FREEDOM OF INFORMATION COMMISSION
OF THE STATE OF CONNECTICUT

In the Matter of a Complaint by FINAL DECISION

Energy Policy Advocates,

Complainant

against Docket # FIC 2020-0122

Attorney General, State of Connecticut, Office of the Attorney General; and State of Connecticut, Office of the Attorney General,

Respondents January 26, 2022

The above-captioned matter was heard as a contested case on March 1, 2021, at which time the complainant and the respondents appeared, stipulated to certain facts, and presented testimony, exhibits and argument on the complaint. For the purposes of hearing only, this matter was consolidated with Docket #FIC2020-0320, Energy Policy Advocates v. Attorney General, State of Connecticut, Office of the Attorney General; and State of Connecticut, Office of the Attorney General. 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 letter dated January 14, 2020, the complainant requested that the respondents provide copies of the following records:

> [a]ll correspondence, and any accompanying information including also any attachments sent to or from or copying Matthew Levine, Scott Koschwitz, Margaret Chapple, Vanessa Avery, and/or Joseph Rubin that also mentions, anywhere, whether in the sent, to, from, cc, bcc or subject fields, or otherwise, mattp@hbsslaw.com, Pawa, steve@hbsslaw.com and/or @sheredling.com and is dated

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

> from March 27, 2019, through the date you process this request, inclusive.

3. It is found that the respondents acknowledged the complainant's request in a letter dated January 16, 2020. It is further found that on or about February 25, 2020, the respondents disclosed 178 pages of responsive records. Additionally, it is found that the respondents disclosed an additional 34 pages of responsive records with redactions. The respondents contended that the redacted portions of such records are exempt from disclosure pursuant to one or more of the following statutes: §§1-210(b)(1), 1-210(b)(4), 1-210(b)(10), 1-210(e)(1), and 52-164r, G.S. At hearing, the respondents offered as evidence an affidavit describing their claims of statutory exemptions.[2]

4. By letter of complaint filed March 9, 2020[3], the complainant appealed to the Commission, alleging that the respondents violated the Freedom of Information ("FOI") Act by denying the request described in paragraph 2, above.

5. 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, videotaped, printed, photostated, photographed or recorded by any other method.

6. 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 . . . (3) receive a copy of such records in accordance with section 1-212.

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[2] It is of note that while the affidavit addresses specific records and specific exemptions, the in camera index submitted along with the in camera records simply cites all of the claimed exemptions as applicable to all of the in camera records.

[3] On March 25, 2020, the Governor issued Executive Order 7M, thereby suspending the provisions of Conn. Gen. Stat. Sec. 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.

7. 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."

8. It is found that the records described in paragraph 2, above, to the extent such records are maintained by the respondents, are public records within the meaning of §§1-200(5), 1-210(a) and 1-212(a), G.S.

9. After the hearing in this matter, the respondents were ordered to submit copies of all responsive records for which they were claiming an exemption, in whole or in part, for in camera inspection. The respondents complied with such order on March 17, 2020. The in camera records shall be referenced herein as IC2020-0122-001 through IC2020-0122-034.

10. The respondents contended that IC2020-0122-001 through IC2020-0122-019; IC2020-0122-026; and IC2020-0122-030 through IC2020-0122-034 are exempt from disclosure as such records pertain to strategy and negotiations with respect to pending litigation pursuant to §1-210(b)(4), G.S.

11. Section 1-210(b)(4), G.S., provides in relevant part that:

> [n]othing in the Freedom of Information Act shall be construed to require disclosure of:...Records pertaining to strategy and negotiations with respect to pending claims or pending litigation to which the public agency is a party until such litigation or claim has been finally adjudicated or otherwise settled.

12. The phrase "pending claim" as defined in §1-200(8) means:

> [a] written notice to an agency which sets forth a demand for legal relief or which asserts a legal right stating the intention to institute an action in an appropriate forum if such relief is not granted.

