment; 3:38 (157 KB) email and attachment; 3:46 (83 KB) email and attachment; 3:47 (83 KB) email and attachment; 3:55 (84 KB) email and attachment; 4:54 (88 KB) email and attachment[2]; 6:00 (5 KB)

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[2] There are two entries on the index with the same date and time received. The emails are identical and, accordingly, both are exempt and may be withheld.

Date: 7/26/11
Received: 3:47 (84 KB); 3:48 (17 KB); 3:49 (15 KB); 3:50 (20 KB)
Date: 8/8/11
Received: 1:00 (9 KB); 1:50 (35 KB)[3]

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[3] There are two entries on the index with the same date and time received. The emails are identical and, accordingly, both are exempt and may be withheld.

Date: 8/10/11
Received: 10:50 (397 KB) final column ONLY; 10:53 (399 KB) final column ONLY

Date: 8/17/11
Received: 9:23 (261 KB); 9:26 (264 KB) email ONLY; 10:12 (20 KB) email ONLY; 11:14 (19 KB); 11:16 (24 KB)
Date: 9/28/11
Received: 11:16 (11 KB); 3:05 (32 KB)
Date: 9/29/11
Received: 1:32 (100 KB) email ONLY; 2:13 (99 KB)
Date: 9/30/11
Received: 8:57 (139 KB) email ONLY; 10:09 (264 KB) email ONLY; 10:12 (22 KB); 11:16 (24 KB) email and attachments; 12:18 (139 KB) second email of two ONLY; 2:29 (60 KB) email and attachment: 2:31 (30 KB); 3:00 (24 KB); 3:01 (65 KB) email and attachment; 3:06 (68 KB); 3:27 (28 KB); 3:38 (61 KB) email ONLY

25. Accordingly, it is concluded that the respondents did not violate the FOI Act as alleged by withholding the records, described in paragraph 24, above, from the complainant.

26. The respondents claimed several emails between Chief Reimondo and an investigator hired by the town to conduct an internal affairs investigation within the police department also are exempt from disclosure pursuant to the attorney-client privilege. Although it is found that the investigator also is an attorney, the respondents offered no evidence, nor is it evident on the face of the internal affairs report itself, that the respondents hired such investigator to provide legal advice, or that he provided legal advice, to the respondents. Thus, this case is distinguishable from Shew v. Freedom of Information Commission, 245 Conn. 149 (1998), in which the Supreme Court concluded that the attorney-client privilege extended to a report prepared by a law firm hired to conduct an investigation of a police chief, but where the investigators/lawyers also provided legal advice to the town. See also Bestoff v. Town Clerk, Town of Avon, Docket #FIC 2012-679 (July 8, 2012) (report prepared by investigator hired by law firm retained by town found to be exempt as attorney-client privileged because it was provided to law firm for purpose of facilitating legal advice); (Anderson v. Superintendent of Schools, Derby Public Schools, Docket #FIC 2009-166 (March 10, 2012), (report compiled by consultant hired by law firm representing town found to be attorney-client privileged where such report was necessary to give the legal advice sought by town). Accordingly, it is found that the following emails and attachments are **not exempt** from disclosure pursuant to 1-210(b)(10), G.S.

Date: 7/6/11
Received: 7:54 (176 KB)
Date: 8/9/11
Received: 1:42 (100 KB); 10:38 (10 KB); 1:49 (16 KB); 3:48 (KB)

Date: 9/21/11
Received: 7:09 (19 KB);
Date: 9/22/11
Received: 3:46 (162 KB)

27. With regard to the following emails and/or attachments claimed exempt pursuant to 1-210(b)(10), G.S., it is found that the respondents failed to prove the applicability of such exemption, because such emails and/or attachments either: are not between the attorney and the client, or because they do not relate to legal advice sought by the agency from the attorney:

Date: 6/6/11
Received: 3:25 (59 KB) attachment ONLY
Date: 6/7/11
Received: 8:13 (34 KB)[4]

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[4] There are two entries on the index with the same date and time received. The emails are identical and, accordingly, neither are exempt and neither may be withheld.

Date: 6/8/11
Received: 10:49 (37 KB)[5]; 3:23 (28 KB)[6]

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[5] There are two entries on the index with the same date and time received. The emails are identical and, accordingly, neither are exempt and neither may be withheld.

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[6] There are two entries on the index with the same date and time received. The emails are identical and, accordingly, neither are exempt and neither may be withheld.

Date: 6/9/11
Received: 3:44 (31 KB)
Date: 6/16/11
Received: 3:59 (27 KB) first email of two
Date: 6/21/11
Received: 11:22 (134 KB)
Date: 6/23/11
Received: 6:35 (95 KB) neither email nor attachment
Date: 7/5/11
Received: 10:23 (7 KB)
Date: 7/6/11
Received: 7:54 (176 KB)
Date: 9/21/11
Received: 7:09 (19 KB)

Date: 9/22/11
Received: 3:46 (162 KB) neither email nor attachment
Date: 9/26/11
Received: 12:03 (67 KB) neither email nor attachment[7]; 12:14 (70 KB) neither email nor attachment; 12:55 (70 KB)

7
There are two entries on the index with the same date and time received. The emails are identical and, accordingly, neither are exempt and neither may be withheld.

Date: 9/29/11
Received: 3:46 (100 KB) attachment not privileged; 2:00 (99 KB) neither email nor attachment
Date: 9/30/11
Received: 3:38 (61 KB) attachment not privileged

28. Accordingly, it is found that the emails described in paragraph 27, above, are **not exempt** from disclosure pursuant to the attorney-client privilege, §1-210(b)(10), G.S.

29. With regard to the respondents' §1-210(b)(4), G.S., claim of exemption, that provision permits a public agency to withhold "[r]ecords pertaining to strategy and negotiations with respect to pending claims or pending litigation to which the public agency is a party until such litigation or claim has been finally adjudicated or otherwise settled." The respondents contend that the following in camera records are exempt from disclosure pursuant to §1-210(b)(4), G.S.:

Date: 6/6/11
Received: 3:25 (59 KB) attachment ONLY
Date: 7/5/11
Received: 10:23 (7 KB)
Date: 7/6/11
Received: 7:54 (176 KB)

30. It is found that the respondents did not offer evidence at the hearing in this matter that the in camera records described in paragraph 29, above, pertain to strategy and negotiations with respect a pending claim or pending litigation to which the public agency is a party. Moreover, it is not clear from the records themselves that they pertain to strategy and negotiations with respect a pending claim or pending litigation. Accordingly, it is found that the respondents failed to prove the applicability of §1-210(b)(4), G.S., to the records at issue.

31. With regard to the respondents' §1-210(b)(9), G.S., claim of exemption, that provision permits a public agency to withhold "[r]ecords, reports and statements or negotiations with respect to collective bargaining." After careful review of the in camera records, it is found that the following records are **exempt** from disclosure pursuant to §1-210(b)(9), G.S.:

Date: 6/16/11
Received: 3:47 (135 KB)[8] attachment ONLY

8
There are two entries on the index with the same date and time received. The emails are identical and, accordingly, both are exempt and may be withheld.

Date: 6/21/11
Received: 11:22 (134 KB) attachment ONLY
Date: 7/21/11
Received: 6:23 (48 KB)[9]; email and attachment

9
There are three entries on the index with the same date and time received. The emails are identical and, accordingly, all are exempt and may be withheld.

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32. Accordingly, it is concluded that the respondents did not violate the FOI Act as alleged when they withheld the records, described in paragraph 31, above, from the complainant.

33. However, it is found that the following in camera records are not records, reports and statements or negotiations with respect to collective bargaining, as contemplated by the statute. Accordingly, it is found that the following records are **not exempt** from disclosure pursuant to §1-210(b)(9), G.S.:

Date: 6/7/11
Received: 8:13 (34 KB)[10]

10
There are two entries on the index with the same date and time received. The emails are identical and, accordingly, neither are exempt and neither may be withheld.

Date: 6/8/11
Received: 10:49 (37 KB)[11]; 3:23 (28 KB)[12]

11
There are two entries on the index with the same date and time received. The emails are identical and, accordingly, neither are exempt and neither may be withheld.

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[12] There are two entries on the index with the same date and time received. The emails are identical and, accordingly, neither are exempt and neither may be withheld.

Date: 6/9/11
Received: 3:44 (31 KB)
Date: 6/16/11
Received: 3:59 (27 KB) first email of two
Date: 6/21/11
Received: 11:22 (134 KB) email

34. With regard to the respondents' §1-210(b)(1), G.S., claim of exemption, that provision permits a public agency to withhold "[p]reliminary drafts or notes provided the public agency has determined that the public interest in withholding such documents clearly outweighs the public interest in disclosure."

35. The respondents contend that the following in camera records are exempt from disclosure pursuant to §1-210(b)(1), G.S.:

Date: 6/23/11
Received: 6:35 (95 KB) email and attachment
Date: 8/9/11
Received: 1:49 (16 KB); 3:48 (KB)
Date: 8/17/11
Received: 9:26 (265 KB) attachment; 10:12 (20 KB) attachment
Date: 9/21/11
Received: 7:09 (19 KB)
Date: 9/22/11
Received: 3:46 (162 KB) email and attachment
Date: 9/26/11
Received: 12:03 (67 KB) email and attachment[13]; 12:14 (70 KB) email and attachment; 12:55 (70 KB)

[13] There are two entries on the index with the same date and time received. The emails are identical and, accordingly, neither are exempt and neither may be withheld.

Date: 9/30/11
Received: 8:57 (139 KB) attachment; 10:09 (264 KB) attachment; 12:18 (139 KB); 3:38 (61 KB) attachment

36. At the hearing in this matter, the respondents did not offer evidence from which it could be found that the public agency determined that the public interest in withholding the in camera records clearly outweighs the public interest in disclosure of such records.

37. Accordingly, it is concluded that the respondents failed to prove the applicability of §1-210(b)(1), G.S., to the records described in paragraph 35, above.

38. Based upon the foregoing, it is concluded that the respondents violated the FOI Act in failing to disclose the records, described in paragraphs 26, 27, 29, 33 and 35, above, to the complainant.

Sgt. Dowty's Emails

39. The respondents contend that all of Sgt. Dowty's emails are exempt from disclosure pursuant to §1-210(b)(3), G.S.

40. It is found that, although there are a total of 181 emails, many of them are duplicates. It is further found that such emails consist of communications from CTIC, as described in paragraph 15, above, or other confidential law enforcement information, not otherwise available to the public. Thus, it is found that such emails are **exempt** from disclosure pursuant to §1-210(b)(3), G.S.

41. Accordingly, it is found that the respondents did not violate the FOI Act as alleged in withholding the in camera records described in paragraph 40, above, from the complainant.

42. With regard to the records, described in paragraph 2(b), above, as they pertain to Sgt. Dowty, it is found that, at the time of the hearing in this matter, the respondents had located three responsive records, but had not yet reviewed such records for possible exemptions or provided copies of such records to the complainant. According to the respondents, the failure to have promptly provided the complainant with copies of such records was an oversight. Nevertheless, it is found that the respondents violated the FOI Act in failing to provide the complainant with copies of such records.

The following order by the Commission is hereby recommended on the basis of the record concerning the above-captioned complaint:

1. Forthwith, the respondents shall provide a copy of the in camera records described in paragraphs 26, 27, 29, 33, 35 and 42, above, at no cost.
2. Henceforth, the respondents shall strictly comply with the provisions of §§1-210(a) and 1-212(a), G.S.

Approved by Order of the Freedom of Information Commission at its regular meeting of December 12, 2012.

Cynthia A. Cannata
Acting Clerk of the Commission

PURSUANT TO SECTION 4-180(c), G.S., THE FOLLOWING ARE THE NAMES OF EACH PARTY AND THE MOST RECENT MAILING ADDRESS, PROVIDED TO THE FREEDOM OF INFORMATION COMMISSION, OF THE PARTIES OR THEIR AUTHORIZED REPRESENTATIVE.

THE PARTIES TO THIS CONTESTED CASE ARE:

Hardie Burgin
26 Apple Lane
Colchester, CT 06415

Chief, Police Department, Town of
East Hampton; and Police Department,
Town of East Hampton
c/o Kenneth R. Slater, Jr., Esq. and
Richard P. Roberts

Halloran & Sage LLP
225 Asylum Street
Hartford, CT 06103

_____

Cynthia A. Cannata
Acting Clerk of the Commission
FIC/2012-089/FD/cac/12/12/2012

2020 WL 5606842

Superior Court of Connecticut,
Judicial District of New Britain, Tax and Administrative Appeals Session at New Britain.

COMMISSIONER OF the DEPARTMENT OF CORRECTION et al.
v.
FREEDOM OF INFORMATION COMMISSION

HHBCV196053190
|
File Date: July 30, 2020

John L. Cordani, Judge

INTRODUCTION

***1** This is an administrative appeal from a final decision of the Freedom of Information Commission (FOIC) brought by the plaintiffs, the Commissioner of the Department of Correction (Commissioner) and the Department of Correction (Department).

FACTS AND PROCEDURAL HISTORY

On May 23, 2018, Noah Snyder, an inmate at the-Carl Robinson Correctional Facility,[1] made a request of the Department for certain records pursuant to the Freedom of Information Act (FOIA). In relevant part, Mr. Snyder requested:

> [a] Any written correspondence between any and all DOC staff especially kitchen staff or staff holding the titles CFSS I, CFSS II, or CFSS III, or regional institutional or district food service managers, to and/or from any and all UCONN and/or CMHE staff discussing, referencing, and/or referencing myself specifically (inmate Noah Snyder #282683) by name, pseudonym, inmate number, or any other manner identifying me specifically and/or by reference, including electronic correspondence
>
> [b] All invoices for food and kitchen supplies ordered for use at CRCI and/or an enumeration of all individual food items ordered for use at CRCI from October 21, 2017, to the date this request is fulfilled." (FOIA Request.)[2]

Apparently Mr. Snyder wanted to investigate communications concerning his alleged dietary restrictions arising from an alleged intolerance to bananas. On June 5, 2018, Mr. Snyder filed a complaint with the FOIC alleging that the Department failed to produce records in response to his FOIA request. The Department produced responsive records, including some redacted emails, free of charge to Mr. Snyder in early September 2018.

The FOIC held a contested case hearing on September 11, 2018 concerning Mr. Snyder's complaint. At the hearing, testimony and evidence were presented by both parties. Mr. Snyder contended that he was suspicious that the Department had not conducted an exhaustive search for records responsive to his FOIA Request. At the hearing, there was testimony concerning a search for text messages on Department issued cell phones. At and after the September 11, 2018 hearing, the hearing officer issued various orders concerning redactions and additional documents. The Department complied with the various orders.

