FREEDOM OF INFORMATION COMMISSION
OF THE STATE OF CONNECTICUT

In the Matter of a Complaint by FINAL DECISION

Maria Pereira,

Complainant

against Docket #FIC 2019-0041

Chairman, Board of Education, City of Bridgeport; and Board of Education, City of Bridgeport,

Respondents December 11, 2019

The above-captioned matter was heard as a contested case on May 31, 2019, 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. By letter of complaint filed January 24, 2019, the complainant appealed to the Commission, alleging (a) that the respondents' attorney improperly opined that a vote to appeal a decision of the respondent Chairman would itself be a violation of the Freedom of Information ("FOI") Act; and (b) that the respondents violated the FOI Act by improperly convening in executive session to discuss an email communication that was not privileged by the attorney-client relationship.

3. As a preliminary matter, it is concluded that the claim described in paragraph 2(a), above—that the respondent's attorney improperly opined concerning the application of the FOI Act—does not allege a violation of the FOI Act, and the Commission in its discretion therefore declines to address that claim.

4. With respect to the allegation described in paragraph 2(b), above, it is found that the respondents held a special meeting on January 7, 2019.

5. It is found that the notice of the January 7, 2019 meeting identified a variety of agenda items, including "Discussion of Attorney Opinion of Board-Personnel Relations."

6. It is found that the respondents convened in executive session at that meeting to discuss the attorney's opinion.

7. It is found that the attorney's opinion, which was subsequently publicly disclosed in the complaint to the Commission and made an exhibit in this case, was contained in a January 3, 2019 email to the respondent Chairman. That opinion recites, in its entirety:

> Over the last several weeks I have been made aware of several incidents where Board members have publically commented and/or expressed concerns regarding specific Bridgeport Public Schools employees. Since such comments are rare, and the Board's unions have reached out and expressed concerns about some of these comments, it is in my opinion worth reminding members that it is best they avoid public criticism of individual district employees and address their concerns through the "chain of command." While I understand Members' responsibility to their constituents and their oversight responsibility, handling such concerns through the Superintendent and *avoiding public comment is necessary to avoid administrative and court complaints which result in the unnecessary expenditure of funds and expose the Board and the individual member to liability which may or may not be subject to indemnification under the law.* [Emphasis added.]

8. Section 1-200(5), G.S., provides in relevant part:

> "Meeting" means any hearing or other proceeding of a public agency, any convening or assembly of a quorum of a multimember public agency, and any communication by or to a quorum of a multimember public agency, whether in person or by means of electronic equipment, to discuss or act upon a matter over which the public agency has supervision, control, jurisdiction or advisory power.

9. Section 1-225, G.S., provides in relevant part:

> The meetings of all public agencies, except executive sessions, as defined in subdivision (6) of section 1-200, shall be open to the public. ...

10. Section 1-200(6), G.S., provides in relevant part:

> "Executive sessions" means a meeting of a public agency at which the public is excluded for one or more of the following purposes: ... (E) discussion of any matter which would result in the disclosure of public records or the information contained therein described in subsection (b) of section 1-210.

11. The respondents contend that the email quoted in paragraph 7, above, is exempt from disclosure pursuant to §1-210(b)(10), G.S., which provides that mandatory disclosure is not required of "communications privileged by the attorney-client relationship." Therefore, the respondents contended, the executive session was permitted under §1-200(6)(E), G.S., since discussing the opinion in open session would have resulted in its disclosure.

12. If the respondents are correct that the email is privileged, then they were in fact permitted to convene in executive session. The Commission agrees that the email is privileged.

13. Established Connecticut law defining the attorney-client privilege governs the applicability of the exemption contained in §1-210(b)(10), G.S. Such law is well set forth in Maxwell v. FOI Commission, 260 Conn. 143 (2002). In Maxwell, 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.

14. 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.

15. Our 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.

16. However, "not every communication between client and attorney is protected by the attorney-client privilege." Ulmann v. State, 230 Conn. 698, 713 (1994). "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." Olson v. Accessory Controls & Equipment Corp., 254 Conn. 145, 157 (2000); PSE Consulting, Inc. v. Frank Mercede and Sons, Inc., 267 Conn. 279, 331 (2004) ("a reconstitution of an event that occurred with third parties involved" is not confidential). Additionally, "statements that are meant to be transmitted to another are not confidential." PSE Consulting, Inc., supra at 331; C. Tait, Connecticut Evidence (3d Ed. 2001) §5.23.2, p. 320.

17. Our Supreme Court recently squarely addressed "the specific situation in which attorneys give business or other nonlegal professional advice to their clients." Harrington v. FOIC, 323 Conn. 1, 14-15 (2016). The Court there expressly held that the "primary purpose" standard governs situations where legal and nonlegal advice are intertwined. "[W]here 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." Id. at 20-21.

18. It is found that the January 13, 2019 email was a communication between a public official and an attorney that was confidential, made in the course of the professional relationship that existed between the attorney and his or her public agency client, and related to legal advice sought by the agency from the attorney, although that legal advice might be considered to be minimal.

19. It is found that, although the January 13, 2019 email included some nonlegal professional advice, the primary purpose of the January 13, 2019 email was to provide legal advice.

20. It is also found that, although the email was communicated by the Chairman to the complainant as a member of the respondent Board, and the complainant disclosed the communication, the privilege was not waived by that disclosure. The forwarding of the email by the Chairman to a fellow board member was certainly not a waiver of the privilege. As for the subsequent disclosure by the complainant, the power to waive the privilege rests in the client, in this case the respondent Board of Education, and the client Board did not knowingly choose to waive the privilege, notwithstanding the action by one of its members.

21. It is therefore concluded that the January 13, 2019 email is privileged by the attorney-client relationship, which was not waived, and the email is exempt from disclosure pursuant to §1-210(b)(10), G.S.

22. It is further concluded that the respondents did not violate the FOI Act when they convened in executive session to discuss the January 13, 2019 email, since discussion would have resulted in disclosure of the substance of the privileged communication within the meaning of §1-200(6)(E), G.S.

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 December 11, 2019.

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:

MARIA PEREIRA, 85 Nutmeg Road, Bridgeport, CT 06610

CHAIRMAN, BOARD OF EDUCATION, CITY OF BRIDGEPORT; AND BOARD OF EDUCATION, CITY OF BRIDGEPORT, c/o Attorney Floyd J. Dugas, Berchem Moses PC, 75 Broad Street, Milford, CT 06460

Cynthia A. Cannata
Acting Clerk of the Commission

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