13. The phrase "pending litigation" as defined in §1-200(9) means:

> (A) a written notice to an agency which sets forth a demand for legal relief or which asserts a legal right stating the intention to institute an action before a court if such relief or right is not granted by the agency; (B) the service of a complaint against an agency returnable to a court which seeks to enforce or implement legal relief or a legal right; or (C) the agency's consideration of action to enforce or implement legal relief or a legal right.

14. Strategy is defined as "a careful plan or method and the art of devising or employing plans or stratagems toward a goal. ... Negotiations is a broad term ... but in general it means the

deliberation which takes place between the parties touching a proposed agreement." (Citations omitted; internal quotation marks omitted.) Bloomfield Education Association v. Frahm, 35 Conn. App. 384, 390, cert. denied, 231 Conn. 926 (1994).

15. At the hearing, the respondents presented no testimony or other evidence with regard to the existence of any pending claim or pending litigation to which the respondents are a party. The respondents made only broad assertions that such records pertained to legal strategy regarding the filing of amicus briefs and the pursuit of potential litigation. The respondents presented no testimony or other evidence with regard to what information within the in camera records pertained to "strategy and negotiations" within the meaning of §1-210(b)(4), G.S.

16. Section 1-210(b)(4), G.S., does not provide an exemption to disclosure for records pertaining to "potential litigation." For such exemption to apply, there must be a pending claim or pending litigation *and* the public agency must be a party to such pending claim or pending litigation.[4] While the respondents contended that they are in the process of contemplating the agency's participation in future litigation, they failed to provide evidence or testimony that they are a party to any pending claims or pending litigation.

17. After careful examination of the in camera records described in paragraph 10, above, it is found that such records do not reference any pending claim or pending litigation to which the respondents are a party. Additionally, it is found that the in camera records do not pertain to strategy and negotiations. It is found, therefore, that the respondents failed to prove that any of the in camera records are exempt from disclosure pursuant to §1-210(b)(4), G.S. Accordingly, it is concluded that such records are not exempt from disclosure as contended by the respondents.

18. Next the respondents contended that IC2020-0122-012, IC2020-0122-013; IC2020-0122-026; and IC2020-0122-030 through IC2020-0122-032 are exempt from disclosure pursuant to §1-210(b)(10), G.S. Such exemption permits a public agency to withhold from disclosure records of "communications privileged by the attorney-client relationship."

19. The applicability of such exemption is governed by established Connecticut law defining the attorney-client 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:

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[4] The court analyzed the terms "pending claim" and "pending litigation" in the context of executive session as defined in §1-200(6), G.S. See Planning and Zoning Commission of Town of Monroe v. Freedom of Info. Commission, 316 Conn. 1 (2015) (When §1-200(9)(C), G.S., is read in conjunction with §1-210(b)(4), G.S., it is clear that the public agency must be a "party" to any pending claims or pending litigation in order to claim the exemption.) See also, Chairperson, Connecticut Medical Examining Board v. FOIC, 310 Conn. 276, 288 (2013) (Thus, in order for §1-200(6)(B) to apply, the public agency either must be bringing or defending a prospective or pending lawsuit in court or some other legal action in an adjudicatory forum.)

> 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. At the hearing, the respondents failed to provide testimony or evidence that identified any clients that had requested legal advice or that any of the responsive records pertained to legal advice requested by a client. After careful examination of the in camera records identified in paragraph 18, above, it is found that the respondents failed to prove that any of their state agency clients had requested legal advice and that the in camera records pertained to any such advice. Therefore, it is concluded that such records are not exempt from disclosure pursuant to §1-210(b)(10), G.S., as contended by the respondents.

23. Additionally, the respondents contended that some or all the in camera records may be exempt pursuant to §§1-210(b)(1) or 1-210(e)(1), G.S. However, they provided no testimony or evidence to identify which specific records were subject to such exemption. The hearing officer carefully inspected all the records to determine if either exemption was applicable.

24. Section 1-210(b)(1), G.S., states that:

> [n]othing in the Freedom of Information Act shall be construed to require disclosure of... 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... .

25. The respondents failed to present any testimony or evidence as to which records were claimed to be preliminary drafts or notes. After a careful inspection of all the in camera records, it is found that the respondents failed to prove that any of the in camera records are preliminary drafts or notes. Therefore, it is concluded that none of the in camera records are exempt from disclosure pursuant to §1-210(b)(1), G.S.