On November 28, 2018, on her own motion, the hearing officer reopened the hearing. The continued hearing was held on January 7, 2019. A proposed final decision was issued on February 4, 2019 which was considered by the FOIC at its meeting on March 13, 2019. The FOIC voted to remand the matter to the hearing officer for consideration of various issues raised by Mr. Snyder at the meeting. On March 19, 2019 and March 21, 2019, the hearing officer issued additional orders to the Department which the Department complied with. A revised proposed final decision was issued by the hearing officer on April 9, 2019. On April 24, 2019, the FOIC voted to amend the second proposed final decision of the hearing officer and then issued its final amended decision.

***2** The final decision of FOIC contained the following findings and related orders:

> 18. With respect to the requests described in paragraph 2[a], above, it is found that, in addition to conducting the search for emails, as described in paragraph 9, above, CS Washington searched for written correspondence and facsimilies. With respect to text messages, at the April 24, 2019 commission meeting, the complainant clarified that he sought text messages only to and from those employees with the specific titles "CFSS I, CFSS II, or CFSS III," and "regional institutional or district food

service managers." *At the hearings, CS Washington [also] testified that he does not have a mechanism by which to "capture" text messages*. CS Washington testified that he contacted the respondents' telephone service provider regarding retrieving text messages, and was informed that such information would not be provided without a warrant. *It is found, however, that the respondents did not provide any testimony as to whether [individual] DOC staff members searched their personal and/or [business] department issued cellphones for any responsive text messages. It is therefore found that the respondents failed to prove that they do not maintain text messages responsive to the requests described in paragraph 2[a], above. Accordingly, it is concluded that the respondents violated the FOI Act by withholding text messages.*

1. *The respondents shall undertake a search for text messages responsive to the complainant's records request as clarified in paragraph 18 of the findings, above,* and provide the complainant with a copy of such text messages, if located[, or otherwise inform the complainant in writing of the results of such search]. The respondents shall also provide an affidavit to the complainant and the commission, prepared by a person with knowledge of the efforts taken, and detailing the scope and results of their search [emphasis added].

The CS Washington noted was the Department's experienced FOIA officer who handled Mr. Snyder's FOIA Request.

The plaintiffs are aggrieved because they have exhausted their administrative remedies and appeal a final adverse decision of the FOIC finding that the plaintiffs have violated FOIA and ordering the plaintiffs to conduct further searches for responsive records.

STANDARD OF REVIEW

This appeal is brought pursuant to the Uniform Administrative Procedure Act (UAPA), General Statutes § 4-183.[3] Judicial review of an administrative decision in an appeal under the UAPA is limited. *Murphy v. Commissioner of Motor Vehicles,* 254 Conn. 333, 343, 757 A.2d 561 (2000). "[R]eview of an administrative agency decision requires a court to determine whether there is substantial evidence in the administrative record to support the agency's findings of basic fact and whether the conclusions drawn from those facts are reasonable ... Neither [the Supreme Court] nor the trial court may retry the case or substitute its own judgment for that of the administrative agency on the weight of the evidence or questions of fact ... Our ultimate duty is to determine, in view of all of the evidence, whether the agency, in issuing its order, acted unreasonably, arbitrarily, illegally or in abuse of its discretion." (Internal quotation marks omitted.) *Id.*

***3** Although the courts ordinarily afford deference to the construction of a statute applied by the administrative agency empowered by law to carry out the statute's purposes, "[c]ases that present pure questions of law ... invoke a broader standard of review than is ... involved in deciding whether, in light of the evidence, the agency has acted unreasonably, arbitrarily, illegally or in abuse of its discretion." (Internal quotation marks omitted.) *Dept. of Public Safety v. Freedom of Information Commission,* 298 Conn. 703, 716, 6 A.3d 763 (2010).

ANALYSIS

It is readily apparent that significant attention, effort and expense have been incurred in addressing Mr. Snyder's FOIA Request. The plaintiffs appeal the final FOIC decision only to the extent that it requires a search of Department employees' personal cell phones for texts. Although there is argument between the parties as to the meaning of the FOIC final findings and orders, there is no doubt that FOIC found that the plaintiffs violated FOIA because they did not search their employees' personal cell phones for text messages and ordered them to do so. The FOIC findings at paragraph 18 found in relevant part:

> It is found, however, that the respondents *did not provide any testimony as to whether [individual] DOC staff members searched their personal and/or* [business] department issued cellphones for any responsive text messages. *It is therefore found* that the respondents failed to prove that they do not maintain text messages responsive to the requests described in paragraph 2[a], above. *Accordingly, it is concluded that the respondents*

> *violated the FOI Act by withholding text messages* [emphasis added].

The "and/or" conjunctive used by FOIC in its findings means exactly that, both "and" as well as "or." Thus FOIC specifically found that the plaintiffs violated FOIA because they failed to search the personal cell phones of at least certain employees for text messages. Further at paragraph 1 of the FOIC's orders, the FOIC ordered the plaintiffs as follows:

> The respondents shall undertake a search for text messages responsive to the complainant's records request as clarified in paragraph 18 of the findings, ...

Thus FOIC has specifically ordered the plaintiff to search the personal cell phones of its employees for text messages.

In considering the foregoing, the court begins with an analysis of the FOIA's definition of public records and its overall disclosure requirements. General Statute § 1-200(5) provides as follows:

> "Public records or files" means any recorded data or information relating to the conduct of the public's business *prepared, owned, used, received or retained* by a public agency, or to which a public agency *is entitled to receive a copy by law or contract* under section 1-218, whether such data or information be handwritten, typed, tape-recorded, printed, photostated, photographed or recorded by any other method [emphasis added].

Further the overall FOIA disclosure requirement is contained in General Statute § 1-210(a) as follows:

> Except as otherwise provided by any federal law or state statute, all records *maintained or kept on file by any public agency*, whether or not such records are required by any law or by any rule or regulation, shall be public records and every person shall have the right to (1) inspect such records promptly during regular office or business hours, (2) copy such records in accordance with subsection (g) of section 1-212, or (3) receive a copy of such records in accordance with section 1-212 [emphasis added].

***4** Thus in order for records to be disclosable under FOIA the records must be prepared, owned, used, received or retained by the public agency, or the public agency must be entitled to receive copy by law or contract, and the records must be maintained or kept on file by any public agency.

On the record in this matter, there is no doubt that text messages on the personal cell phones of Department employees are not disclosable pursuant to a FOIA request to the Department. There is no evidence that text messages on personal cell phones were prepared, owned, used, received or retained by the Department. Further, there is no evidence that the Department was entitled to receive a copy of texts on personal cell phones by law or contract. Lastly, there is no evidence that the Department maintained or kept on file text messages from the personal cell phones of its employees. In fact, the only relevant evidence in the record, not surprisingly, shows the exact opposite. Department FOIA officer, CS Washington, testified that the Department had no means of "capturing" text messages that reside only on the personal cell phones of its employees. Again, this is not a surprising finding. The inability to "capture" such text messages means that the Department did not maintain or keep such text messages on file. Further, it is evidence that such messages contained only on personal cell phones were not prepared, owned, used, received or retained by the Department. Further CS Washington testified that he contacted the cell phone carrier and inquired about the Department's ability to acquire such text messages, and was, not surprisingly, told that the carrier would not provide personal text messages without a search warrant. The foregoing is evidence that the Department

was not entitled to receive a copy of texts on personal cell phones by law or contract.

Again, not surprisingly, the Department represents that it has a policy that prohibits personal cell phones in its facilities. The FOIC complains that this policy was not presented at the hearing below. However, one should expect that such a policy would be in place with an agency such as the Department of Correction. Further, for the Department to have introduced the policy at the hearing below, the issue of text messages on personal cell phones would need to have been squarely in issue, which it was not. Lastly, the court is capable to taking judicial notice of such an official policy of a state agency. [4] In any case, even without the policy, it is clear that the record contains no substantial evidence that such text messages, that exist only on personal cell phones, are disclosable public records under FOIA. [5]

***5** The FOIC appears to be requiring that the Department prove that texts contained solely on personal cell phones are not disclosable public records under FOIA. However, the complainant in this matter has made no showing that employees of the Department conduct official Department business on personal cell phones. [6] In fact, the issue of texts on personal cell phones was not squarely at issue in the hearings below. Further, in recognition of the lack of evidence, the Commission made no supportive findings that Department employees were conducting Department business on their personal cell phones, or even that any of the referenced employees used personal cell phones at work in any regard. On the record, it was not reasonable to require the Department to disprove an alleged fact that was not squarely at issue, and for which the complainant made no showing.

To the extent that FOIC's order requires the Department to search the personal cell phones of its employees, [7] the FOIC went too far on the record before it as noted above. The Department's employees have a reasonable expectation of privacy in their personal cell phones and in the text messages contained on their personal cell phones. See *State v. Boyd*, 295 Conn. 707 (2010). How the search of employee personal cell phones is conducted is really beside the point. Whether the employer seizes the cell phones and searches them, or orders the employees to search and report the results to the employer, the employees' right to privacy in their personal cell phones and texts contained thereon would be inappropriately violated. The FOIC in their brief state: "There is a big difference between asking an employee to check his or her own cellphone for the existence of public records and an order that directs an agency to seize and search a personal cell phone ..." Although there may be a difference, both proposals inappropriately invade the privacy of employees and are unauthorized by the record here. A fishing expedition for the unsupported possibility of public records on the personal cell phones of employees [8] on this record clearly goes beyond the authority of the FOIC. [9]

In view of the foregoing, the court concludes that, to the extent that the FOIC's order required the plaintiff to search, or to direct their employees to search, their employees' personal cell phones for text messages, such order is (1) in violation of constitutional or statutory provisions; (2) in excess of the statutory authority of the agency; (3) affected by error of law; (4) clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record. As such the court respectfully sustains the appeal.

ORDER

***6** The appeal is sustained. The plaintiffs appealed the final FOIC decision only to the extent that it required a search of Department employees' personal cell phones for texts. To the extent that the FOIC's order required the plaintiffs to search, or to direct their employees to search, their employees' personal cell phones for text messages, the FOIC's order is vacated, and no violation of FOIA arose from the fact that the plaintiff did not search the personal cell phones of their employees.

All Citations

Not Reported in Atl. Rptr., 2020 WL 5606842, 70 Conn. L. Rptr. 196

Footnotes

1 Mr. Snyder was serving a series of sentences for felony theft and drug offenses. Mr. Snyder has since passed away. Given Mr. Snyder's passing, the matter is now partly mooted since we do not have a party interested in the disclosure of public records. However, the Department has been found to have violated FOIA and seeks to rectify that finding.

2 Initially Mr. Snyder's requests were broader but the requests were refined through the administrative process below.

3 Section 4-183(j) provides in relevant part: “The court shall not substitute its judgment for that of the agency as to the weight of the evidence on questions of fact. The court shall affirm the decision of the agency unless the court finds that substantial rights of the person appealing have been prejudiced because the administrative findings, inferences, conclusions, or decisions are: (1) in violation of constitutional or statutory provisions; (2) in excess of the statutory authority of the agency; (3) made upon unlawful procedure; (4) affected by other error of law; (5) clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record; or (6) arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion. If the court finds such prejudice, it shall sustain the appeal and, if appropriate, may render a judgment under subsection (k) of this section or remand the case for further proceedings.”

4 The policy is in fact reflective of General Statute § 53a-174b which provides “(b) Conveyance or use of an electronic wireless communication device in a correctional institution is a class A misdemeanor.”

5 The FOIC cites a string of cases to support the FOIC's proposition that “if the *content* of the emails relates to the conduct of the public's business, such records [on employees' personal electronic devices] are “public records,” within the meaning of General Statute § 1-200(5). The FOIC's proposition is clearly too broad. It is certainly possible for an employee of a public agency to make private comments in a personal email or text on his or her personal electronic device that “relate to the conduct of public business” and for such personal email or text not to be a public record. Clearly every comment or text sent by a public employee that merely relates to public business is not necessarily a public record, for if that were the case, then every text of a public employee to their spouse informing them that they will be late for dinner because of public business would be a public record. Such is clearly not the case. Further, there is no substantial evidence in the record establishing that these Department employees in question conducted Department business on their personal cell phones.

6 The complainant's view that he observed texting and his mere suspicion that the texts might concern Department business and him are deeply insufficient to make a showing that texts on personal cell phones are public records and to provoke a search of the personal cell phones.

7 The FOIC states in the conclusion section of their brief that “The order to ‘search’ in this context is meant to ‘*direct* your employees to search.’ ” [Emphasis added.]

8 It should be noted the no Department employee is a party to this litigation. Attempting to litigate and decide the rights of individual citizens to privacy in their personal cell phones without notice to them and an ability for the individuals to participate in the litigation raises the specter of a violation of the due process rights of those individuals.

9 The FOIC clearly admits the fishing expedition nature of their order in stating the following in their brief: “However, in the underlying matter, neither party knows of the existence of any public records because the plaintiffs failed to make a simple inquiry of their employees.” On this record, even a simple inquiry of employees to search their personal cell phones goes too far and exceeds the FOIC's authority. The mere alleged foreseeability that an employee might possibly mix work and personal business on one device does not create an obligation to search employees' personal devices. Should the Department order their employees

to search their homes as well for public records based upon the mere asserted view that it is foreseeable that employees might create public records at home without any evidentiary showing that such is the case? Clearly such is not the case.

End of Document

2000 WL 1862558

UNPUBLISHED OPINION. CHECK COURT RULES BEFORE CITING.

Superior Court of Connecticut.

FIRST SELECTMAN, Town of Columbia,

v.

FREEDOM OF INFORMATION COMMISSION, et al.

No. CV000501055.

|

Nov. 28, 2000.

MEMORANDUM OF DECISION

OWENS.

***1** This is an administrative appeal from a final decision of defendant, Freedom of Information Commission ("FOIC"), directing the plaintiff, First Selectman, Town of Columbia ("Town"), to provide the complainant, John M. Leahy, with access to all project files and arbitration hearing transcripts pertaining to a construction dispute between the Town and J.S. Nasin Company. This appeal, brought pursuant to General Statutes §§ 1–206(d) and 4–183 of the Uniform Administrative Procedure Act ("UAPA"), raises the issue of whether project files and arbitration hearing transcripts are public records within the meaning of General Statutes § 1–200(5).[1] For the reasons set forth herein, the appeal is dismissed.

The administrative record sets forth the following factual background, which is undisputed. During late August or early September of 1999, Mr. Leahy made an oral request to the Town for access to all project files and arbitration hearing transcripts pertaining to a construction dispute between the Town and J.S. Nasin Company in order to assess the likely tax impact on his community. (Return of Record ("ROR") Item 1, p. 1.) By letter dated September 8, 1999, the Town, after consulting with its attorney, denied Mr. Leahy's request and informed him that the requested records would not be available for inspection until the conclusion of the arbitration process. (ROR, Item 7, p. 20.) The Town also claimed the inspection would disrupt the preparations for arbitration since the records had all been sorted and marked. (ROR, Item 6, p. 19.) By letter dated September 13, 1999, Mr. Leahy appealed to the FOIC alleging that the Town had violated the Freedom of Information Act ("FOIA") by denying his request for access to the records. The subject records requested by Mr. Leahy concerned a dispute between the Town and J.S. Nasin regarding a school construction project submitted to an American Arbitration Association panel ("AAA panel"). At the time of the hearing before the FOIC, the underlying dispute pending before the AAA panel had not been resolved.

