FREEDOM OF INFORMATION COMMISSION
OF THE STATE OF CONNECTICUT

In the Matter of a Complaint by FINAL DECISION

Joseph Sastre,

Complainant

against Docket #FIC 2020-0133

Brandon Robertson, Town Manager,
Town of Avon; and Town of Avon,

Respondents November 17, 2021

The above-captioned matter was heard as a contested case on November 19, 2020, at which time the complainant and the respondents appeared, stipulated to certain facts and presented testimony, exhibits and argument on the complaint. Due to the COVID-19 pandemic and the state's response to it, the hearing was conducted telephonically.[1]

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 February 10, 2020, the complainant requested that the respondents provide him with any and all records relating to the "accusations" concerning the Town of Avon's Chief of Police, Mark Rinaldo. It is found that the February 10, 2020 request was a renewed request, as the complainant had previously requested these records (the "original request").

3. It is found that, by email dated February 11, 2020, the respondents acknowledged the February 10 request, indicating that, in response to the original request, they had provided the complainant with all "non-exempt documents" in their possession.

4. It is found that, by email dated February 27, 2020, the respondents again communicated with the complainant, stating this time that the Town of Avon would be finalizing its response to the February 10 request sometime during the next week.

[1] On March 14, 2020, the Governor issued Executive Order 7B, which suspended the requirement to conduct public meetings in person.

5. By email dated and filed March 13, 2020[2], the complainant appealed to this Commission, alleging that the respondents violated the Freedom of Information ("FOI") Act by failing to provide him with all requested records.

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

> "[p]ublic 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.

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

> [e]xcept 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.

8. 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."

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

10. It is found that, in November 2019, a managerial town employee met with the respondent town manager to discuss incidents and events involving Chief Rinaldo. It is found that the respondent town manager is not an attorney and that the employee was not seeking legal advice from him. Rather, it is found that the employee was seeking the respondent town manager's guidance on how to deal with the chief regarding the incidents that the employee had observed.

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[2] On March 25, 2020, the Governor issued Executive Order 7M, thereby suspending the provisions of Conn. Gen. Stat. §1-206(b)(1), which requires the Freedom of Information Commission to hear and decide an appeal within one year after the filing of such appeal. Executive Order 7M is applicable to any appeal pending with the Commission on the issuance date and to any appeal filed on or after such date, for the duration of the current public health and civil preparedness emergency. Consequently, the Commission retains jurisdiction over this matter.

11. It is found that, following the November 2019 meeting described in paragraph 10, above, the respondent town manager contacted counsel for the Town of Avon in order to obtain legal advice regarding the incidents the town employee had described to him. It is found that the respondent town manager relayed to counsel the incidents that had been described to him by the employee. It is found that, at such time, town counsel asked the respondent town manager to inquire of the employee as to whether the employee had any documentation or personal notes concerning the incidents involving the chief.

12. It is found that the respondent town manager contacted the employee and first learned that the employee had created a log detailing the underlying incidents. It is further found that the log details incidents occurring over the course of one year, four months and five days (June 20, 2018 to October 25, 2019). It is also found that the employee had not brought such log to the November 2019 meeting.

13. It is found that the respondent town manager informed the employee that the town counsel wished to review the log. It is further found that the employee provided the log to the respondent town manager, who made a copy of the log, provided the copy to town counsel, and returned the log to the employee.

14. It is found that the chief of police was placed on administrative leave, pending investigation, by the respondent town manager by memorandum dated November 11, 2019. It is found that, thereafter, the town and the chief negotiated a severance agreement and the chief retired from town employment.

15. It is found that, in response to the requests described in paragraph 2, above, the respondents provided the complainant with a copy of the November 11, 2019 memorandum and the severance agreement described in paragraph 14, above. It is found, however, that neither the memorandum nor the severance agreement reference or describe the reason the chief was placed on administrative leave.

16. The complainant contended that the respondents should maintain additional responsive records which were not provided to him that detail the reason the chief was placed on administrative leave in the first instance or that pertain to an investigation into some aspect of the chief's conduct or leadership.

17. It is found that the only record responsive to the requests described in paragraph 2, above, that the respondents maintain which was not provided to the complainant is the log described in paragraphs 12 and 13, above.

18. The respondents submitted the log to the Commission for in camera inspection. The log is fairly described as an ll-page document containing multiple dated entries and one photograph. It shall be referred to as IC-2020-0133-1 through IC-2020-0133-11.

19. The respondents contended that the in camera records described in paragraph 18, above, are 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."