26. The respondents also argued that some or all of the in camera records are exempt from disclosure pursuant to the "deliberative process privilege." The respondents contended such privilege is a common law privilege which was incorporated into the FOI Act by way of the

2011 amendment of §1-210(b)(10), G.S.[5]

27. Under federal law, the deliberative process privilege "has been applied to protect from disclosure intra-governmental documents 'comprising part of the process by which governmental decisions are formulated.'" Zinker v. Doty, 637 F.Supp. 138, 140 (D. Conn. 1986). It is a privilege that is based on the policy of "protecting the decision making process of government agencies," with a focus on the protection of documents "reflecting advisory opinions, recommendations and deliberations comprising part of a process by which governmental decisions and policies are formulated." N.L.R.B. v. Sears, Roebuck & Co., 421 U.S. 132, 150-51 (1975) (internal citations omitted).

28. The Connecticut Supreme Court interpreted the phrase "preliminary drafts and notes" in the FOI Act as identical to the deliberative process privilege found in 5 U.S.C. § (b)(5) of the federal Freedom of Information Act, with the exception that, under Connecticut's FOI Act, the public agency carried the additional burden to show that "the public interest in withholding such document clearly outweighs the public interest in disclosure." See Wilson v. FOIC, 181 Conn. 324, 333-340, 435 A.2 353 (1980).

29. The year following Wilson, the Connecticut legislature adopted Public Act 81-431, and added to the FOI Act the language now codified in §1-210(e)(1), G.S.

30. Section 1-210(e)(1), G.S., states that:

> (e) Notwithstanding the provisions of subdivisions (1) and (16) of subsection (b) of this section, disclosure shall be required of: (emphasis added)
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> (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;

31. It is concluded that with adoption of Public Act 81-431, the Connecticut General Assembly made clear that the Connecticut FOI Act required more robust disclosure than is required by the deliberative process privilege permitted at the federal level. The Commission

[5] In 2011, Public Act 11-242, amended §1-210(b)(10), G.S., to permit nondisclosure of the following kinds of records: "Records, tax returns, reports and statements exempted by federal law or [state] the general statutes or communications privileged by the attorney-client relationship, marital relationship, clergy-penitent relationship, doctor-patient relationship, therapist-patient relationship or any other privilege established by the common law or general statutes, including such records, tax returns, reports or communications that were created or made prior to the establishment of the applicable privilege under the common law or the general statutes." The underlining signifies language added to the statute, while the brackets signify language that was deleted from the existing statute.

will not read the general "common law"[6] language in the 2011 amendments to §1-210(b)(1), G.S., which do not mention the deliberative process privilege, as implicitly superseding the specific provisions contained in §1-210(e)(1), G.S., nor would such a reading be proper. It is a well settled principle of statutory construction that the specific terms covering the given subject matter will prevail over general language of the same statute which might otherwise prove controlling: "Where there are two provisions in a statute, one of which is general and designed to apply to cases generally, and the other is particular and relates to only one case or subject within the scope of a general provision, then the particular provision must prevail; and if both cannot apply, the particular provision will be treated as an exception to the general provision." Tomlinson v. Tomlinson, 305 Conn. 539, 552-53, 46 A.3d 112 (2012) (internal citations omitted). Furthermore, "implied repeal of a statute is not favored and will not be presumed where, as here, the old and the new statutes can coexist peaceably." Miller's Pond Co. LLC v. New London, 273 Conn. 786, 813, 873 A.2d 965 (2005) (internal citations omitted).

32. It is concluded that the specific provisions of §§1-210(b)(1), and 1-210(e)(1), G.S., control the analysis of the exemption claimed by the respondents in this case as opposed to the respondents' interpretation of the "deliberative process privilege." Accordingly, it is concluded that none of the in camera records in this matter are exempt from disclosure pursuant to the "deliberative process privilege" as contended by the respondents.