At the hearing before the FOIC, the Town argued that the records and transcripts were not public records subject to disclosure under the provisions of FOIA. The Town also asserted that the records were exempt from disclosure because they contained the attorney's work product but failed to identify or designate the documents claimed to be exempt or to offer them for an *in camera* inspection by FOIC. In its final decision, the FOIC concluded that although the plaintiff did not personally maintain the arbitration hearing transcripts, they were public records regardless of their physical location. The FOIC concluded that the attorney work product privilege under the rules of discovery did not constitute an exemption to the disclosure requirements of FOIA and that the plaintiff failed to prove that any of the records pertained to strategy and negotiations with respect to pending claims or pending litigation. Consequently, the FOIC concluded that, by failing to provide copies of the requested records, the plaintiff violated General Statutes § 1–210(a). The FOIC ordered the Town to provide such copies and this present appeal followed.

This appeal was timely filed on March 24, 2000. The record was filed on June 2, 2000. Briefs were filed on July 5, 2000 by the Town and on August 11, 2000 by the FOIC. A statement was filed by Mr. Leahy on August 30, 2000. The parties were heard in oral argument on October 16, 2000.

***2** Since the decision of the FOIC requires the plaintiff to provide access to the subject records, the court finds that the Town is aggrieved within the meaning of General Statutes § 4–183. See *New England Rehabilitation Hospital of Hartford, Inc. v. CHHC,* 226 Conn. 105, 120, 627 A.2d 1257 (1993).

In the present appeal, the Town claims that the arbitration hearing records are not public records as defined by General Statutes § 1–200(5). The Town also claims that FOIC unreasonably and impermissibly limited and narrowed the scope of General Statutes § 1–213(1) by interpreting

that statute to compel the disclosure of documents which would limit the Town's litigation rights in the arbitration proceeding and determining that the attorney work product rule did not provide a basis for withholding documents under FOIA where these documents were being used in an ongoing legal dispute. The Town also asserts that the documents were exempt from disclosure since the records were never in the Town's possession.

The court reviews the issues in accordance with the limited scope of judicial review afforded by the UAPA. *Dolgner v. Alander,* 237 Conn. 272, 280, 676 A.2d 865 (1996). The scope of permissible review is governed by General Statutes § 4–183(j) of the UAPA and is very restricted. *Cos Cob Volunteer Fire Co. No. 1., Inc. v. FOIC,* 212 Conn. 100, 104, 561 A.2d 429 (1989); *New Haven v. Freedom of Information Commission,* 205 Conn. 767, 774, 535 A.2d 1297 (1988). The court may not retry the case or substitute its judgment for that of the agency. *C. & H. Enterprises, Inc. v. Commissioner of Motor Vehicles,* 176 Conn. 11, 12, 404 A.2d 864 (1973). "The conclusion reached by [an administrative agency] must be upheld if it is legally supported by the evidence ... The credibility of witnesses and the determination of factual issues are matters within the province of the administrative agency, and, if there is evidence ... which reasonably supports the decision of the [agency], [the court] cannot disturb the conclusion reached by [the agency]. *Hart Twin Volvo Corporation v. Commissioner of Motor Vehicles,* 165 Conn. 42, 49, 327 A.2d 588 (1983). See *Paul Bailey's, Inc. v. Kozlowski,* 167 Conn. 493, 496–97, 356 A.2d 114 [(1975)]." (Citations omitted; internal quotation marks omitted.) *Lawrence v. Kozlowski,* 171 Conn. 705, 708, 372 A.2d 110 (1976), cert. denied, 431 U.S. 969, 97 S.Ct. 2930, 53 L.Ed.2d 1066 (1977). "Our ultimate duty is to determine, in view of all of the evidence, whether the agency, in issuing its order, acted unreasonably, arbitrarily, illegally or in abuse of its discretion ..." (Citations omitted.) *Dolgner v. Alander, supra,* 237 Conn. 280–81.

"The interpretation of statutes presents a question of law ... Although the factual and discretionary determinations of administrative agencies are to be given considerable weight by the courts ... it is for the courts, and not for administrative agencies, to expound and apply governing principles of law ..." (Citations omitted; internal quotation marks omitted.) *Connecticut Humane Society v. Freedom of Information Commission,* 218 Conn. 757, 761–62, 591 A.2d 395 (1991); *Domestic Violence Services of Greater New Haven, Inc. v. FOIC,* 47 Conn.App. 466, 470–71, 704 A.2d 827 (1998).

***3** The Town claims that the arbitration hearing transcripts sought by Mr. Leahy are not "public records" within the meaning of § 1–200(5) and, thus, not subject to the disclosure provisions of General Statutes § 1–210(a). The Town does not assert that the transcripts are not public records per se. Rather, the Town claims that because, in this case, the records were delivered directly to the Town's attorneys after preparation by the stenographer and not to the Town directly, they are not public records. The transcripts were prepared by a private stenographic service and were not physically received or actually kept in the actual physical confines of the Town. This argument is unavailing. Statutory definitions of terms such as "meetings" and "records" under FOIA must be used to limit, rather than to expound, the opportunities for public agencies to conduct their business in private. *Glastonbury Education Assn. v. FOIC,* 234 Conn. 704, 712–13, 663 A.2d 349 (1995). A restrictive reading of the term "public records" as defined by statute would simply allow municipalities to circumvent their statutory obligations relating to disclosure of "public records" by simply delivering the records to their attorney. This cannot be countenanced.

The claim that the disclosure of the records is prohibited by the rules of the American Arbitration Association is also unavailing. The statutory requirements under FOIA clearly supercedes any non-binding private agreement that the Town may have with the AAA panel. By its express terms, General Statutes § 1–210(a) requires the disclosure of public records "[e]xcept as otherwise provided by any federal law or state statute." No exception is made for private agreements.

The transcripts were the property of the Town and were received and used by the Town's attorney as the Town's agent. The transcripts were then returned to the Town at the conclusion of arbitration. The Town argues that this use is somewhat akin to *State Library v. Freedom of Information Commission,* 50 Conn.App. 491, 717 A.2d 842 (1999), wherein the Appellate Court found that the FOIC's decision violated the contract clause of the federal Constitution because its action affected a previously existing contract. No contract clause issue is raised in this appeal because FOIA supersedes any agreement of the parties.

The next argument advanced by the Town is that disclosure of the documents originally in its possession and transferred to the Town's attorney's office "would disclose to a viewer some or much of the Town's strategy with respect to the arbitration" within the meaning of General Statutes § 1–210(b)(4), as they have been "organized, cataloged, notated, etc., for use in the arbitration." (Appellant's Brief, p. 9.)

***4** There are three flaws to this argument. First, while it is true that the documents were organized and catalogued, the evidence in the record indicates that such organizing was performed by Town employees before the documents were delivered, not by the attorneys. Since there is no evidence in the record that the organization was done by the attorneys or at their direction, and since no evidence of the nature of the organization was offered by the plaintiff, the FOIC was not obliged to infer that the attorneys' strategy would be revealed.

Second, since the Town did not produce any of the documents, or the nature of the cataloguing, or the asserted "notations," available to the FOIC for *in camera* inspection, or provide any other evidence beyond the broad assertions of its counsel, the FOIC correctly concluded that the Town failed to meet its burden of proof that either the documents or their organization would reveal strategy with respect to pending claims or litigation.

> The burden of establishing the applicability of an exemption clearly rests upon the party claiming the exception. See *Hartford v. Freedom of Information Commission,* 201 Conn. 421, 431, 518 A.2d 49 (1986); *Maher v. Freedom of Information Commission,* 192 Conn. 310, 315, 472 A.2d 321 (1984); *Board of Police Commissioners v. Freedom of Information Commission,* 192 Conn. 183, 188, 470 A.2d 1209 (1984); *Wilson v. Freedom of Information Commission,* 181 Conn. 324, 329, 435 A.2d 353 (1980); see also *State v. Januszewski,* 182 Conn. 142, 170–71, 438 A.2d 679 (1980), cert. denied, 453 U.S. 922, 101 S.Ct. 3159, 69 L.Ed.2d 1005 (1981).

This case is distinguishable from *Stamford v. Freedom of Information Commission,* 241 Conn. 310, 696 A.2d 321 (1997), where our Supreme Court found that an *investigative report* was exempt from disclosure. In *Stamford,* the record sought was an actual investigative report, and the only question was whether there was substantial evidence in the record to support the plaintiff's claim that the *investigative report itself* pertained to strategy with respect to pending claims and litigation.

In the instant case, no investigative report was being sought. There were simply *no* records before the FOIC, including the complaint, that establish either the contents or existence of the "marks" and "notations" on the Town's records, or that the mere organization of the project files revealed strategic information.

Finally, aside from the claimed "notations" and "cataloguing," the Town records that were public before the start of arbitration or litigation do not become confidential simply because the agency is later engaged in a dispute. *Chief of Police, Hartford Police Department v. FOIC,* 252 Conn. 377, 746 A.2d 1264 (2000) (holding that FOIA, not rules of discovery, govern whether records of an agency in litigation are subject to disclosure by the FOIC). Indeed, our Supreme Court, in *Chief of Police,* made clear that even a member of the public, who was an adversary of the agency, would not lose his rights to public records under FOIA and could obtain records through FOIA that might not be available through discovery. *Id.,* 397, 746 A.2d 1264.

***5** In the present case, the FOIC's factual findings and determinations are fully supported by substantial evidence in the record and by existing case law. Accordingly, the plaintiff's appeal is hereby dismissed.

All Citations

Not Reported in A.2d, 2000 WL 1862558, 29 Conn. L. Rptr. 27

Footnotes

1 Subsection (5) of General Statutes § 1–200 defines "public records or files" as "any recorded data or information relating to the conduct of the public's business prepared, owned, used, received or retained by a public agency, whether such data or information be handwritten, typed, tape-recorded, printed, photostated, photographed or recorded by any other method."

Final Decision FIC2015-323

In the Matter of a Complaint by	FINAL DECISION
Renee LaMark Muir, Complainant	
against	Docket #FIC 2015-323
Chief, Police Department, City of Hartford; Police Department, City of Hartford; and City of Hartford, Respondents	January 13, 2016

The above-captioned matter was heard as a contested case on September 8, 2015, at which time the complainant and the respondents appeared, stipulated to certain facts and presented testimony, exhibits and argument on the complaint.

After consideration of the entire record, the following facts are found and conclusions of law are reached:

1. The respondents are public agencies within the meaning of §1-200(1), G.S.

2. It is found that, in 2014, the complainant filed a complaint of discrimination against the respondents. It is also found that the respondents hired Attorney Nicole Chomiak of the law firm of Nuzzo & Roberts, L.L.C., to perform an investigation of such complaint.

3. It is found that, in the course of her investigation, Attorney Chomiak interviewed a number of witnesses and made audio recordings of such interviews.

4. It is found that, at the conclusion of her investigation, in May, 2014, Attorney Chomiak prepared a written report summarizing her investigation (hereinafter "the report"), and provided it to the respondents. It is also found that, at such time, Attorney Chomiak did not provide to the respondents copies of the audio recordings described in paragraph 3, above, nor did she provide any other records relating to the investigation.

5. It is found that, by letter dated April 27, 2015, the complainant requested that the respondents provide her with copies of any and all records related to the investigation described in paragraph 2, above, including all audio recordings of interviews.

6. It is found that, by letter dated April 28, 2015, the respondents acknowledged the complainant's request, described in paragraph 5, above, and informed her that the only record responsive to such request maintained by the respondents was the report, which would be provided upon payment of the statutory copying fee. It is found that the respondents ultimately provided a copy of the report to the complainant.

7. By notice of appeal dated May 6, 2015, and filed with the Commission on May 8, 2015, the complainant appealed, alleging that the respondents violated the Freedom of Information ("FOI") Act by denying her copies of all requested records, including the audio recordings of interviews described in paragraph 3, above. The complainant seeks as relief an order for the disclosure of all requested records, attorney's fees, and any other appropriate relief.

8. Section 1-200(5), G.S., defines "public records or files" as:

> ...any recorded data or information relating to the conduct of the public's business prepared, owned, used, received or retained by a public agency, or to which a public agency is entitled to receive a copy by law or contract under section 1-218, whether such data or information be handwritten, typed, tape-recorded, printed, photostated, photographed or recorded by any other method.

9. Section 1-210(a), G.S., further provides in relevant part that:

> Except as otherwise provided by any federal law or state statute, all records maintained or kept on file by any public agency, whether or not such records are required by any law or by any rule or regulation, shall be public records and every person shall have the right to (1) inspect such records promptly during regular office or business hours, (2) copy such records in accordance with subsection (g) of section 1-212, or (3) receive a copy of such records in accordance with section 1-212.

10. Section 1-212(a), G.S., further provides in relevant part that: "[a]ny person applying in writing shall receive promptly upon request, a plain, facsimile, electronic or certified copy of any public record."

11. It is found that, upon their receipt of the complainant's request, described in paragraph 5, above, the respondents made no attempt to contact Attorney Chomiak to ask whether she possessed any responsive records. As of the time of the hearing in this matter, the respondents had not asked Attorney Chomiak for copies of the audio recordings and any other responsive records.

12. The respondents have not claimed that the requested records are exempt from disclosure by virtue of the attorney-client privilege, as set forth in §1-210(b)(10), G.S., or by any other exemption. Rather, the respondents contended that they have fulfilled their obligations under the FOI Act in this matter because they were not in possession of any other responsive records at the time of the request described in paragraph 5, above, and because they provided to the complainant the one record which they did possess, the report.

13. The respondents further contended that Attorney Chomiak is not a public agency, but merely an attorney contracted to perform a service for the government and thus not subject to the FOI Act, citing to Envirotest Systems Corporation v. Freedom of Information Commission, et al, 59 Conn. App. 753 (2000) (company performing emission testing not the functional equivalent of a public agency) and an earlier case, Hallas v. Freedom of Information Commission, et al, 18 Conn. App. 291 (1989) (law firm hired by a public agency as bond counsel is not the functional equivalent of a public agency).

14. However, neither Envirotest nor its predecessor Hallas is on point, because, in both cases, the facts involved a request for records made to an entity which had contracted with a public agency, and the question decided was whether that contracting agency was the functional equivalent of a public agency.[1] In this matter, the request was made to the public agency, and the question before the Commission is whether, in these circumstances, the public agency need only provide responsive records which are physically in its possession at the time of the request.

1

It should be noted that the 2000 Envirotest decision was largely overturned by the General Assembly in the following legislative session. Public Act 2001-169.

