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FREEDOM OF INFORMATION



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Mark Dumas and the
Connecticut State Police Union,
Complainant(s)
against

Notice of Meeting

Docket #FIC 2016-0209

Dora Schriro, Commissioner, State of Connecticut,
Department of Emergency Services and Public
Protection; and State of Connecticut, Department of
Emergency Services and Public Protection,
Respondent(s)

February 10, 2017

Transmittal of Proposed Final Decision

In accordance with Section 4-179 of the Connecticut General Statutes, the Freedom of Information Commission hereby transmits to you the proposed finding and decision prepared by the hearing officer in the above-captioned matter.

This will notify you that the Commission will consider this matter for disposition at its meeting which will be held in the Freedom of Information Commission Hearing Room, 18-20 Trinity Street, 1st floor, Hartford, Connecticut, at **2 p.m. on Wednesday, February 22, 2017**. At that time and place you will be allowed to offer oral argument concerning this proposed finding and order. Oral argument shall be limited to ten (10) minutes. For good cause shown, however, the Commission may increase the period of time for argument. A request for additional time must be made in writing and should be filed with the Commission **ON OR BEFORE February 17, 2017**. Such request **MUST BE (1) copied to all parties, or if the parties are represented, to such representatives, and (2) include a notation indicating such notice to all parties or their representatives.**

Although a brief or memorandum of law is not required, if you decide to submit such a document, an **original and fourteen (14) copies** must be filed **ON OR BEFORE February 17, 2017**. **PLEASE NOTE: Any correspondence, brief or memorandum directed to the Commissioners by any party or representative of any party MUST BE (1) copied to all parties, or if the parties are represented, to such representatives, (2) include a notation indicating such notice to all parties or their representatives and (3) be limited to argument. NO NEW EVIDENCE MAY BE SUBMITTED.**

If you have already filed a brief or memorandum with the hearing officer and wish to have that document distributed to each member of the Commission, it is requested that **fifteen (15) copies** be filed **ON OR BEFORE February 17, 2017**, and that **notice be given to all parties or if the parties are represented, to their representatives, that such previously filed document is being submitted to the Commissioners for review.**

By Order of the Freedom of
Information Commission

W. Paradis
Acting Clerk of the Commission

Notice to: Mark Dumas
Assistant Attorney General Terrence M. O'Neill

FREEDOM OF INFORMATION COMMISSION
OF THE STATE OF CONNECTICUT

In The Matter of a Complaint by

Report of Hearing Officer

Mark Dumas and the Connecticut
State Police Union,

Complainants

against

Docket #FIC 2016-0209

Dora Schriro, Commissioner,
State of Connecticut, Department
of Emergency Services and Public
Protection; and State of Connecticut,
Department of Emergency Services
and Public Protection,

Respondents

February 10, 2017

The above-captioned matter was heard as a contested case on July 20, 2016 and October 6, 2016, at which times the complainants 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 email dated March 8, 2016, the complainants submitted the following request for records:
 - a. Any records provided to or received from the Office of the Chief State's Attorney regarding the investigation referenced as "William T. Finney" with file number "2015-00093" that was referenced in a letter to Lieutenant Pendleton dated February 10, 2016.
 - b. Any complaint, email, or correspondence dated May 12, 2015 addressing conduct by Andrew Matthews or the Connecticut State Police Union.

- c. Any correspondence, including email, between any person employed in the Department of Emergency Services and Public Protection and any person employed in the Office of Chief State's Attorney regarding Andrew Matthews or the Connecticut State Police Union from September 1, 2014 to the date of this request.
- d. Any records, including emails, regarding any complaint, email, or correspondence dated May 12, 2015 addressing conduct by Andrew Matthews or the Connecticut State Police Union.

3. By email dated and filed on March 16, 2016, the complainants appealed to this Commission alleging that the respondents denied their request for records and requested the imposition of civil penalties against the named respondent, Commissioner Dora Schiro.

4. 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.

5. 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.

6. 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."

