

FREEDOM OF INFORMATION COMMISSION
OF THE STATE OF CONNECTICUT

In the Matter of a Complaint by

FINAL DECISION

Jon Lender and the Hartford Courant,

Complainants

Docket # FIC 2018-0011

against

Commissioner, State of Connecticut,
Department of Education; and State of
Connecticut, Department of Education,

Respondents

October 10, 2018

The above-captioned matter was heard as a contested case on April 19, 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 by email sent on December 11, 2017, the complainants requested that the respondents provide them with a copy of “an email that was sent on March 9, 2016, at (or approximately at) 5:37 p.m., from Matthew Venhorst to Peter Haberlandt. It had a memo as an attachment, which also falls under this request.” (“December 11th request”).
3. It is found that by email sent on December 12, 2017, the respondents acknowledged the complainants’ December 11th request.
4. It is found that by email sent on December 13, 2017, the respondents denied the December 11th request, claiming that the requested records were exempt from disclosure pursuant to the attorney-client privilege and attorney work product doctrine.
5. By letter email sent on January 8, 2018, the complainants appealed to this Commission, alleging that the respondents failed to provide them with copies of records responsive to their December 11th request in violation of the Freedom of Information (“FOI”) Act.
6. 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.

7. 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.

8. 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."

9. 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.

10. At the hearing, the respondents claimed that the requested email and memorandum were exempt from disclosure pursuant to §§1-210(b)(10) and 52-146r, G.S., and the attorney work product doctrine. Subsequently, by letter received on April 24, 2018, and copied to the complainants, the respondents informed the hearing officer that they were no longer claiming an exemption for the email. A copy of the requested email was enclosed with the April 24th letter.¹

11. After the hearing in this matter, the respondents submitted an unredacted copy of an eight-page memorandum to the Commission for in camera review, which has been marked as IC-2018-0011-1 through IC-2018-0011-8. On the in camera index, the respondents claim that IC-2018-0011-1 through IC-2018-0011-5 are exempt, in their entirety, from disclosure pursuant to §§1-82a(a), 1-210(b)(10), and 52-146r, G.S., respectively. The respondents did not claim an exemption for IC-2018-0011-6 through IC-2018-0011-8.

12. With respect to IC-2018-0011-6 through IC-2018-0011-8, it is found that the respondents failed to prove that such records were exempt from disclosure. It is concluded, therefore, that the respondents violated the disclosure provisions of §§1-210(a) and 1-212(a), G.S., by withholding IC-2018-0011-6 through IC-2018-0011-8 from the complainants.

13. With respect to IC-2018-0011-1 through IC-2018-0011-5, section 1-210(b)(10), G.S.,

¹ Copies of the respondents' April 24, 2018 letter, with the email enclosure, were marked as Respondents' Exhibit 1 (after-filed).

permits an agency to withhold from disclosure records of “communications privileged by the attorney-client relationship.”

14. 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.

15. 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. . . .

16. 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.

17. At the hearing, Matthew Venhorst, a staff attorney within the respondents’ Division of Legal and Governmental Affairs, testified that in late 2015/early 2016, Peter Haberlandt, the respondents’ Legal Director, requested that Attorney Venhorst look into the circumstances surrounding the selection of certain contractors hired to work in the respondents’ Information Technology department; perform legal research regarding the reporting requirements under the State Code of Ethics; determine whether the Code had been violated under the particular circumstances; and make recommendations as to whether any action needed to be taken based on that legal conclusion. After completing his inquiries into the circumstances surrounding the hiring, and conducting legal research and analysis, Attorney Venhorst provided Attorney Haberlandt with a memorandum. According to Attorney Venhorst, the purpose of the assignment was to assist the Legal Director in providing legal advice to the respondent Commissioner as to whether the State Ethics Code had been violated. In addition, Attorney Venhorst testified that he understood that the preliminary conclusions and recommendations were to be confidential between the respondents’ legal division and the Commissioner, and not disseminated.

18. The complainants, citing to Harrington v. Freedom of Information Commission, 323 Conn. 1 (2016), contended that the attorney-client privilege exemption applies only if the “primary purpose” of the document is to seek or provide legal advice; and that the

communication must either explicitly or implicitly seek specific legal advice. The complainants contended that if the memorandum contained “factual information,” then they should be entitled to such information.

19. In Harrington, the Supreme Court considered the applicability of the attorney-client privilege to communications containing or seeking both legal and business advice.

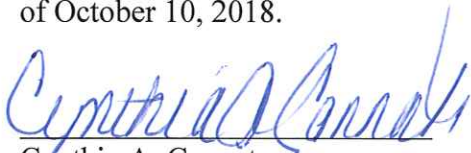
20. Based upon the evidence in the record and upon careful examination of IC-2018-0011-1 through IC-2018-0011-5, it is found that such record is a communication transmitted in confidence between an attorney for the respondents and employees and officials of the respondents relating to legal advice sought by the respondents or in furtherance of the rendition of such legal advice, within the meaning of §§1-210(b)(10) and 52-146r(2), G.S. It is further found that based upon a careful review of IC-2018-0011-1 through IC-2018-0011-5, such record does not contain a mix of business and legal advice as in Harrington. Finally, it is found that the respondents did not waive the attorney-client privilege.

21. It is concluded, therefore, that IC-2018-0011-1 through IC-2018-0011-5 is exempt from disclosure pursuant §1-210(b)(10), G.S., and that the respondents did not violate the disclosure provisions of §§1-210(a) and 1-212(a), G.S., with respect to such record.²

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 copies of the records, described in paragraph 12, above, to the complainants, free of charge.
2. Henceforth, the respondents shall strictly comply with the disclosure provisions in §§1-210(a) and 1-212(a), G.S.

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

² In light of the conclusion in paragraph 21, above, there is no need to address any further exemptions.

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:

JON LENDER AND THE HARTFORD COURANT, 285 Broad Street, Hartford, CT 06115

**COMMISSIONER, STATE OF CONNECTICUT, DEPARTMENT OF EDUCATION;
AND STATE OF CONNECTICUT, DEPARTMENT OF EDUCATION**, c/o Assistant Attorney General Ralph E. Urban, Office of the Attorney General, 55 Elm Street, PO Box 120, Hartford, CT 06141-0120



Cynthia A. Cannata
Acting Clerk of the Commission