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15. The respondents next claim that the audio recordings were utilized and maintained solely by Attorney Chomiak and are the sole property Nuzzo & Roberts, L.L.C., citing Town of Windham v. Freedom of Information Commission, 48 Conn. App. 522, 528 (1998). In Windham, the records at issue were affidavits prepared by an attorney hired by the Town of Windham to represent it in an FOI Commission proceeding. The affidavits were not put into evidence in the underlying FOI proceeding. Although the requester in that matter ultimately received the affidavits, the case went forward. Based on the evidence presented in that case, the Appellate Court concluded that the Commission's earlier decision concluding that the affidavits were prepared and used by a public agency and that they related to the conduct of the public's business, was not supported by substantial evidence. Based on the evidence in that case, the Court concluded that the affidavits were not used by the public agency, but only by its private attorney in preparing for a FOI hearing in which the affidavits ultimately were not used. The Court further concluded that the affidavits were not public records.

16. In this case, however, it is found that the respondents used the audio recordings, since they are apparently the entire basis of the report; indeed numerous quotes are used throughout the report, which is the culmination of the respondents' investigation of the complaint described in paragraph 2, above.

17. Finally, the respondents cite to Docket #FIC 2009-103, William Comerford v. Stephen P. Nere, Executive Director, Housing Authority, Town of Wallingford; Robert Prentice, Chairman, Housing Authority, Town of Wallingford; and Board of Commissioners, Housing Authority, Town of Wallingford (September 23, 2009), a prior Commission Final Decision, which held that an audio recording made by a recording secretary to assist her in preparing meeting minutes was not a public record since the audio recording was owned by the recording secretary, and not the public agency.

18. The complainant contends that the respondents own the requested records, and cites to a decision of the Statewide Grievance Committee, Machado v. Johnson, Grievance Complaint, # 11-0618 (original file documents are property that a client is entitled to receive on demand under the Rules of Profesional Conduct 1.15 (e)).

19. It is found that the repondents paid the firm of Nuzzo & Roberts, L.L.C., an hourly fee to investigate the discrimination complaint, described in paragraph 2, above. It is further found that the requested records were prepared exclusively for the benefit of the respondents. It is also found that the respondents own the audio recordings and, to the extent that they exist, other requested records created in the course of the investigation.

20. Consequently, it is concluded that the requested records are public records within the meaning of §1-200(5), G.S.

21. It is concluded that the respondents cannot avoid disclosure of a public record merely by avoiding physical possession of such record. See e.g., First Selectman, Town of Columbia v. State of Connecticut, Freedom of Information Commission and John M. Leahy, Docket #CV 00 0501055, Judicial District of New Britain, November 28, 2000 (Owens, J.) (claim that records are not in the physical possession of public agency, but rather are in the physical possession of its attorney, is unavailing).

21. It is therefore concluded that respondents violated to §§1-210(a) and 1-212(a), G.S., by failing to provide to the complainant all requested records, including the audio recordings, discussed herein.

22. The Commission notes that the FOI Act does not specifically set forth as a remedy the award of attorney's fees, as requested by the complainant. Under the facts and circumstances of this case, the Commission believes that only an order of disclosure is warranted.

The following order by the Commission is hereby recommended on the basis of the record concerning the above-captioned complaint:

1. Forthwith, the respondents shall contact the law firm of Nuzzo & Roberts, L.L.C., and demand copies of the contents of its file relative to the investigation described in paragraph 2, above, including the audio recordings at issue herein. Upon receipt of such copies, the respondents shall promptly forward same to the complainant, free of charge.

Approved by Order of the Freedom of Information Commission at its regular meeting of January 13, 2016.

_____

Cynthia A. Cannata
Acting Clerk of the Commission

PURSUANT TO SECTION 4-180(c), G.S., THE FOLLOWING ARE THE NAMES OF EACH PARTY AND THE MOST RECENT MAILING ADDRESS, PROVIDED TO THE FREEDOM OF INFORMATION COMMISSION, OF THE PARTIES OR THEIR AUTHORIZED REPRESENTATIVE.
THE PARTIES TO THIS CONTESTED CASE ARE:
Renee LaMark Muir
c/o Alexa J.P. Lindauer, Esq.
Beck & Eldergill, P.C.
447 Center Street
Manchester, CT 06040
Chief, Police Department, City of Hartford; Police
Department, City of Hartford; and City of Hartford
c/o Cynthia Lauture, Esq.
Office of the Corporation Counsel
550 Main Street
Hartford, CT 06103

_____

Cynthia A. Cannata
Acting Clerk of the Commission
FIC/2015-323/FD/cac/1/13/2016

FREEDOM OF INFORMATION COMMISSION
OF THE STATE OF CONNECTICUT

In the Matter of a Complaint by Final Decision

Robert Fromer,

Complainant

against Docket #FIC 92-71

New London Director of Law,

Respondent February 24, 1993

The above-captioned matter was heard as a contested case on July 7, 1992, at which time the complainant and the respondent appeared, stipulated to certain facts and presented testimony, exhibits and argument on the complaint.

After consideration of the entire record, the following facts are found and conclusions of law are reached:

1. By letter dated February 6, 1992, the complainant requested from the respondent access to certain case files in which the City of New London (hereinafter "City") was a party to litigation. The case files requested from the respondent consist of ten cases that were listed in an interdepartmental memorandum entitled "Report on Litigation" from the respondent to the City Council, dated January 29, 1992 (hereinafter "case files").

2. By reply letter dated February 20, 1992, the respondent informed the complainant that disclosure of the requested case files would violate the the attorney-client privilege and the Code of Professional Conduct for attorneys and referred the complainant to the courts where the cases to which the files relate were returned.

3. By letter dated February 25, 1992 and filed February 26, 1992, the complainant appealed the respondent's denial of access to the requested case files to the Commission.

4. Specifically, the complainant wishes to review legal briefs, bills, memoranda to City Council and all other records that he is entitled to under the Freedom of Information ("FOI") Act, contained in the case files.

5.

5. Subsequent to this complaint, the individual serving as the respondent director of law died and was replaced by the current incumbent respondent who also is engaged in the private practice of law.

6. The current incumbent respondent maintains that as a private practioner of law, he is not a public agency and that the requested case files are not public records subject to

disclosure under the FOI Act.

7. It is found that pursuant to the City charter the respondent acts as the head of the City's Department of Law and as chief legal advisor of, and attorney for, the City.

8. It is concluded that when acting in his capacity as New London's Director of Law, the current incumbent respondent is himself a City official and therefore a public agency within the meaning of 1-18a(a), G.S.

9. It is further concluded that the respondent as head of New London's Department of Law, is responsible for keeping and maintaining the department's records, including the requested case files, as required by 1-19(a), G.S., and for obtaining, on request for inspection or copying, all records to which the agency itself is legally entitled.

10. The respondent maintains that the requested case files are exempt from disclosure pursuant to 1-19(b)(4) and 1-19(b)(10), G.S.

11. Section 1-19(b)(4), G.S., exempts from disclosure:

> "records pertaining to strategy and negotiations with respect to pending claims or pending litigation to which the public agency is a party until such litigation or claim has been finally adjudicated or otherwise settled."

12. The respondent claims that at the time of the complainant's request many of the cases to which the files in question relate were still pending.

13. It is concluded that the records contained in the requested case files which pertain to strategy or negotiations with respect to pending litigation are exempt from disclosure pursuant to 1-19(b)(4), G.S.

14. Section 1-19(b)(10), G.S., permits the nondisclosure of "communications privileged by the attorney-client relationship."

15. It is concluded that those portions of the records contained in the requested case files which constitute communications privileged by the attorney-client relationship are exempt from disclosure pursuant to 1-19(b)(10), G.S.

16. The current incumbent respondent claims that not all of the requested case files are in his actual possession because some are located at the office of the former respondent and some may be in the possession of other attorneys to whom the former respondent delegated responsibility, on approval by the City Council. He further maintains that to require him to locate the requested case files and peruse them to ascertain whether exemptions to disclosure would apply, would be overly burdensome and time consuming.

17. It is concluded however, that all of the non-exempt records requested by the complainant, access to which the respondent is legally entitled, whether such records are in the possession of the current incumbent respondent, his predecessors or some other attorney appointed by the City, are public records within the meaning of §1-18a(d), G.S., and are subject to disclosure under §§1-15(a) and 1-19(a), G.S. To hold otherwise would be to permit agencies to avoid disclosure of otherwise public records merely by transferring physical possession to another person.

The following order by the Commission is hereby recommended on the basis of the record concerning the above-captioned complaint:

1. The respondent shall forthwith provide the complainant with a copy of all records contained in the requested case files that are not exempt from disclosure by virtue of §§1-19(b)(4) and 1-19(b)(10), G.S, as described in paragraphs 13 and 15, of the findings above.

Approved by Order of the Freedom of Information Commission at its regular meeting of February 24, 1993.

Debra L. Rembowski
Acting Clerk of the Commission

Docket #FIC 92-71 Page 4

PURSUANT TO SECTION 4-180(c), G.S. THE FOLLOWING ARE THE NAMES OF EACH PARTY AND THE MOST RECENT MAILING ADDRESS, PROVIDED TO THE FREEDOM OF INFORMATION COMMISSION, OF THE PARTIES OR THEIR AUTHORIZED REPRESENTATIVE.

THE PARTIES TO THIS CONTESTED CASE ARE:

Robert Fromer
281 Gardner Avenue, J4
New London, CT 06320

Thomas Londregan
New London Director of Law
c/o Conway, Londregan & McNamara, P.C.
38 Huntington Street
P.O. Box 1351
New London, CT 06320

Debra L. Rembowski
Acting Clerk of the Commission

New London Director of Law,

Respondent February 24, 1993

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3. By letter dated February 25, 1992 and filed February 26, 1992, the complainant appealed the respondent's denial of access to the requested case files to the Commission.

4. Specifically, the complainant wishes to review legal briefs, bills, memoranda to City Council and all other records that he is entitled to under the Freedom of Information ("FOI") Act, contained in the case files.
5.

5. Subsequent to this complaint, the individual serving as the respondent director of law died and was replaced by the current incumbent respondent who also is engaged in the private practice of law.

6. The current incumbent respondent maintains that as a private practioner of law, he is not a public agency and that the requested case files are not public records subject to disclosure under the FOI Act.

7. It is found that pursuant to the City charter the respondent acts as the head of the City's Department of Law and as chief legal advisor of, and attorney for, the City.

8. It is concluded that when acting in his capacity as New London's Director of Law, the current incumbent respondent is himself a City official and therefore a public agency within the meaning of §1-18a(a), G.S.

9. It is further concluded that the respondent as head of New London's Department of Law, is responsible for keeping and maintaining the department's records, including the requested case files, as required by §1-19(a), G.S., and for obtaining, on request for inspection or copying, all records to which the agency itself is legally entitled.

10. The respondent maintains that the requested case files are exempt from disclosure pursuant to §§1-19(b)(4) and 1-19(b)(10), G.S.

11. Section 1-19(b)(4), G.S., exempts from disclosure:

> "records pertaining to strategy and negotiations with respect to pending claims or pending litigation to which the public agency is a party until such litigation or claim has been finally adjudicated or otherwise settled."

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15. It is concluded that those portions of the records contained in the requested case files which constitute communications privileged by the attorney-client relationship are exempt from disclosure pursuant to §1-19(b)(10), G.S.

16. The current incumbent respondent claims that not all of the requested case files are in his actual possession because some are located at the office of the former respondent and some may be in the possession of other attorneys to whom the former respondent delegated responsibility, on approval by the City Council. He further maintains that to require him to locate the requested case files and peruse them to ascertain whether exemptions to disclosure would apply, would be overly burdensome and time consuming.

17. It is concluded however, that all of the non-exempt records requested by the complainant, access to which the respondent is legally entitled, whether such records are in the possession of the current incumbent respondent, his predecessors or some other attorney appointed by the City, are public records within the meaning of §1-18a(d), G.S., and are subject to disclosure under §§1-15(a) and 1-19(a), G.S. To hold otherwise would be to

permit agencies to avoid disclosure of otherwise public records merely by transferring physical possession to another person.

The following order by the Commission is hereby recommended on the basis of the record concerning the above-captioned complaint:

1. The respondent shall forthwith provide the complainant with a copy of all records contained in the requested case files that are not exempt from disclosure by virtue of □□1-19(b)(4) and 1-19(b)(10), G.S, as described in paragraphs 13 and 15, of the findings above.

Approved by Order of the Freedom of Information Commission at its regular meeting of February 24, 1993.

Debra L. Rembowski
Acting Clerk of the Commission

Docket #FIC 92-71 Page 4

PURSUANT TO SECTION 4-180(c), G.S. THE FOLLOWING ARE THE NAMES OF EACH PARTY AND THE MOST RECENT MAILING ADDRESS, PROVIDED TO THE FREEDOM OF INFORMATION COMMISSION, OF THE PARTIES OR THEIR AUTHORIZED REPRESENTATIVE.

THE PARTIES TO THIS CONTESTED CASE ARE:
Robert Fromer
281 Gardner Avenue, J4
New London, CT 06320

Thomas Londregan
New London Director of Law
c/o Conway, Londregan & McNamara, P.C.
38 Huntington Street
P.O. Box 1351
New London, CT 06320

Debra L. Rembowski
Acting Clerk of the Commission

FREEDOM OF INFORMATION COMMISSION
OF THE STATE OF CONNECTICUT

In the Matter of a Complaint by	FINAL DECISION
William Comerford,	
Complainant	
against	Docket #FIC 2009-103
Stephen P. Nere, Executive Director, Housing Authority, Town of Wallingford; Robert Prentice, Chairman, Housing Authority, Town of Wallingford; and Board of Commissioners, Housing Authority, Town of Wallingford,	
Respondents	September 23, 2009

The above-captioned matter was heard as a contested case on July 24, 2009, at which time the complainant and respondents appeared, stipulated to certain facts and presented testimony, exhibits and argument on the complaint.

After consideration of the entire record, the following facts are found and conclusions of law are reached:

1. The respondents are public agencies within the meaning of §1-200(1), G.S.

2. By letter dated and filed on February 25, 2009, the complainant appealed to this Commission, alleging that the respondents violated the Freedom of Information ("FOI") Act by:

   a. preventing him from videotaping the January 22, 2009 meeting of the Town of Wallingford Housing Authority; and

   b. failing to provide him with a copy of the audio recording for such meeting.

The complainant requested the imposition of civil penalties against the named respondents.

3. It is found that the respondents conducted a meeting on January 22, 2009 (the "January 22nd meeting").

4. Section 1-206(b)(1), G.S., provides, in relevant part:

> Any person denied the right to inspect or copy records…or wrongfully denied the right to attend any meeting of a public agency or denied any other right conferred by the Freedom of Information Act may appeal therefrom to the Freedom of Information Commission, by filing a notice of appeal with said commission. A notice of appeal shall be filed not later than thirty days after such denial, except in the case of an unnoticed or secret meeting, in which case the appeal shall be filed not later than thirty days after the person filing the appeal receives notice in fact that such meeting was held.

5. It is found that the January 22nd meeting, at which the complainant alleges that the respondents violated the meetings provisions of the FOI Act, occurred more than 30 days before the filing of this complaint. It is further found that such meeting was neither secret nor unnoticed, and that the complainant attended such meeting.