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

8. It is found that, as of the date of the October 6, 2016 hearing in this matter, the respondents had provided the complainants with copies of all records responsive to the request that are maintained by the respondent department. It is also found, however, that portions of those records were redacted and that the Ethics Policy, which was among the records responsive to the request, was initially withheld.

9. At the hearing on this matter, the respondents contended that the redacted portions of the requested records contain information that is exempt from disclosure pursuant to §1-210(b)(10), G.S. However, the respondents had no explanation for initially withholding the Ethics Policy.

10. The respondents submitted the responsive records to the Commission for an in camera inspection (hereinafter referred to as the “in camera records”). The in camera records have been identified as IC-2016-209-01 through IC-2016-209-131.

11. On the in camera index filed with the in camera records, the respondents indicated that the redacted portions of IC-2016-209-02, 12, 13-19, 23 through 25, 39, 40 through 41, 46 through 49, 86 through 87, 96 through 99, 117, 119, 121 through 124, are exempt from disclosure pursuant to §1-210(b)(10), G.S. The respondents indicated that the redacted portions of IC-2016-209-05, 68, 70, 74 through 76 are exempt pursuant to §1-210(b)(2), G.S.¹

12. With regard to the respondents’ claim that the redacted portions of IC-2016-209-05, 68, 70, 74 through 76 are exempt from disclosure pursuant to §1-210(b)(2), G.S., that statute provides that disclosure is not required of “personnel or medical and similar files, the disclosure of which would constitute an invasion of personal privacy.”

13. 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.

14. It is found, however, that none of the redacted portions of the in camera records are “personnel or medical and similar files,” and that even if they were, the respondents failed to prove that their disclosure would constitute an invasion of personal privacy within the meaning of §1-210(b)(2), G.S. Accordingly, it is concluded that the

¹ It is found that the respondents claimed no exemption with respect to in camera records IC-2016-209-01, 3-4, 6-11, 20-22, 26-38, 42-45, 50-67, 71-73, 77-85, 88-95, 100-116, 118, 120, 125-131. It is found that those records were provided to the complainant in unredacted form.

respondents violated §§1-210(a) and 1-212(a), G.S., by failing to disclose such records to the complainants.

15. With respect to the claimed exemption found in §1-210(b)(10), G.S., that statute provides that disclosure is not required of “. . . communications privileged by the attorney-client relationship.”

16. 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 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.

17. 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.

18. The Supreme Court has 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.

19. It is found that the redacted information in IC-2016-209-02, 12, 13 through 15, 40 through 41, 86 through 87, 117, 119, and 121, of the in camera records constitute communications between a public official or employee and an attorney and were made in the course of the professional relationship that exists between the attorney and his or her public agency client, and further, relate to legal advice sought by the agency from the attorney. It is also found that there is no evidence in the administrative record of this case that the privilege was waived with respect to those particular communications. It is concluded, therefore, that the in camera records cited, above, are communications privileged by the attorney-client relationship within the meaning of §1-210(b)(10), G.S. .

20. Consequently, it is concluded that the respondents did not violate the disclosure provisions of the FOI Act by withholding the redacted information in the in camera records described in paragraph 19, above.

21. With respect to the records identified as IC-2016-209-46 through 49 and IC-2016-209-96 through 99, the complainants, in their brief, specifically addressed those records identified by the parties as an “investigatory inquiring report” which report was withheld by the respondents. It is found that the report was drafted by Major Alaric Fox,

an employee of the respondents who is also an attorney. The complainants contended that the report does not fall within the exemption found in §1-210(b)(10), G.S., because Major Fox, as a state trooper, was not primarily engaged in legal activities and that Major Fox was only providing business advice in that report.