33. The respondents contended that some or all the in camera records are exempt from disclosure pursuant to "the common law common interest privilege."[7] The joint defense privilege, also called the "common-interest" rule, is an extension of the attorney-client privilege that protects communications between parties and the parties' attorneys when the parties have decided upon and undertaken a joint defense strategy in litigation. "It serves to protect the confidentiality of communications passing from one party to the attorney for another party where a joint defense effort or strategy has been decided upon and undertaken by the parties and their respective counsel ... Only those communications made in the course of an ongoing common enterprise and intended to further the enterprise are protected." McPhee Elec. Ltd., LLC v. Konover Const. Corp., No. CV075009694, 2009 WL 455866, at *1 (Conn. Super. Ct. Jan. 29, 2009) (Internal citations omitted).

34. The common interest rule was intended "to protect the free flow of information from client to attorney ... whenever multiple clients share a common interest about a legal matter." Raymond Rd. Assocs., LLC v. Taubman Centers, Inc., No. X02UWYCV075007877S, 2009 WL 4069251, at *8 (Conn. Super. Ct. Oct. 30, 2009). "Third parties receiving copies of the communication and claiming a community of interest may be distinct legal entities from the client receiving the legal advice and may be a non-party to any anticipated or pending litigation." Id.

35. A party relying on the common interest doctrine to shield privileged communications from disclosure has the burden of establishing all of its elements. Id. at *5 Therefore, the party

[6] It is not clear that the deliberative process privilege even existed in common law. The respondents provided no testimony, argument or briefing in this regard.

[7] Similar to the respondents' assertion of the deliberative process privilege, the respondents provided no testimony, argument or briefing regarding the "common law common interest privilege."

claiming the privilege has the burden of proving that the records for which an exemption is being claimed consist of: (a) a communication; (b) made between counsel and client; (c) in confidence; (d) for the purpose of seeking, obtaining or providing legal advice to the client. Additionally, the party claiming the exemption must prove that a common legal interest exists between entities represented in the records for which the privilege is being claimed.

36. It is found that other than conclusory representations regarding the existence of a common interest agreement by counsel, the respondents did not offer any testimony or other evidence regarding such agreement, its provisions, or the parties to whom such agreement applied.

37. The respondents failed to provide any specific testimony or evidence that the communications contained within the in camera records were provided in confidence or pertained to a matter with which the respondents had a common legal interest with another entity. Therefore, it is found that the respondents failed to prove that any of the in camera records were exempt from disclosure pursuant to the attorney-client privilege as it pertains to a common legal interest among parties. Accordingly, it is found that the in camera records are not exempt from disclosure pursuant to the common interest privilege as contended by the respondents.

38. Based upon all of the foregoing, it is found that none of the in camera records are exempt from disclosure pursuant to any of the exemptions claimed by the respondents. Therefore, it is concluded that the respondents violated §§1-210(a) and 1-212(a), G.S., by withholding the in camera records, or portions thereof, identified in paragraph 9, above.

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 an unredacted copy of all the in camera records (IC2020-0122-001 through IC2020-0122-034) to the complainant at no charge.

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

Approved by Order of the Freedom of Information Commission at its regular meeting
Of January 26, 2022.

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:

ENERGY POLICY ADVOCATES, c/o Attorney Margaret A. Little, New Civil Liberties Alliance, 1225 19th Street NW, Suite 450, Washington DC 20036 and Attorney Matthew D. Hardin, 1725 I Street NW, Suite 300, Washington, DC 20006

ATTORNEY GENERAL, STATE OF CONNECTICUT, OFFICE OF THE ATTORNEY GENERAL; AND STATE OF CONNECTICUT, OFFICE OF THE ATTORNEY GENERAL, c/o Associate Attorney General Antoria Howard, State of Connecticut, Office of the Attorney General, 165 Capitol Avenue, Hartford, CT 06106, Assistant Attorney General Matthew F. Fitzsimmons, State of Connecticut, Office of the Attorney General, 165 Capitol Avenue, Hartford, CT 06106, and Assistant Attorney General Daniel M. Salton, State of Connecticut, Office of the Attorney General , 165 Capitol Avenue, Hartford, CT 06106

Cynthia A. Cannata
Acting Clerk of the Commission

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