6. It is concluded that the Commission lacks subject matter jurisdiction to address the allegation, described in paragraph 2.a, above, pursuant to §1-206(b)(1), G.S.

7. It is found that, by letter dated January 27, 2009, the complainant made a request to the respondents for "a copy of the audio recording of the Wallingford Housing Authority meeting on January 22, 2009… [and]…audio tapes of the two prior Wallingford [H]ousing Authority meetings."

8. Section 1-200(5), G.S., defines "public records or files" as:

> any recorded data or information relating to the conduct of the public's business prepared, owned, used, received or retained by a public agency, or to which a public agency is entitled to receive a copy by law or contract under section 1-218, whether such data or information be handwritten, typed, tape-recorded, printed, photostated, photographed or recorded by any other method.

9. Section 1-210(a), G.S., provides in relevant part that:

> Except as otherwise provided by any federal law or state statute, all records maintained or kept on file by any public agency, whether or not such records are required by any law or by any rule or regulation, shall be public records and every person shall have the right to (1) inspect such records promptly during regular office or business hours . . . or (3) receive a copy of such records in accordance with section 1-212.

10. The respondents contend that the requested records are not the respondents' records but those of the recording secretary, and are therefore, not "public records."

11. It is found that the recording secretary is not a public official or a public employee, but rather an independent contractor whom the respondents hired to prepare the minutes of their meetings.

12. It is found that the respondents do not have a policy governing, or a contract setting forth, the duties of the recording secretary. It is further found that the respondents do not specify or otherwise direct the means and methods by which the recording secretary must compose the meeting minutes.

13. It is found that the recording secretary, on her own accord, decided to audiotape the respondents' meetings in order to assist her in composing accurate minutes. It is also found that the respondents do not own or store such audiotapes or taping equipment.

14. It is found that the audiotapes, described in paragraphs 2.b and 7, above, are records of the recording secretary who provides a service to the respondents.

15. It is found that the requested records, to the extent they exist, are not records "prepared, owned, used, received or retained" by the respondents, within the meaning of §1-200(5), G.S. It is further found that the requested records are not "maintained or kept on file" by the respondents, within the meaning of §1-210(a), G.S.

16. It is therefore concluded that the requested records are not "public records" within the meaning of §§1-200(5) and 1-210(a), G.S. See Docket #FIC 1996-518; Jeffrey W. Burkitt and Ansonia Republican Town Committee v. Board of Aldermen, Town of Ansonia (Aug. 27, 1997); Docket #FIC 1992-073; William L. Kuusela v. Daniel W. Teper, Lisbon First Selectman (Sept. 9, 1992) (audiotapes used by secretaries to assist in preparing minutes under similar facts are not "public records").

17. The Commission notes that the audiotape of the January 22nd meeting, described in paragraph 2.b, above, was destroyed in the normal course of business by the recording secretary on January 26, 2009.

18. There is no basis for the imposition of a civil penalty in this matter.

The following order by the Commission is hereby recommended on the basis of the record concerning the above-captioned complaint:

1. The complaint is hereby dismissed.

Approved by Order of the Freedom of Information Commission at its regular meeting of September 23, 2009.

S. Wilson
Acting Clerk of the Commission

PURSUANT TO SECTION 4-180(c), G.S., THE FOLLOWING ARE THE NAMES OF EACH PARTY AND THE MOST RECENT MAILING ADDRESS, PROVIDED TO THE FREEDOM OF INFORMATION COMMISSION, OF THE PARTIES OR THEIR AUTHORIZED REPRESENTATIVE.

THE PARTIES TO THIS CONTESTED CASE ARE:

William Comerford
5 Broadview Drive
Wallingford, CT 06492

Stephen P. Nere, Executive Director, Housing Authority, Town of Wallingford;
Robert Prentice, Chairman, Housing Authority, Town of Wallingford; and Board of Commissioners, Housing Authority, Town of Wallingford
C/o E. James Loughlin, Esq.
Loughlin Fitzgerald PC
150 South Main Street
Wallingford, CT 06492

S. Wilson
Acting Clerk of the Commission

FIC/2009-103FD/sw/9/25/2009

FREEDOM OF INFORMATION COMMISSION
OF THE STATE OF CONNECTICUT

In the Matter of a Complaint by	FINAL DECISION
Bruce Kaz,	
Complainants	
against	Docket #FIC 1999-575
Robert Skinner, First Selectman,	
Town of Suffield; and Ted Flanders,	
Building Inspector, Town of Suffield,	
Respondents	January 23, 2002

Following remand for further proceedings in Kaz v. Freedom of Information Commission, et al., CV 000503942S, Cohn J., June 26, 2001, Superior Court Judicial District of New Britain, the above-captioned matter was heard as a contested case on October 16, 2001, limited to addressing the issue of whether certain supporting documents/ attorneys' notes are disclosable to the complainant. The complainant and the respondents appeared at the October 16, 2001 hearing, stipulated to certain facts, and presented testimony, exhibits and argument. After consideration of the entire record, the following facts are found and conclusions of law are reached:

1. The respondents are public agencies within the meaning of §1-200(1), G.S.

2. By letter dated August 23, 1999 ("letter"), the North Central District Health Department informed Scott Gilmartin, a member of the Suffield Planning and Zoning Commission, that he was violating the state public health code in his handling of washing machine waste water on his premises. Kaz v. FOI supra at p. 1. Subsequently, the letter was sent anonymously to newspaper reporters and other individuals during the time period when Gilmartin was involved in a contested primary for his office. Id. Soon thereafter, Gilmartin filed a complaint with the town of Suffield ("town"), alleging that a town employee released the letter without his permission in order to harm his political campaign. Kaz v. FOI supra at p. 2. The town retained attorney Justin Donnelly to investigate Gilmartin's complaint (hereinafter "investigation"). Id. Such investigation concluded on or about November 17, 1999. Id. On or about December 3, 1999, the complainant made a request to the respondents for all documentation or correspondence related to the Health Department letter of August 23, 1999, including the investigation into the alleged "leak" of said letter and the billing statements of the attorneys handling the investigation. Id. By letter dated December 3, 1999, the respondents provided the complainant with some of the requested records, denied the complainant's request with respect to certain other records, and claimed attorney client privilege with respect to the notes taken by the attorneys during their investigation (hereinafter "notes"). Kaz v. FOI supra at p. 3. The October 16, 2001 hearing into this matter has been convened to address whether the notes and any other supporting documents exist and are disclosable to the complainant.

3. It is found that during attorney Donnelly's investigation he interviewed town employees and elected officials. He conducted some interviews in person and others by telephone. Each interview was conducted with one individual at a time. Following interviews, attorney Donnelly summarized the contents of the interview on a tape recording, by verbally speaking into a dictaphone-type tape recorder. All of the summaries were contained on a single tape. Attorney Donnelly also jotted down information gleaned from the interviews on certain 3x5 cards (hereinafter "3x5 cards").

4. It is found that the only records that exist at present are the 3x5 cards containing attorney Donnelly's notes. It is found that the dictaphone tape recording containing the summary of interviews, described in paragraph 3, above, was erased and recycled by attorney Donnelly's office, and no longer exists. It is found that attorney Donnelly, believing this case had long been put to rest was unaware that such tape was a record at issue. It is further found that attorney Edward G. McAnaney, the town attorney for Suffield, does not have any supporting documents or notes that are responsive to the court's order to determine specifically whether supporting documents and attorneys' notes exist.

5. The respondents first contend that attorney Donnelly is not a "public agency" and therefore the 3x5 cards, containing his personal notes are not "public records".

6. It is found that attorney Donnelly is in private practice and not the "town attorney" for the town of Suffield. He was neither appointed, nor acting in such capacity while conducting the investigation. It is found that the town (specifically, the respondent First Selectman) hired attorney Donnelly for the limited and discreet purpose of conducting the investigation and producing a final report, which final report is not at issue in this case. It is found that attorney Donnelly created the dictaphone tape recording, and the 3x5 cards containing his personal jottings, for his own use, and such tape recording and cards were never provided to or turned over to the town or any public agency within the town.

7. Section 1-200(1), G.S., in relevant part defines "public agency" or "agency" as:

> any executive, administrative or legislative office of …any political subdivision of the state and any … town agency, any department, institution, bureau, board, commission, authority or official of … any city, town, borough, municipal corporation, school district, regional district or other district or other political subdivision of the state, including any committee of, or created by, any such office, subdivision, agency, department, institution, bureau, board, commission, authority or official, and also includes any judicial office, official, or body or committee thereof but only in respect to its or their administrative functions….

8. It is found that attorney Donnelly is not an authority, official, or agency of the town of Suffield, within the meaning of §1-200(1), G.S., and therefore not a "public agency."

9. Section 1-200(5), G.S., defines "public records" or "files" as: "[a]ny recorded data or information relating to the conduct of the public's business prepared, owned, used, received or retained by a public agency, whether such data or information be handwritten, typed, tape-recorded, printed, photostated, photographed or recorded by any other method." [Emphasis added.]

10. Section 1-210(a), G.S., further provides, in relevant part:

> except as otherwise provided by any federal law or state statute, all records maintained or kept on file by any public agency, whether or not such records are required by any law or by any rule or regulation, shall be public records and every person shall have the right . . . to receive a copy of such records in accordance with the provisions of section 1-212. Any agency rule or regulation, or part thereof, that conflicts with the provisions of this subsection or diminishes or curtails in any way the rights granted by this subsection shall be void. [Emphasis added.]

11. It is concluded that attorney Donnelly's personal notes contained on the 3x5 cards, as well as his personal dictaphone tape recording, are not records "prepared, owned, used, received or retained by a public agency" within the meaning of §1-200(5), G.S., nor are they records "maintained or kept on file" by a public agency, within the meaning of §1-210(a), G.S. Consequently, the 3x5 cards and the dictaphone tape recording are not "public records".

12. In light of the conclusions reached in findings 8 and 11, above, it is not necessary to address the respondents' further claims that the records at issue are exempt from disclosure because they are "preliminary drafts and notes", within the meaning of §1-210(b)(1), G.S., and "attorney client privileged communications" within the meaning of §1-210(b)(10), G.S.

13. It is therefore concluded that the complainant's rights were not violated when he was not provided with attorney Donnelly's 3x5 cards and dictaphone tape recording.

The following order by the Commission is hereby recommended on the basis of the record concerning the above-captioned complaint.

1. The complaint is hereby dismissed.

Approved by Order of the Freedom of Information Commission at its regular meeting of January 23, 2002.

_____

Petrea A. Jones

Acting Clerk of the Commission

PURSUANT TO SECTION 4-180(c), G.S., THE FOLLOWING ARE THE NAMES OF EACH PARTY AND THE MOST RECENT MAILING ADDRESS, PROVIDED TO THE FREEDOM OF INFORMATION COMMISSION, OF THE PARTIES OR THEIR AUTHORIZED REPRESENTATIVE.

THE PARTIES TO THIS CONTESTED CASE ARE:

Bruce Kaz

297 East Street South

Suffield, CT 06078

Robert Skinner, First Selectman,

Town of Suffield; and Ted Flanders,

Building Inspector, Town of Suffield

c/o Edward G. McAnaney, Esq.

Suffield Village

Suffield, CT 06078

and Owen P. Eagan, Esq.

24 Arapahoe Road

West Hartford, CT 06107

_____

Petrea A. Jones

Acting Clerk of the Commission

FIC/1999-575/PRFD/paj/1/28/2002

1991 WL 86931
Only the Westlaw citation is currently available.
United States District Court, E.D. Pennsylvania.

Kermit A. ANGST, et al.
v.
MACK TRUCKS, INC., and William C. Craig, Robert E. Kendall and the United Automobile Workers' Union, Local 677.
Stephen T. HAWK and Robert M. Stasko
v.
MACK TRUCKS, INC. and UAW Local 677 and William C. Craig and Robert E. Kendall.

Civ. A. Nos. 90–3274, 90–4329.
|
May 14, 1991.

Attorneys and Law Firms

Alan B. Epstein, Philadelphia, Pa., Wallace B. Eldridge, III, David M. Spitko, Allentown, Pa., for plaintiffs.

Anthony B. Haller, Pepper, Hamilton & Scheetz, William T. Josem, Markowitz & Richman, Philadelphia, Pa., for defendants.

MEMORANDUM

CAHN, District Judge.

I. *BACKGROUND*

***1** The defendants, Mack Trucks, Inc., William C. Craig, and Robert E. Kendall, seek to compel the production of a typed summary of notes made by the plaintiff Thomas C. Shappell. Mr. Shappell produced the typed summary from handwritten notes he made shortly after meetings with management and union officials. Mr. Shappell destroyed the handwritten notes after compiling the typed summary of their contents. He claims that he made the typed summary for the specific purpose of securing counsel and that they therefore fall within the scope of the attorney-client privilege.

The existence of the typed summary came to the attention of the defendants' counsel during Mr. Shappell's deposition. The following exchange occurred between Mr. Shappell and the defense counsel:

Q. But soon after the meeting you made notes?

A. Yes.

Q. What did you do with those notes?

A. I used them in trying to obtain an attorney just to brief him on what the case was about.

Deposition of Thomas C. Shappell at 8. At another point in his deposition Mr. Shappell, when asked if he prepared the typed summary for his attorneys, stated: "... it was done for me. I did it for my records." Deposition of Thomas C. Shappell at 9. However, a short while later in the deposition, Mr. Shappell reiterated his prior statement: "I told you prior that I used it to obtain an attorney. I called a few different attorneys and I said, I'll send you a copy of what had happened on previous dates and a copy of a paper I signed to see if you are interested in taking this case, just a brief description of what took place." Deposition of Thomas C. Shappell at 11. Finally, Mr. Shappell stated that the handwritten notes were "... just something for personal use that I had jotted down at that time." Deposition of Thomas C. Shappell at 36.

II. *DISCUSSION*

Under Rule 26(b)(1) of the Federal Rules of Civil Procedure,

[p]arties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action....

It is undisputed that Shappell's typed notes are relevant; however, Shappell claims that the notes are privileged under the attorney-client privilege, because he produced them in order to retain an attorney. In order for the attorney-client privilege to apply, the following requirements must be met:

(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.

United States v. United Shoe Machinery Corp., 89 F.Supp. 357, 358–59 (D.Mass.1950). Thus, the elements required to establish the existence of the privilege are:

***2** 1. A communication;

2. made between privileged persons;

3. in confidence;

4. for the purpose of seeking, obtaining, or providing legal assistance for the client.

Restatement, The Law Governing Lawyers § 118 (Tent. Draft No. 1, 1988). Because of the adverse effect of its application on the disclosure of relevant facts, the attorney-client privilege is narrowly construed. *Diversified Industries, Inc. v. Meredith,* 572 F.2d 596, 602 (8th Cir.1978); *Coastal States Gas Corp. v. Department of Energy,* 617 F.2d 854, 862 (D.C.Cir.1980). Accordingly, the privilege cannot be invoked if any of its elements are missing, *United States v. Wilson,* 798 F.2d 509, 512 (1st Cir.1986).