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 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. The Commission recognizes that "[w]here legal advice of any kind is sought from a professional legal adviser in his capacity as such, the communications relating to that purpose, made in confidence by the client, are at his instance permanently protected from disclosure by himself or by the legal adviser, except the protection be waived." Rienzo v. Santangelo, 160 Conn. 391, 395 (1971), see also Olson v. Accessory Controls & Equipment Corp., 254 Conn. 145, 159, 757 A.2d 14 (2000). Moreover, in Connecticut, the attorney-client privilege protects both the confidential giving of professional advice by an attorney acting in the capacity of a legal advisor to those who can act on it, as well as the giving of information to the lawyer to enable counsel to give sound and informed advice. . . . The privilege fosters full and frank communications between attorneys and their clients and thereby promote[s] the broader public interests in the observation of law and [the] administration of justice." PSE Consulting, Inc. v. Frank Mercede & Sons, Inc., 267 Conn. 279, 329–30 (2004). However, the privilege only applies when necessary to achieve its purpose; it is not a blanket privilege. See Harrington v. FOI Comm'n, 323 Conn. 1, 12 (2016).

24. With regard to claims of privilege involving documents, "[t]he privilege must be established for 'each document separately considered' and must be narrowly applied

and strictly construed." State v. Kosuda-Bigazzi, 335 Conn. 327, 342-43 (2020).

25. The Commission notes that there are essentially three ways to establish the attorney-client privilege with regard to documents. See Kosuda-Bigazzi, 335 Conn. at 343.

26. First, a party can establish that a document is privileged by showing that the document itself is a record of a communication between the client and the attorney. Id. In this case, it is found that the in camera records do not constitute a record of communication between the client and the attorney.

27. Second, if the document is not a record of communication, a party can still establish the privilege by showing that (1) the document was created with the intent to communicate the contents to an attorney and (2) the client actually communicated the contents to an attorney. Id. In this case, it is found that the in camera records were not created with the intent to communicate the contents to an attorney.

28. Third, a party can establish the attorney-client privilege by showing transformation of a preexisting document into a communication for the purpose of seeking legal advice and that the document was communicated to an attorney. Id. at 344. "Preexisting documents are documents that are *not* created for the purpose of seeking legal advice." Id. at 345 (emphasis in original). Most importantly, "[a] preexisting document does not become privileged merely because it is transferred to or routed through an attorney." Id. at 343 (citations omitted); 1 Restatement (Third), The Law Governing Lawyers § 69, comment (b), p. 525 (2000) ("[a client authored] document that is not a privileged document when originally composed does not become privileged simply because the client has placed it in the lawyer's hands"). However, a preexisting document could become privileged if it were somehow transformed for the purpose of seeking legal advice and communicated or intended to be communicated to an attorney. See Angst v. Mack Trucks, Inc., Docket Nos. 90-3274, 90-4329, 1991 WL 86931, *2 (E.D. Pa. May 14, 1991) (reasoning that plaintiff's handwritten notes made for personal use, not for purpose of securing attorney, would not fall within privilege, but typed compilation and summary created for purpose of securing counsel would fall within privilege). The oft stated shorthand rule for preexisting documents provides: "If the client would have to produce [the document], were the client in possession of [it], then the attorney must produce it; if the client would not have to produce, the attorney would not have to produce." Kosuda-Bigazzi, 335 Conn. at 345 (citations omitted).

29. It is found that the log is a preexisting document, in that it was in existence before the town sought legal advice from the town attorney. It is further found that the employee created the log for his own personal use and not for the purpose of seeking legal advice. It is also found that the employee did not later create a typed compilation and/or summary of the log for the purpose of securing counsel. Accordingly, it is found that the log is not a communication protected by the attorney-client privilege. Finally, it is concluded that the employee's log in the possession of the respondent town manager is not an attorney-client privileged document within the meaning of §1-210(b)(10), G.S.

30. Accordingly, it is concluded that the respondents violated §§1-210(a) and 1-212(a), G.S., when they declined to disclose the in camera records, described in paragraph 18, above, to the complainant.

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 to the complainant a copy of the in camera records, described in paragraph 18, above, free of charge.

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 November 17, 2021.

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:

JOSEPH R. SASTRE, The Law Office of Joseph R. Sastre, LLC, 852 Plainville Avenue, Farmington, CT 06032

BRANDON ROBERTSON, TOWN MANAGER, TOWN OF AVON; AND TOWN OF AVON, c/o Attorney Michael C. Harrington, FordHarrison, LLP, City Place II, 185 Asylum Street, Suite 610, Hartford, CT 06103

Cynthia A. Cannata
Acting Clerk of the Commission

FIC 2020-0133/FD/CAC/11/17/2021