22. In support of their contention in paragraph 21, above, the complainants cited in their brief the Supreme Court's decision in Harrington v. FOI Commission, 323 Conn. 1 (2016), in which the Court held that "in order to determine whether a communication containing or seeking both business or other non-legal professional advice and legal advice is privileged in its entirety under §1-210(b)(10), a determination must be made whether the primary purpose of the communication was incidental or subject to separation, the proponent of the attorney-client privilege may be entitled to redact those portions of the communication..."*Id.*, at 15. The Court also noted, in explaining the attorney-client privilege, that "(t)he communication must be made by the client to the attorney acting as an attorney and not, e.g., as a business advisor...In sum, attorneys do not act as lawyers when not primarily engaged in legal activities." *Id.*, at 15.

23. It is found, however, that providing legal advice (which is a legal activity) to the respondent Commissioner is one of Major Fox's primary duties as chief of staff. It is also found, upon careful review, that the records identified as IC-2016-209-46 through 49 and IC-2016-209-96 through 99 constitute communications between a public official or employee and an attorney and were made in the course of the professional relationship that exists between the attorney and his or her public agency client, and further, relate to legal advice sought by the agency from the attorney. It further found that there is no "business advice" within the report. It is also found that there are non-legal aspects within the report, however, they are integral to the legal advice provided by Major Fox and that the provision of such legal advice was the primary purpose of the report. See Harrington, *supra*, 17.

24. Based upon a careful inspection of the in camera records, it is concluded that IC-2016-209-46 through 49 and IC-2016-209-96 through 99, constitute attorney-client privileged communications within the meaning of §1-210(b)(10), G.S.

25. The complainants also contend that even if this Commission were to find that the redacted portions of the records are subject to the attorney-client privilege, the respondents waived the privilege by disclosing the advice given by Major Fox to an employee who was "not necessary to the legal consultation" and by partially disclosing conclusions contained therein in the internal investigation report.

26. The Commission is guided by the court decision in Berlin v. FOIC concerning the scope of a partial waiver of attorney-client privilege. The court in that case held that where disclosure of communications protected by the attorney-client privilege occurs in an extrajudicial setting – i.e., outside of the context of an adversarial proceeding – waiver applies "only as to the limited portion of the opinion that confirms what was actually disclosed." Berlin Public Schools v. Freedom of Information Commission, HHBCV156029080S Superior Court, Judicial District of New Britain

33. With respect to the complainant's contention that the requested records were not provided promptly within the meaning of §1-210(a), G.S., the Commission has previously opined that the word "promptly" in §1-210, G.S., means "quickly and without undue delay, taking into account all of the factors presented by a particular request . . . [including] the volume of records requested; the amount of personnel time necessary to comply with the request; the time by which the requester needs the information contained in the record; the time constraints under which the agency must complete its other work; the importance of the records to the requester, if ascertainable; and the importance to the public of completing the other agency business without loss of the personnel time involved in complying with the request." See FOI Commission Advisory Opinion #51 (Jan. 11, 1982). The Commission also recommended in Advisory Opinion #51 that, if immediate compliance is not possible, the agency should explain the circumstances to the requester.

34. It is found that the first set of records responsive to the complainants' request was provided on June 10, 2016 – about three months after the date of the respondents' letter acknowledging the request. It is found that additional records were provided one week later.

35. At the hearing on this matter, the witnesses who testified for the respondents could not provide an explanation for the time it took to provide the requested records because those witnesses were not responsible for complying with the complainants' request. It is found that the individual responsible for complying with the complainants' request was laid off from her job the morning of the July 20th hearing and was not present for the hearing in this matter.

36. However, it is found that:

- a. all records requests are complied with by the legal affairs unit of the respondent department;
- b. the breadth of the legal affairs unit's responsibilities is vast and includes providing legal support to approximately 1,800 managers and employees, the Office of the Attorney General and private counsel handling agency matters as well as responding to the hundreds of records requests it receives a year; and
- c. the legal affairs unit, has a total of only 8 positions when fully staffed.

37. It is also found that the subject request was voluminous and required coordination with several different individuals within different divisions of the respondent department in order for the search for responsive records to be conducted. It is further found that once the records were compiled, they had to be reviewed.