At issue here is whether Mr. Shappell compiled the notes, both handwritten and typed, for the primary purpose of securing legal advice. From Mr. Shappell's deposition testimony it appears that he compiled the handwritten notes for his own personal use but produced the typed summary of the handwritten notes to secure an attorney. The typed notes do not appear to contain any additional information from what which was contained in the handwritten notes. Because the handwritten notes were made by Mr. Shappell for his own personal use and not for the purposes of securing an attorney, they would not fall within the attorney-client privilege if they still existed. On the other hand, because the typed notes were made for the primary purpose of securing counsel, they ordinarily would be privileged. *See Cohen v. Uniroyal, Inc.,* 80 F.R.D. 480, 482 (E.D.Pa.1978) ("[T]he attorney-client privilege protects from disclosure confidential communications made for the purpose of obtaining a lawyer's professional advice and assistance") (citations omitted).

However, because the handwritten notes comprised the material from which Mr. Shappell produced the typed summary and because they were subsequently destroyed, according attorney-client privilege to the typed notes is problematical. McCormick distinguishes preexisting documents given to an attorney by a client from written communications from a client to an attorney made for the purpose of soliciting legal advice, the latter receiving privilege and the former being discoverable. *See McCormick on Evidence* § 89, at 184 (2d ed. 1954) ("A professional communication in writing, as a letter from a client to lawyer for example, will of course be privileged. These written privileged communications are steadily to be distinguished from preexisting documents or writings, such as deeds, wills, and warehouse receipts, not in themselves constituting communications between client and lawyer."). The typed notes, because they merely summarize information from the handwritten notes, appear to be both preexisting documents and written communications from a client to an attorney.

Mr. Shappell's destruction of the handwritten notes is decisive in tilting the balance in favor of disclosure. If the handwritten notes had not been destroyed, it would be a fairly simple task to hold the typed summary privileged and the handwritten notes non-privileged. However, because Mr. Shappell destroyed the handwritten notes and because the typed summary contains only information which was contained in the handwritten notes, I hold that they are not privileged. To do otherwise would be to reward the plaintiff Shappell for his destruction of relevant, non-privileged information.

III. *CONCLUSION*

***3** For the foregoing reasons, the defendants' motion to compel shall be granted.

An order follows.

ORDER

AND NOW, upon consideration of the Defendants' (Mack Trucks, Inc., William C. Craig, and Robert E. Kendall) Motion to Compel, and the plaintiffs' response thereto, IT IS ORDERED that the motion is GRANTED.

All Citations

Not Reported in F.Supp., 1991 WL 86931

2016 WL 2602274
Only the Westlaw citation is currently available.

UNPUBLISHED OPINION. CHECK COURT RULES BEFORE CITING.

Superior Court of Connecticut,
Judicial District of Middlesex.

KENT LITERARY CLUB et al.
v.
WESLEYAN UNIVERSITY et al.

No. CV156013185.
|
April 12, 2016.

Attorneys and Law Firms

Beck & Eldergill, Manchester, for Kent Literary Club et al.

Day Pitney LLP, Hartford, for Wesleyan University et al.

Opinion

VITALE, Judge.

***1** Pursuant to P.B. § 13–28(e)(1), the Deponent Scott Karsten ("Deponent") filed a Motion to Quash a Subpoena duces tecum issued by the Defendant Wesleyan University ("Wesleyan") addressed to "Custodian of the Records, Karsten and Tallberg, LLC." In the motion, the Deponent alleges that he has "provided legal representation" to the Plaintiff Gamma Phi Chapter of DKE at Wesleyan ("DKE") since at least 1991," and "has served as legal counsel to the Board of Directors of the plaintiff Kent Literary Club of Wesleyan University ("KLC") since at least 1991." He also alleges that he has "provided legal representation to the Raimand Duy Baird Memorial Association ("RDBMA")." The Deponent also communicated with various alumni and undergraduate members of DKE and KLC. Some of those individuals are named in the subpoena duces tecum. In summary, the Deponent argues that "the subpoena seeks disclosure of documents which are not within the scope of examination permitted by our rules of practice in that "(1) the documents sought include many which are subject to attorney-client privilege and/or the work-produce doctrine; (2) the documents sought are not reasonably calculated to lead to the discovery of admissible evidence; (3) the documents sought are not material to the subject matter involved in the pending action; and (4) the demand for documents is unduly burdensome."

The defendant Wesleyan objects to the motion to quash, arguing that the Deponent has failed to establish that the communications at issue were in fact protected either by the attorney-client or the work-product privilege. Wesleyan further asserts that the documents are relevant, nor overly broad and unduly burdensome, and any privilege, if it existed, has been waived.

In their second amended complaint, plaintiff allege violation of Connecticut Unfair Trade Practices Act ("CUTPA"), promissory estoppel, negligent misrepresentation, and tortious interference with business expectancies, all based on Wesleyan's denial of the proposed plan for co-educating DKE House, suspension of DKE House's Program Housing status, and termination of the Greek Organization Standards Agreement.

The parties filed briefs, and oral argument was heard on April 4, 2016.

Discussion

In ruling on discovery matters, including motions to quash deposition notices and subpoenas, the court is obligated to take a reasoned and logical approach to the relevant contest between the parties. See e.g. *Blumenthal v. Kimber Mfg.*, 265 Conn. 1, 7–8 (2003). The Deponent has moved to quash the subpoena duces tecum served on his law firm [1] arguing, *inter alia,* that the documents sought are subject to the attorney-client privilege and thus, are unavailable for production in any matter. The defendant contends that the privilege does not exist as to the records sought and further, that the Deponent has relied on conclusory statements that the materials are protected. Defendant further argues that any privilege, if it existed, has been waived by virtue of the Deponent's conduct, prior testimony, and prior relinquishment of certain records, all of which occurred within the context of this case.

***2** The existence of attorney-client privilege must be established by the party seeking to assert it. *PSE Consulting, Inc. v. Frank Mercede & Sons, Inc.*, 267 Conn. 279, 330 (2004). Each element of the privilege must be proven by a fair preponderance of the evidence. *Id.*, at 330. "This burden requires the claimant of the exemption to provide

more than conclusory language, generalized allegations or mere arguments of counsel. Rather, a sufficiently detailed record must reflect the reasons why [the privilege] applies to the materials requested." *City of New Haven v. FOIC,* 205 Conn. 767, 775–76 (1988).

To invoke the attorney-client privilege, a communication must satisfy four criteria: (1) the attorney participating in the communication must be acting in a professional capacity as an attorney; (2) the communication must be between the attorney and the client; (3) the communication must be for the purpose of providing legal advice; and (4) the communication must be made in confidence. *Lash v. Freedom of Information Commission,* 300 Conn. 511, 516 (2011); *Shew v. FOIC,* 245 Conn. 149, 159 (1998). Because of its preclusive nature on discovery, the attorney-client privilege is to be narrowly construed to protect the communication of legal advice. *PSE Consulting, Inc.,* 267 Conn. at 330; *Turner's Appeal,* 72 Conn. 305, 318 (1899).

"Not every communication between attorney and client falls within the [attorney-client] privilege." *Ullmann v. State,* 230 Conn. 698, 713 (1994). Instead, "communications between client and attorney are privileged [only] when made in confidence for the purpose of seeking legal advice." *Olson v. Accessory Controls & Equip. Corp.,* 254 Conn. 145, 157 (2000) (citation omitted). In *Cuno, Inc. v. Pall Corp.,* 121 F.R.D. 198, 203 (E.D.N.Y.1988), the District Court held that some of the documents at issue were not privileged because their "primary purpose" was not for obtaining legal advice.

The privilege does not exempt a party from disclosing other information that may involve a lawyer, such as the identity of who spoke to a lawyer, the date on which they spoke, the length of the communication, etc. *Ullmann,* 230 Conn. at 712–14; *State v. Yates,* 174 Conn. 16, 19–20 (1977). Likewise, information an attorney receives from a non-privileged source does not become privileged when communicated to a client. *Turner's Appeal,* 72 Conn. at 318; *see also Fine v. Moomjian,* 114 Conn. 226, 233 (1932) (communication from client was not privileged because the attorney was acting as a scrivener and not as a professional providing legal advice); Tait's Handbook of Connecticut Evidence, § 5.23.1 (5th Ed.).

The attorney-client privilege recognized at common law is not, in fact, a general and total bar to discovery of any and all transactions and contracts that involve an attorney and a client. *Ullman v. State,* 230 Conn. 698, 711, 713 (1994); *Doyle v. Reeves,* 112 Conn. 521, 523 (1931). A request, for example, that an attorney obtain information from outside sources is not privileged. *Turner's Appeal,* 72 Conn. 305, 318 (1899).

***3** The Connecticut Supreme Court has stated that the proper approach is "to apply the privilege where the communications at issue are 'inextricably linked to the giving of legal advice.' " *Olson v. Accessory Control & Equipment Corp.,* 254 Conn. 145, 164 (2000).

With regard to documents, the Supreme Court has similarly approved a case-by-case inquiry into the primary purpose of the document. If that purpose is to solicit legal advice based on the information supplied, the privilege applies. *Olson v. Accessory Controls & Equipment Corp., supra,* 254 Conn. at 163, quoting *Hercules, Inc. v. Exxon Corp.,* 434 F.Sup. 136, 143 (D.Del.1977). The Connecticut court cited with approval in *Olson* the conclusion in *Cuno, Inc. v. Pall Corp.,* 121 F.R.D. 198, 204 (E.D .N.Y.1988), that "where a lawyer mixes legal and business advice the communication is not privileged 'unless the communication is designed to meet problems which can fairly be characterized as predominantly legal.' " *Olson v. Accessory Controls & Equipment Corp, supra,* 254 Conn. at 163.

In *Shew, supra,* the Supreme Court ruled that an attorney was acting in her professional capacity when conducting an investigation where the communications at issue were for the purpose of providing legal advice to a public official concerning disciplinary issues, 245 Conn. at 160. The *Shew* Court concluded that the attorney was acting as a lawyer, because (1) the public official stated that he hired her *to seek legal advice* and, (2) had she not been a lawyer, he would *not* have hired her to explore whether the town should take adverse action against its police chief. *Id.* The public official further testified that he felt that an attorney was needed to interview the agency's employees because of statutory requirements that a police chief not be dismissed without a hearing establishing just cause and to avoid legal complications related to potential discipline. *Id.*

However, when an activity could be handled by a layperson as easily as a lawyer, the privilege will not apply. See *Bird v. Penn. Cent. Co.,* 61 F.R.D. 43, 47, n. 3 (E.D.Pa.1973) (holding that "[i]t is unnecessary to reach the issue of whether some or all of these reports, correspondence, etc. prepared by counsel were not protected because counsel were acting as lay claim investigators at the time"); *Marsh v. Safir,* 2000 U.S. Dist. LEXIS 5136, at 34 (S.D.N.Y. Apr. 20, 2000) ("An attorney's performance of a function that is normally done by a non-attorney is not covered by the attorney-client privilege") (A689–03).

A party in a civil action may obtain "discovery of information or disclosure, production and inspection of papers, books or documents material to the subject matter involved in the pending action, which are not privileged." Practice Book Section 13–2. A party asserting the attorney-client or work-product privilege has the burden of establishing that the information sought is protected from disclosure. *Babcock v. Bridgeport Hospital,* 251 Conn. 790, 848, 742 A.2d 322 (1999).

***4** In addition, "statements made in the presence of a third party are usually not privileged because there is then no reasonable expectation of confidentiality." *State v. Cascone,* 195 Conn. 183, 186, 487 A.2d 186 (1985).

"[T]he attorney-client privilege implicitly is waived when the holder of the privilege has placed the privileged communications in issue ... [B]ecause of the important public policy considerations that necessitated the creation of the attorney-client privilege [however], the 'at issue,' or implied waiver, exception is invoked only when the contents of the legal advice is integral to the outcome of the legal claims of the action ... Such is the case when a party specifically pleads reliance on an attorney's advice as an element of a claim or defense, voluntarily testifies regarding portions of the attorney-client communication, *or specifically places at issue, in some other manner, the attorney-client relationship.* In those instances the party has waived the right to confidentiality by placing the content of the attorney's advice directly at issue because the issue cannot be determined without an examination of that advice." (Citation omitted; emphasis added; internal quotation marks omitted.) *Hutchinson v. Farm Family Casualty Inc., Co.,* 273 Conn. 33, 38–39 (2005).

In addition, the attorney-client privilege is waived where the representation of a former attorney is integral to the resolution of a client's present claim. *Cox v. Burdick,* 98 Conn.App. 167, 173 & N.4, 907 A.2d 1282, cert. denied, 280 Conn. 951 (2006). "A party cannot invoke the privilege as to communications whose confidentiality he has already compromised for his own benefit ... [because] the attorney-client privilege is not designed for such tactical employment." *In re Intel Corp. Microprocessor Antitrust Litigation,* 258 F.R.D. 280, 289–90 (D.Del.1994).

The work product doctrine provides that "a party may obtain discovery of documents and tangible things ... prepared in anticipation of litigation or for trial by or for another party or by or for the other party's representative only upon a showing that the party seeking discovery has substantial need of the materials in the preparation of the case and is unable without undue hardship to obtain the substantial equivalent of the materials by other means." Practice Book Section 13–3(A).

The mere fact that a document may contain opinion or legal theories of an attorney is insufficient to cloak it with work product protection. The document must still be prepared by or for an attorney for a client with a view towards pending or anticipated litigation in which that client is a party. *Raymond Road Associates, LLC v. Taubman Centers, Inc.,* superior court, Judicial District of Waterbury, No. CV–07–5007877 (October 30, 2009, Eveleigh, J.) (internal citation omitted).

"Work product can be defined as the result of an attorney's activities when those activities have been conducted with a view to pending or anticipated litigation. The attorney's work must have been an essential step in the procurement of the data which the opponent seeks, and the attorney must have performed duties *normally attended to by attorneys* (emphasis added)." *Stanley Works v. New Britain Redevelopment Agency,* 155 Conn. 86, 95 (1967) (internal citations omitted).

***5** As the court understands the conflict between the parties, at issue are the following document requests attached the defendant's Notice of Deposition dated September 30, 2015:

DOCUMENT REQUEST

1. All documents concerning the co-education of residential fraternities at Wesleyan, including but not limited to communications with Zac Cuzner, Frank Sica, Jeff Gray, Gary Breitbord, Dennis Robinson, Jeff Hoder, David Bagatelle,

Terence Durkin, Tucker Ingraham, any other person who is a current or former member of KLC or DKE, Beta, DKE National, Psi U, Rho Ep and/or members of women's sports teams at Wesleyan.

2. All documents concerning the co-education of DKE House, including but not limited to communications with Zac Cuzner, Frank Sica, Jeff Gray, Gary Breitbord, Dennis Robinson, Jeff Hoder, David Bagatelle, Terence Durkin, any other person who is a current or former member of KLC or DKE, Beta, DKE National, Psi U, Rho Ep and/or members of women's sports teams at Wesleyan.

