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FREEDOM OF INFORMATION



Connecticut Freedom of Information Commission • 18-20 Trinity Street, Suite 100 • Hartford, CT 06106
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Jeff Johnson and the New London Day,
Complainant(s)
against

Notice of Meeting

Docket #FIC 2012-635

Mayor, Town of Montville; and
Town of Montville,
Respondent(s)

May 29, 2013

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, June 26, 2013**. 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 June 14, 2013**. 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, the Commission requests that an **original and fourteen (14) copies** be filed **ON OR BEFORE June 14, 2013**. 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 **fourteen (14) copies** be filed **ON OR BEFORE June 14, 2013**, 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: Joe Wojtas
Eileen C. Duggan, Esq.

5/29/13/FIC# 2012-635/Trans/wrbp/CAL//LFS

FREEDOM OF INFORMATION COMMISSION
OF THE STATE OF CONNECTICUT

In the Matter of a Complaint by

Report of Hearing Officer

The New London Day,

Complainant

against

Docket #FIC 2012-635

Mayor, Town of Montville; and
Town of Montville,

Respondents

May 6, 2013

The above-captioned matter was heard as a contested case on April 17, 2013, at which time the complainant and the respondents appeared and presented testimony, exhibits and argument on the complaint. Based upon a request by the complainant New London Day, the caption above has been amended to delete Mr. Jeff Johnson as a complainant. Representatives of the complainant New London Day stated that Mr. Johnson has left his employ at The Day and he did not appear at the hearing.

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 May 8, 2012, the complainant made a request to the respondents for a "report on a Water Pollution Control Authority employee who was terminated" (the "report"). On October 26, 2012, the complainant renewed the request.
3. By email dated and filed November 8, 2012, the complainant appealed to this Commission, alleging that the respondents violated the Freedom of Information Act ("FOIA") by failing to provide the requested records.

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 . . . (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 found that the records, described in paragraph 2, above, are public records, within the meaning of §§1-200(5) and 1-210(a), G.S.

8. It is found that the respondent Mayor assigned attorneys Eileen Duggan and Eric Callahan of the law firm of Suisman Shapiro, PC, to investigate potential misconduct and/or work performance deficiencies arising out of incidents on December 23, 2011 and December 28, 2011, as well as related matters. By the time of this assignment, the relevant employee had been placed on administrative leave with pay. It is found that attorneys Eileen Duggan and Eric Callahan prepared a report dated March 29, 2012.

9. It is also found that a copy of the report was provided to the respondent Mayor. The employment of the relevant employee was subsequently terminated. At the time of the approval of a settlement of a lawsuit brought by the terminated employee, the members of the town council and the Water Pollution Control Authority were allowed to inspect the report at a meeting of each respective body. However, members of the town council and the Water Pollution Control Authority were not allowed to retain copies.

10. It is further found that in May or June 2012 the report was also provided to the attorney for terminated employee, subject to a confidentiality and non-disclosure agreement with the attorney and the terminated employee, both of whom were permitted to inspect the report. The report was provided to the attorney for the terminated employee in order to facilitate settlement of the lawsuit that the employee filed against various officials and public agencies of the respondent town. This lawsuit was settled in February 2013.

11. During the hearing, the respondents submitted the report to the Commission for in camera inspection. The in camera records consist of a thirty-four page report, plus attached exhibits, for a total of 150 pages.

12. The respondents first claim that the report is exempt from disclosure, pursuant to §1-210(b)(1), G.S., which exempts “preliminary drafts or notes”.

13. Section 1-210, G.S., states in relevant parts:

(b) Nothing in the Freedom of Information Act shall be construed to require disclosure of:

(1) Preliminary drafts or notes provided the public agency has determined that the public interest in withholding such documents clearly outweighs the public interest in disclosure;

...

(e) Notwithstanding the provisions of subdivision[] (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....

14. After inspection of the report, it is further found that the report is stamped "DRAFT" on every page of the body of the report. It is also found that the report contains a completed set of recommendations at the conclusion of the report.

15. It is further found that the report was not revised from March 29, 2012 until the date of the hearing. Nor has it ever been formally accepted or approved or scheduled for any such action by the respondents.

16. In Shew v. Freedom of Information Commission, 245 Conn. 149 (1998), the Supreme Court found an investigation report prepared by an attorney to be "preliminary drafts or notes." However, the Court emphasized that the conclusion section of the investigation report was "left completely blank." Id. at 165. Moreover, the investigation report of relevant facts was preliminary to another record prepared by a supervising attorney. The Court reasoned that "preparatory materials" that "precede[] formal and informed decisionmaking", and are part of the "preliminary, deliberative and predecisional process", are exempt as "preliminary drafts or notes." Id. at 165-166.

17. It is concluded that, because the report herein represented the final recommendation to the respondents, and because the report included recommendations that were in the nature of a conclusion, the report is, in effect, final and is not "preliminary drafts or notes" pursuant to §1-210(b)(1), G.S. In the language of §1-210(e)(1), G.S., the report was a "report comprising part of the process by which governmental decisions and policies are formulated...." Following the issuance of the report, the employee was terminated. And the report was not "subject to revision prior to submission to" the Mayor, the town council and the Water Pollution Control Authority. Indeed, it was not revised for over a year after such submission. The mere stamping of a report with the word "DRAFT" cannot render it exempt from mandatory public disclosure.