(February 2, 2016) (Shuman, J.)(disclosure of part of a communication protected by the attorney client privilege waived the attorney client privilege only as to the limited portion of the opinion that confirms what was actually disclosed.) See also In re Von Bulow, 828 F.2d 94 (2d Cir. 1987)(holding that public disclosure in a book of portions of attorney-client conversations waived as to the particular matters actually disclosed in the book.) Long-Term Capital Holdings v. United States, No. 3:01 CV 1290 (JBA), 2003 WL 1548770, at *8 (D.Conn. Feb. 14, 2003)(disclosure of part of a communication protected by the attorney-client privilege waived the attorney client privilege to the limited portion of the opinion that confirms what was actually disclosed). In re Kidder Peabody Sec. Litig., 168 F.R.D. 459, 470 (S.D.N.Y. 1996)(disclosure of the substance of a privileged communication - in an extrajudicial context - is as effective a waiver as a direct quotation since it reveals the 'substance' of the statement)

27. It is found that the report described in paragraphs 22 and 23, above, was shared with Major Stephen Castagliuolo, the officer who conducted an internal affairs investigation on the same issue for which Major Fox drafted his investigatory inquiry report. It is found that Major Castagliuolo disclosed the legal conclusion reached by Major Fox in the internal affairs investigation report. It is also found that the internal affairs investigation report was then provided to the complainants pursuant to their March 8, 2016 request.

28. It is found that the respondents voluntarily disclosed a portion of the content of a privileged attorney-client communication.

29. It is concluded, therefore, that the respondents waived the attorney-client privilege with respect to that portion of Major Fox's report in which he provides his legal conclusion, but did not waive it as to the remainder of the report as nothing else within the report can be construed as "confirming what was actually disclosed." Berlin v. FOIC, Id.

30. It is further concluded that the respondents violated the disclosure provisions of §§1-210 and 1-212 G.S., by failing to disclose that portion of Major Fox's report in which he provides his legal conclusion.

31. In addition, based upon a careful review of the in camera records, it is found that IC-2016-209-016 through 19, IC-2016-209-023 through 25, and IC-2016-209-39 are not written communications relating to legal advice sought by the public agency or a public official or employee of such public agency from that attorney. It is found that the records do not reveal the substance of any legal advice.

32. It is therefore concluded that IC-2016-209-016 through 19, IC-2016-209-023 through 25, and IC-2016-209-39 are not exempt from disclosure pursuant to §1-210(b)(10), G.S., and that the respondent violated the provisions of the §§1-210 and 1-212, G.S.

38. Based on the findings in paragraph 36 through 37, above, it is concluded that the respondents promptly complied with the complainants' request with respect to all the responsive records, except the Ethics Policy.

39. It found that the respondents' initially withheld the Ethics Policy when the responsive records were provided on June 10, 2016. The respondents subsequently provided the complainants with an unredacted copy of the Ethics Policy but were unable to explain why that record was withheld in the first place.

40. It is concluded, therefore, that the respondents violated the promptness provisions of §§1-210 and 1-212(a), G.S., by failing to promptly provide a copy of the Ethics Policy.

41. Based on the facts and circumstances of this case, the Commission declines to consider the complainants' request for a civil penalty in this case.

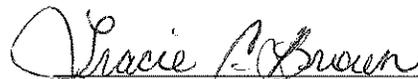
The following order by the Commission is hereby recommended on the basis of the record concerning the above-captioned complaint:

1. Forthwith, the respondents shall provide the complainants with an unredacted copy of IC-2016-209-05, 68, 70, 74 through 76, described in paragraph 12, above.

2. Forthwith, the respondents shall provide the complainants with an unredacted copy of IC-2016-209-016 through 19, IC-2016-209-023 through 25, and IC-2016-209-39, described in paragraph 31, above

3. Forthwith the respondents shall provide the complainants with a copy of that portion of Major Fox's report in which he provides his legal conclusion.

4. Henceforth, the respondents shall strictly comply with the provisions of §1-210(a) and 1-212(a), G.S.



Attorney Tracie C. Brown
as Hearing Officer