3. All documents concerning the participation of DKE and DKE House in program housing at Wesleyan, including but not limited to communications with Zac Cuzner, Frank Sica, Jeff Gray, Gary Breitbord, Dennis Robinson, Jeff Hoder, David Bagatelle, Terence Durkin, nay other person who is a current or former member of KLC or DKE, Beta, DKE National, Psi U, Rho Ep and/or members of women's sports teams at Wesleyan.

4. All documents concerning the Action, including but not limited to communications with Zac Cuzner, Frank Sica, Jeff Gray, Gary Breitbord, Dennis Robinson, Jeff Hoder, David Bagatelle, Terence Durkin, any other person who is a current or former member of KLC or DKE, Beta, DKE National, Psi U, Rho Ep and/or members of women's sports teams at Wesleyan.

During his testimony at the April 2015 hearing, Mr, Karsten described his posture with regard to the pending litigation. He is an alumnus of DKE and a member of its alumni organization KLC. His communications with Dean Whaley, in e-mail form, can be characterized as suggesting that he was working as an informal spokesperson for DKE and KLC.

The e-mails also reflect Mr. Karsten's active role in discussions between other alumni regarding Wesleyan's co-education plan and “brainstorming” ideas to counteract the plan.

He was publicly vocal, writing letters to Wesleyan's newspaper criticizing Wesleyan's co-education efforts (http://wesleyanargus.com/20 15/09/14/the-real-world-consequences-of-wesleyansanti-frat-campaign/), posting on a website created by DKE alumni to discuss this dispute (http:/ /cardinaltruths.com/a-group-of-guys-that-anyone-would-beproud-to-call-their-own/; ht tp:// www.theatlantic.com/education/archive/2015/03 /wesleyan-coed-frats/389177/).

There is nothing in the materials submitted for the court's review by the parties that in the court's view demonstrated Mr. Karsten either provided or was requested to provide legal advice. It is noteworthy that in November 2014, while discussions regarding the co-education of DKE were in progress, Mr. Karsten affirmatively and unambiguously disclosed his role as counsel to another fraternity, Beta Theta Pi, Mu Epsilon Chapter. This fraternity was involved in a similar dispute with Wesleyan.

***6** Wesleyan's general counsel contacted Mr. Karsten to clarify whether Mr. Karsten was acting as DKE's lawyer in the ongoing dispute. For example, Exhibits 2, 5, 6 and 7 reflect e-mails or e-mail chains involving Mr. Karsten. In Exhibit 7, an e-mail chain, Mr. Karsten confirmed that he had not been acting in such capacity, stating:

> I agree with your assessment of the capacity in which I have communicated with Mike Whaley to this point in connection with the coeducation issue; and I further agree that, should my assessment of that capacity change so that it is more in the nature of legal counsel, I will certainly direct any such correspondence to you, or the two of you. I do not anticipate that happening, at least not in the foreseeable future.

In Exhibit 8, Mr. Karsten acknowledged that he may be getting into a “grey area” with respect to the nature of his role in the dispute on January 27, 2015, but still did not claim to be Plaintiffs' counsel. As noted previously, plaintiffs presented Mr. Karsten as a fact witness at the April 22–23, 2015 hearing on the Motion for Preliminary Injunction. While Mr. Karsten described himself as KLC's “informal general counsel, I guess you could say” he did not claim that he acted as KLC or DKE's counsel with respect to the discussions surrounding co-education of DKE House. Mr. Karsten did not decline to answer any questions on the grounds that answering would reveal privileged communications. Much of Mr. Karsten's testimony at the April 2015 hearing on Plaintiffs' Motion for Preliminary Injunction on Plaintiffs'

behalf described DKE and KLC's thoughts regarding co-education generally and thoughts and intent behind the formulation and implementation of the co-education plan presented to Wesleyan.

During the hearing, Mr. Karsten testified regarding:

- the facts and reasoning behind seeking a survey of DKE alumni and undergraduates regarding co-education (Apr. 22 Tr. at 121:8–19),
- the reason behind Plaintiffs' statement in the plan that they reserved rights to amend it as required (*id.* at 125:8–9),
- Plaintiffs' decision and efforts to explore renovations to DKE House to house women (*id.*),
- the reasoning and basis for the conclusion reached about having separate physical facilities for men and women (*id.* at 131:1–18),
- the concerns expressed by alumni that they were being "set up for a failure" and coeducation of DKE House might result in a sexual assault on the DKE property (*id.*),
- Plaintiffs' intentions regarding common areas in their co-education plan (*id.* at 138:22–139:1),
- Plaintiffs' reasoning behind their questions presented to the University regarding co-education (*id.* at 140:21–141:22),
- the level of detail Plaintiffs thought should be included in the initial proposed plan (Ex. 10, Tr. of Apr. 23, 2015 Hearing ("Ap. 23 Tr.") at 38–39).
- conversations he had with DKE's associated national fraternity regarding coeducation (*id.* at 67–68).

***7** Plaintiffs also produced 81 pages of documents Mr. Karsten described as "not privileged" from his files, which were identified as Exhibit Z by Mr. Karsten. (Apr. 23 Tr. at 36–37.) Those pages included correspondence among DKE alumni and with Mr. Karsten regarding co-education generally, and, similar to Mr. Karsten's testimony, revealed the Plaintiff's thoughts and strategy behind the plan proposal. The production included, for instance, correspondence regarding:

- efforts to contact fraternities at Trinity that had gone through similar issues (Ex. 2).
- the potential usefulness of a law review article in supporting Plaintiffs' position (Ex. 2).

The status of Mr. Karsten as a so-called "fact witness" at the April 2013 hearing in support of plaintiffs' motion for temporary injunction does not appear to be seriously in dispute. The memorandum in support of the motion to quash, dated October 27, 2015, does not directly address said circumstance, nor the fact that some 81 pages of documents regarding communications with other DKE alumni and KLC representations were apparently produced by Mr. Karsten at said hearing.

The court has thoroughly reviewed the exhibits and attachments provided by the parties in connection with their memorandums and motions. Those materials included excerpts from Mr. Karsten's testimony before the court (Domnarski, J.) in April 2015, as well as e-mails exchanged between Mr. Karsten and other interested parties concerning the general area. It is clear that Mr. Karsten is an alumnus of DKE, and is a member of its alumni organization, KLC. A review of the electronic correspondence between Mr. Karsten and Dean Whaley of Wesleyan University evidences an understanding that Mr. Karsten was acting as a liaison or spokesperson for DKE in connection with its dispute with Wesleyan. Some of his efforts in this regard commenced in May of 2014. As referenced in the materials submitted by the defendant,

- the alumni survey conducted regarding co-education,
- general strategy for reacting to Wesleyan's co-education efforts,
- strategy for responding to Wesleyan's questions and comments regarding the proposed plan,
- a summary of a strategy call among DKE alumni,
- Mr. Karsten's advice to the chapter president of DKE not to have any more conversations with the university without alumni present.

In addition, Mr. Karsten included correspondence he had with various individuals regarding the proposed plan. (Ex. 11 admitted as Exhibit D at the April 22 Hearing; Apr. 22 Tr. at 122:18–23; Apr. 23 Tr. at 128.) In that correspondence, Mr. Karsten recommended that the proposal be "as minimalistic as has some credibility." The correspondence also included discussions among DKE and KLC members regarding the alumni survey as well as wording for a proposal for coeducation. Mr. Karsten testified regarding that correspondence at the hearing, first at Plaintiffs' instigation

on direct examination and then again when being cross-examined. (Apr. 22 Tr. at 122:18–23, Apr. 23 Tr. at 35, 37–40, 48–49.) Neither he nor Plaintiffs argued this correspondence was privileged, and that claim was not raised.

***8** In general, the materials submitted demonstrate that Mr. Karsten and the plaintiffs have already produced and discussed documents pertaining to DKE and KLC theories and strategies regarding negotiations with the defendant and its co-education plans.

The Deponent has not pointed to any specific document or testimony that thus far demonstrates he was engaged to provide legal services to the plaintiffs. There is nothing apparent in the materials provided, or specified by the Deponent, that relates to the solicitation of or provision of legal advice. To the contrary, the materials suggest that Mr. Karsten affirmatively represented he was not acting as Plaintiffs' attorney at the times in question.

The attorney-client privilege does not apply in any instance where the client is not seeking *legal* advice from its attorney. *Ullman, supra* at 698 (1994). Similarly, the attorney-client privilege does not apply when a lawyer provides "general business advice." *Fine v. Facet Aerospace Prods Co.,* 133 F.R.D. 439, 444 (S.D.N.Y.1990) ("[W]hile the privilege covers communications made in connection with the rendering of legal advice, it does not extend to the provision of business and management advice"). Furthermore, "the business aspects of the decision are not protected simply because legal considerations are also involved." *Hardy v. New York News, Inc.,* 114 F.R.D. 633, 643–44 (S.D.N.Y.1987). Indeed, "legal advice must *predominate* for the communication to be protected ... [W]hen the legal advice is merely incidental to business advice, the privilege does not apply[.]" *North Pacifica, LLC v. City of Pacifica,* 274 F.Sup.2d 1118, 1127 (N.D.Cal.2003) (emphasis added) (citation omitted).

With regard to whether the communications at issue were "inextricably linked to the giving of legal advice," a determination must be made that the claimed privileged matter is so intertwined with an non-privileged matter that it cannot be redacted or otherwise separated. Again, the Deponent has not pointed to specific instances where that claim arises or exists.

The court concludes, applying the principles articulated in *Lash, supra* and *Olson, supra,* the Deponent has failed to satisfy his burden by a preponderance of the evidence that the attorney-client privilege applies to the documents sought. The Deponent has failed to provide a sufficiently detailed record reflecting why the privilege applies to the materials requested.

As a result, the Deponent has merely asserted conclusory claims.

The court is not persuaded that the documents requested are appropriately categorized as within the attorney-client privileged as asserted by the Deponent. [2]

Even assuming, arguendo, that the attorney-client privilege is applicable, the court could reasonably conclude that it was implicitly waived based on the conduct of the Deponent and Plaintiffs. Mr. Karsten has provided documents, and Plaintiffs produced him as a "fact witness" during the April 2015 hearing. See *Beverly Hills Concepts v. Schatz, Schatz, Ribicoff & Kotkin,* No. CV 89–0369864–S, 1995 Conn.Super. LEXIS 3617 (Dec. 18, 1995) (voluntary partial disclosure of attorney advice waived privilege with respect to the remainder); *Altayeb v. Warden,* No. CV 12–40044 13, 2014 Conn.Super. LEXIS 809, at *11 (Apr. 8, 2014) ("it would be unfair to allow a client to assert the attorney-client privilege and prevent disclosure of damaging communications while allowing the client to disclose other selected communications solely for self-serving purposes" (internal quotations omitted)); *MBIA Ins. Corp. v. Patriarch Partners VIII, LLC,* No. 09 Civ. 3255, 2012 U.S. Dist. LEXIS 92435, at *14–25 (S.D .N.Y. July 2, 2012) (parties could not selectively disclose which communications to reveal regarding intent and understanding of contract); *see also* Fed.R.Civ.P. 502(a) (waiver extends to undisclosed communications where they ought in fairness to be considered with disclosed communications).

***9** For the reasons articulated above, and applying the relevant legal principles, the court is also not persuaded that the claim of "work product" precludes the discovery of the requested documents. [3]

Turning next to the specifics of the requests, it is the court's understanding, referenced at oral argument, that the parties reached an agreement with respect to document and interrogatory requests 5 through 9, and their current dispute relates only as to requests and interrogatories 1 through 4. The Deponent's additional claims as set forth in his Motion to Quash shall next be succinctly addressed. The

court has considered the requests in conjunction with the remaining objections thereto, generally concerning claims of lack of relevance and "overly broad and burdensome." The Deponents remaining objections on the grounds asserted are overruled. The requested documents shall be provided encompassing the time period January 1, 2014 to the present time. For the foregoing reasons, the Motion to Quash is denied.

All Citations

Not Reported in A.3d, 2016 WL 2602274

Footnotes

1 The subpoena is directed to the law firm's record custodian.

2 With respect to the affidavit submitted by Mr. Karsten, the defendant asserts it does not seek those documents referenced in the affidavit Meaning, it does not seek documents kept confidential due to legal advice, thoughts, or impressions of plaintiffs *retained* counsel, a point made at oral argument.

3 The court observes parenthetically that this "separate" claim was not necessarily distinctly briefed or argued extensively by the Deponent.

2010 WL 3522495
Only the Westlaw citation is currently available.
United States District Court, D. Connecticut.

Susan VALENTE, Plaintiff,
v.
LINCOLN NATIONAL CORP. d/b/
a Lincoln Financial Group, Defendant.

No. 3:09cv693 (MRK).
|
Sept. 2, 2010.

Attorneys and Law Firms

Todd D. Steigman, William G. Madsen, Madsen, Prestley & Parenteau, LLC, Hartford, CT, for Plaintiff.

Deborah Dehart Cannavino, Stephen P. Rosenberg, Littler Mendelson, P.C., New Haven, CT, for Defendant.

RULING AND ORDER

MARK R. KRAVITZ, District Judge.

***1** One frequently hears complaints that the discovery process in American courts is out of control. *See, e.g.,* Stephen N. Subrin, *The Limitations of Transsubstantive Procedure: An Essay on Adjusting the "One Size Fits All" Assumption,* 87 Denv. U.L.Rev. 377, 403 (2010) ("It has been amply demonstrated that ... uncontrolled discovery often spins out of control in terms of time and expense, with little or no additional benefit to the litigation process."). This Court's experience is to the contrary. The discovery process—while rarely pleasant—actually works quite well when the attorneys for all the parties, consistent with their dual roles as both advocates for their clients and officers of the Court, are willing to cooperate with one another and act reasonably and in accordance with the *Federal Rules of Civil Procedure.* The discovery process only spins out of control-and requires Court intervention-in those rare cases in which attorneys overlook their dual roles as advocates and officers of the Court, and refuse to cooperate and act reasonably. [1]

Plaintiff Susan Valente filed this lawsuit against her former employer, Lincoln National Corp., on April 28, 2009. Under the original Case Management Order in this case, discovery was scheduled to be completed no later than April 1, 2010. *See* Order [doc. # 20] dated September 3, 2009. However, the parties had a number of discovery-related disputes and found themselves unable to complete discovery by that deadline. *See* Joint Status Report [doc. # 47] dated April 6, 2010. The Court therefore agreed to extend the deadline for fact discovery in this case until September 15, 2010 and to also extend the deadline for expert witness discovery until October 15, 2010. *See* Order [doc. # 71] dated August 19, 2010.