18. The respondents further claim that the report is exempt from disclosure, pursuant to §1-210(b)(10), G.S., which permits an agency to withhold from disclosure records of “communications privileged by the attorney-client relationship.”

19. 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.

20. 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. . . .

21. 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.

22. In Shew v. Freedom of Information Commission, *op. cit.*, the Supreme Court also held that the report there at issue was exempt from mandatory public disclosure based upon the portion of §1-210(b)(10), G.S., which recites the attorney-client privilege. Id. at 160. See also Lash v. Freedom of Information Commission, 300 Conn. 511, 516 (2011). Following the Supreme Court decision in Shew, the Commission has held investigation reports of town attorneys to be exempt pursuant to §1-210(b)(10), G.S. Jason L. McCoy v. Town Manager, Town of Rocky Hill, Docket FIC# 2004-159 (March 23, 2005); Thomas White v. City Attorney, Office of City Attorney, City of Bridgeport; and Office of the City Attorney, City of Bridgeport, Docket FIC# 2012-157 (September 27, 2012). The Commission has also applied the same principles to the report of an investigator hired by attorneys for a town. Len Besthoff and WFSB-TV v. Town Clerk, Town of Avon; and Town of Avon, Docket FIC# 2010-679 (July 27, 2011). However, none of these cases involved waiver of the attorney-client privilege.

23. After inspection of the report and also based on the findings above, it is further found that such report was created by attorneys Duggan and Callahan in furtherance of the legal advice the respondents requested from them. Specifically, as in Shew, it is found that: (a) attorneys Duggan and Callahan were acting in their capacity as attorneys for the respondents; (b) that the communications contained in the report were made by attorneys Duggan and Callahan to the

respondent Mayor, the city council members and members of the Water Pollution Control Authority; and (c) the communications in the report relate to the legal advice sought by the respondents from attorneys Duggan and Callahan.

24. It is finally found that, while the communications were initially made in confidence, the confidentiality of the communications was abrogated in May or June 2012 when the report was disclosed to the terminated employee and his attorney.

25. In Permian Corporation and Occidental Petroleum Corporation v. United States, 665 F. 2d 1214 (1981), the District of Columbia Court of Appeals established the contemporary standard concerning limited or selective waiver, which has subsequently been followed by numerous other federal Circuit Courts including our First Circuit. United States v. Massachusetts Institute of Technology, 129 F.3d 681 (1997). In Permian, Occidental Petroleum had disclosed attorney-client privileged records to the Securities and Exchange Commission subject to an agreement that allowed Occidental to assert the privilege against others. Reasoning that “courts have been vigilant to prevent litigants from converting the privilege into a tool for selective disclosure”, the Court quoted Oliver Wendell Holmes and concluded: “The client cannot be permitted to pick and choose among his opponents, waiving the privilege for some and resurrecting the claim of confidentiality to obstruct others...” op. cit. at 1221. Stating that the very purpose of the privilege is to protect confidential attorney-client communications, id. at 1219, the Court said: “a litigant who wishes to assert confidentiality must maintain genuine confidentiality.” Id. at 1222. Occidental was held to have waived its attorney-client privilege as against its adversary the Department of Energy.

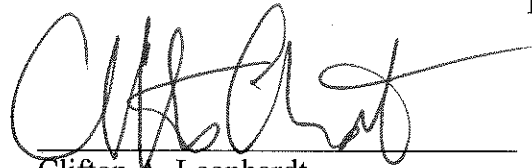
26. In the present case, the respondents are analogous to Occidental, the terminated employee and his attorney are in the position of the Securities and Exchange Commission, and the complainant is in the place of the Department of Energy. The respondents had knowledge of the attorney-client privilege and intentionally relinquished it to the terminated employee and his attorney. Blumenthal v. Kimber Manufacturing, 47 Conn. Supp. 378, 381-382 (2001), citing Novella v. Hartford Accident & Indemnity Co., 163 Conn. 552, 565 (1972).

27. Accordingly, it is concluded that, by the time the complainant renewed its request for the report on October 26, 2012, the respondents had waived the attorney-client privilege within the meaning of §1-210(b)(10), G.S.

28. Based upon the foregoing, it is concluded that the report is subject to mandatory disclosure and that the respondents violated the disclosure provisions of §§1-210(a) and 1-212(a), G.S., when they failed to provide the report. This legal conclusion is buttressed by the strong public interest in favor of allowing the public to examine the safety and other operations of the Water Pollution Control Authority as well as the circumstances under which one of its employees was terminated.

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

1. The respondents shall provide a copy of the report to the complainant forthwith.

A handwritten signature in black ink, appearing to read 'Clifton A. Leonhardt', written over a horizontal line.

Clifton A. Leonhardt
as Hearing Officer

FIC2012-635/HOR/CAL/05062013