The purpose of this Ruling and Order is to resolve a remaining discovery dispute and—the Court hopes—thus to enable the parties to complete fact discovery in a timely fashion without further disputes. With the deadline for fact discovery quickly approaching, counsel for Ms. Valente challenged counsel for Lincoln National's inclusion of several email communications to and from Lincoln National's in-house counsel on the privilege log. During a telephonic conference with counsel for both parties, the Court determined that a number of emails that counsel for Lincoln National included on the privilege log were sent for the sole purpose of sharing factual information, rather than for the purpose of obtaining or providing legal advice, and were therefore not protected by the attorney-client privilege. *See* Transcript of Proceedings [doc. # 76] held on August 17, 2010. The Court therefore permitted counsel for Ms. Valente to select an additional thirty documents from the privilege log for the Court to review *in camera* . Counsel for both parties also sought the Court's advice on one additional document that counsel for Lincoln National had disclosed inadvertently.

***2** "The attorney-client privilege protects confidential communications between client and counsel made for the purpose of obtaining or providing legal assistance." *In re County of Erie,* 473 F.3d 413, 418 (2d Cir.2007). The purpose of the privilege is to encourage full and frank communication between attorneys and their clients, and thereby to promote "broader public interests in the observance of law and administration of justice." *Upjohn Co. v. United States,* 449 U.S. 383, 389(1981). However, because there is a countervailing public interest in ensuring materials relevant to legal disputes are discoverable, courts construe the attorney-client privilege narrowly, *see* *County of Erie,* 473 F.3d at 418, and apply it "only where *necessary* to achieve its purpose." *Fisher v. United States,* 425 U.S. 391, 403 (1976) (emphasis added).

The standard for determining whether a particular communication is protected by the attorney-client privilege is

not complex. A communication is protected by the attorney-client privilege if (a) it was a communication between client and counsel; (b) it was intended to be kept confidential and actually was kept confidential; and (c) it was made for the purpose of obtaining or providing legal advice. *See* *County of Erie,* 473 F.3d at 419. The party invoking the privilege bears the burden of establishing all of the elements of the privilege. *See* *United States v. Int'l Bhd. of Teamsters,* 119 F.3d 210, 214 (2d Cir.1997).

While the standard for determining whether a communication is protected by the attorney-client privilege is straightforward, the application of that standard sometimes requires nuance. The line between legal advice and non-legal advice is hazy. In particular, the line between business advice and legal advice is blurry when an attorney work in-house for a corporate client. *See* *County of Erie,* 473 F.3d at 419. In the specific context of communications to and from corporate in-house lawyers, courts therefore typically hold that a communication is privileged only if it was generated for the *predominant purpose* of rendering or soliciting legal advice. *See* *id.* at 420 & n. 7 (citing, *inter alia,* 24 Charles Alan Wright & Kenneth W. Graham, *Federal Practice and Procedure* § 5490 (1986)). The Second Circuit recently expounded on the meaning of "predominant purpose":

> The complete lawyer may well promote and reinforce the legal advice given, weigh it, and lay out its ramifications by explaining: how the advice is feasible and can be implemented; the legal downsides, risks, and costs of taking the advice or doing otherwise; what alternatives exist to present measures or the measures advised; what other persons are doing or thinking about the matter; or the collateral benefits, risks or costs in terms of expense, politics, insurance, commerce, morals, and appearances. So long as the *predominant purpose* of the communication is legal advice, these considerations and caveats are not other than legal advice or severable from it. The predominant purpose of a communication cannot be ascertained by quantification or classification of one passage or another; it should be asserted dynamically and in light of the advice being sought or rendered, as well as the relationship between advice that can be rendered only by consulting the legal authorities and advice that can be given by a non-lawyer.

***3** *County of Erie,* 473 F.3d at 420–21.

This Court is confident that under the predominant purpose test, it is not enough for the party invoking the privilege to show that a communication from corporate personal to in-house counsel communicated factual information that might become relevant to the future rendering of legal advice. Instead, the communication must also either explicitly or implicitly seek specific legal advice about that factual information. The Court believes that such a rule is necessary to protect against the possibility that "corporate clients could attempt to hide mountains of otherwise discoverable information behind a veil of secrecy by using in-house legal departments as conduits of otherwise unprivileged information." *Neuberger Berman Real Estate Income Fund, Inc. v. Lola Brown Trust No. 1B,* 230 F.R.D. 398, 411 n. 20 (D.Md.2005); *see also* *Lindley v. Life Investors Ins. Co. of Am.,* 267 F.R.D. 382, 388–92 (N.D.Okla.2010). As New York's highest court observed more than two decades ago: "[T]he need to apply [the privilege] cautiously is heightened in the case of corporate staff counsel, lest the *mere participation* of an attorney be used to seal off disclosure." *Rosi v. Blue Cross & Blue Shield of Greater N.Y.,* 73 N.Y.2d 588, 593 (1989) (emphasis added). In sum, it cannot be that *every* e-mail sent to an in-house lawyer is automatically privileged.

With that rule in mind, the Court concludes that the thirty-one emails at issue in this case fall into four broad categories. The first category consists of emails from Lincoln National personnel to Lincoln National's in-house counsel explicitly seeking legal advice, or emails from in-house counsel to personnel explicitly providing legal advice. Nearly two-thirds of the emails—emails 2, 4, 5, 6, 8, 9, 10, 11, 13, 14, 15, 16, 17, 19, 23, 24, 27, 28, and 29—belong in that category. Lincoln National has borne its burden of showing that those emails

are privileged, as it is plain from the content of the emails that their purpose was to ask for or to provide legal advice.

The second category consists of emails from Lincoln National's personnel simply forwarding developing factual information on to in-house counsel. Seven of the emails—emails 1, 3, 4, 7, 12, 18, and 30—belong in that category. The Court is not satisfied that those emails are privileged. Although Lincoln National's counsel has asserted that the purpose of those emails was to obtain legal advice, it is not at all clear from the content of the emails or from the context of those emails that the purpose of the emails was to elicit specific legal advice. Instead, it appears that Lincoln National personnel simply made a habit of copying in-house counsel (along with many other individuals) on any email that included factual information that might become relevant to a possible claim.

Counsel for Lincoln National has not provided the Court with any additional evidence regarding the purpose of those seven emails. Keeping in mind that the party seeking application of the privilege bears the burden of persuasion, the Court will not simply draw an inference that the purpose of *every* communication from Lincoln National's personnel to in-house counsel was for the purpose of seeking legal advice. Defense counsel appears to take the position that any email that is copied to in-house counsel and that contains information that may become relevant to a future claim is always privileged. As the Court has already discussed, that is not now and has never been the law.

***4** The third category consists of emails from Lincoln National personnel to in-house counsel providing factual information and *also* either implicitly or explicitly seeking legal advice from counsel. Three emails—emails 20, 21, and 26—fall into the third category. Email 20 is an email providing counsel with detailed notes about a meeting. It was not sent to any other person, and it is apparent from the context that this detailed information was provided for the purpose of enabling counsel to provide legal advice. Email 21 is an email forward much like those in the second category, but it also contains a request asking counsel for advice about how to proceed in response to the forwarded information. Email 26 is a draft of a document, and it is apparently from the context that the draft was sent to counsel with an implicit request to provide feedback and comments about the draft. Those communications are all privileged.

The fourth category consists of emails the purpose of which the Court has been unable to determine from either their content or their context. The Court is simply unable to determine what the purpose of those two emails—22 and 31—might be. Furthermore, is not even clear to the Court that email 31 is actually a communication between client and counsel. The Court therefore concludes that Lincoln National has not borne its burden of showing that those emails 22 and 31 are protected by the attorney-client privilege.

In light of this Ruling, the Court encourages counsel for Lincoln National to take a second look—and perhaps even a third look—at its privilege log in order to determine whether it can bear the burden of showing that *all* the documents this Court has not yet reviewed are truly privileged. If Lincoln National's counsel has further information to bring to the Court's attention about the purposes of the emails this Court has determined are not privileged, they should bring that information to the Court's attention no later than September 17, 2010.

IT IS SO ORDERED.

All Citations

Not Reported in F.Supp.2d, 2010 WL 3522495

Footnotes

1 Recent surveys conducted by the Federal Judicial Center show that when counsel fail to cooperate in discovery, the costs of discovery skyrocket. *See* Emery G. Lee III & Thomas E. Willging, Fed. Judicial Ctr., National Case–Based Civil Rules Survey 2 (2009) (“A majority of respondents reported that the parties were able to reduce the cost and burden of discovery by cooperating.”), *available at* http://www.fjc.gov/public/pdf. nsf/lookup/FJC_Civil_Report_ Sept_2009.pdf/$file/FJC_Civil_Report_Sept_2009.pdf; Emery G. Lee III & Thomas E. Willging, Fed. Judicial Ctr., Litigation Costs in Civil Cases:

Multivariate Analysis 5, 7 (2010) (“For each dispute over [discovery], the party had approximately 10% higher costs, all else equal.”), *available at* http://civilconference.uscou rts.gov/LotusQuickr/dcc/Main.nsf/ $defaultview/ A6B71E18F14D17AA852577070048 6E15/$File/FJC#% 20Litigation% 20Costs% 20in% 20Ci vil% 20Cases% 20–% 20M ultivariate% 20Analysis.pdf?OpenElement. Although attorneys who engage in endless discovery disputes may believe they are merely engaged in zealous advocacy on behalf of their clients, such increases in costs are ultimately to the detriment of clients.

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FREEDOM OF INFORMATION COMMISSION
OF THE STATE OF CONNECTICUT

In the Matter of a Complaint by FINAL DECISION

Noelle Bates,

Complainant

against Docket #FIC 2015-855

Director, Personnel Department, City of Bristol; Personnel Department, City of Bristol; and City of Bristol,

Respondents November 16, 2016

The above-captioned matter was heard as a contested case on March 1, 2016, at which time the complainant and the respondents appeared, stipulated to certain facts and presented testimony, exhibits and argument on the complaint.

The hearing officer issued a Report of Hearing Officer on June 21, 2016. The Freedom of Information ("FOI") Commission considered such report at its regular meeting of September 14, 2016, at which time they voted to table the matter for reconsideration by the hearing officer.

After consideration of the entire record, the following facts are found and conclusions of law are reached:

1. The respondents are public agencies within the meaning of §1-200(1), G.S.

2. It is found that on December 3, 2015, the complainant requested a copy of the respondent Personnel Director's "handwritten notes and any other written and/or printed documents you may have taken and/or received during your 'fact finding' investigation" of the mayor.

3. It is found that by letter dated December 4, 2015, the respondents denied the complainant's request for the Personnel Director's handwritten notes, claiming that such notes were exempt from disclosure.

4. By letter filed December 14, 2015, the complainant appealed to this Commission, alleging that the respondents violated the Freedom of Information ("FOI") Act by failing to provide copies of the requested records.

5. Section 1-200(5), G.S., provides:

> Public records or files means any recorded data or information relating to the conduct of the public's business prepared, owned, used, received or retained by a public agency, ...whether such data or information be handwritten, typed, tape-recorded, printed, photostated, photographed or recorded by any other method.

6. Section 1-210(a), G.S., provides, in relevant part:

> Except as otherwise provided by any federal law or state statute, all records maintained or kept on file by any public agency, whether or not such records are required by any law or by any rule or regulation, shall be public records and every person shall have the right to (1) inspect such records promptly during regular office or business hours, ... or (3) receive a copy of such records in accordance with section 1-212.

7. Section 1-212(a), G.S., provides in relevant part: "Any person applying in writing shall receive, promptly upon request, a plain, facsimile, electronic or certified copy of any public record."

8. It is found that the records requested by the complainants are public records within the meaning of §§1-200(5), 1-210(a), and 1-212(a), G.S.

9. The respondents claim that the Director's notes are exempt pursuant to §1-210(b)(1), G.S., which provides that "[n]othing in the Freedom of Information Act shall be construed to require disclosure of ... [p]reliminary drafts or notes provided the public agency has determined that the public interest in withholding such documents clearly outweighs the public interest in disclosure."

10. It is found that the respondent Director claimed the exemption for the requested records because she wants to encourage employees' candor, and she fears that disclosure of the contents of her conversations with employees might discourage employees from discussing sensitive matters with her. It is found that the respondents determined that the public interest in withholding the requested records clearly outweighed the public interest in disclosure, within the meaning of §1-210(b)(1), G.S.

11. It is found that the Personnel Director wrote her handwritten notes as she interviewed the complainant and another respondent employee. It is found that the purpose of the notes was to help the Director make an initial assessment about what was being reported and to help her "determine what course of action to take" as a result of the complainant's allegations. It is found that the notes were not incorporated into a final report or investigation, and that the notes have not been shared with anyone.

12. In Shew v. Freedom of Information Commission, the Supreme Court concluded that "the legislation makes it very evident that preparatory materials are not required to be disclosed...Furthermore, the concept of preliminary, as opposed to final, should [not] depend

upon...whether the actual documents are subject to further alteration...It is records of this preliminary, deliberative and predecisional process that...the exemption was meant to encompass." (Citations omitted; quotation marks omitted.) Shew v. Freedom of Information Commission, 245 Conn. 149, 165 (1998).

13. Following the hearing in this matter, the respondents submitted the requested handwritten notes for in camera inspection. These records are hereby identified as IC-2015-855-1 through IC-2015-855-6.

14. Upon careful review of the in camera records, it is found that the requested handwritten notes were preparatory to the Personnel Director's decision-making about what steps to take, if any, with respect to the allegations against the mayor.

15. Accordingly, it is found that the requested records are preliminary notes within the meaning of §1-210(b)(1), G.S.

16. Section 1-210(e), G.S., provides in relevant part:

> Notwithstanding the provisions of subdivisions (1) ... of subsection (b) of this section, disclosure shall be required of:
>
> (1) Interagency or intra-agency memoranda or letters, advisory opinions, recommendations or any report comprising part of the process by which governmental decisions and policies are formulated, except disclosure shall not be required of a preliminary draft of a memorandum, prepared by a member of the staff of a public agency, which is subject to revision prior to submission to or discussion among the members of such agency[.]

17. It is found that the notes are not interagency or intra-agency memoranda or letters, advisory opinions, recommendations or a report, within the meaning of §1-210(e)(1), G.S.; therefore the disclosure provisions of §1-210(e)(1), G.S., are not applicable.

18. It is concluded that the records withheld from the complainant are permissibly exempt from disclosure pursuant to §1-210(b)(1), G.S., and the respondents did not violate the FOI Act as alleged.

The following order by the Commission is hereby recommended on the basis of the record concerning the above-captioned complaint:

1. The complaint is dismissed.

Approved by Order of the Freedom of Information Commission at its regular meeting of November 16, 2016.

Cynthia A. Cannata
Acting Clerk of the Commission

PURSUANT TO SECTION 4-180(c), G.S., THE FOLLOWING ARE THE NAMES OF EACH PARTY AND THE MOST RECENT MAILING ADDRESS, PROVIDED TO THE FREEDOM OF INFORMATION COMMISSION, OF THE PARTIES OR THEIR AUTHORIZED REPRESENTATIVE.

THE PARTIES TO THIS CONTESTED CASE ARE:

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Cynthia A. Cannata
Acting Clerk of the Commission

FIC/2015-855/FD/cac/11/16/2016