

Office of the Attorney General
State of Connecticut

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June 12, 2018

Robert J. Kane, State Auditor
John C. Geragosian, State Auditor
Auditors of Public Accounts
State Capitol, Room 116
Hartford, CT 06106-1559

Dear Messrs. Kane and Geragosian:

You have asked my opinion regarding the ability of the Auditors of Public Accounts (APA or Auditors) to review and copy a report of a private contractor to the Department of Corrections (DOC) regarding the medical care of certain DOC inmates, even though the document is privileged under the attorney-client and attorney work product privileges. In my opinion, the APA is entitled to review and copy the report, but it must do so subject to all applicable legal privileges, and thus may not further distribute or reveal the report or its contents. Release by the APA of privileged records, such as those at issue, could expose the State of Connecticut and its taxpayers to adverse legal and/or fiscal consequences.

You report that you have learned that DOC contracted with a private party to conduct a review of about twenty inmate medical cases. You report that the contract includes a provision requiring that "[t]he Contractor shall make all of its . . . Records available at all reasonable hours for audit and inspection by . . . the Connecticut Auditors of Public Accounts . . ." You further report that you have requested a copy of the report from DOC, but DOC has not provided it because DOC asserts that it is privileged under the attorney-client and work product privileges,^{1,2} and because the report is a draft and contains confidential

¹ "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." *Metropolitan Life Ins. Co. v. Aetna Cas. And Sur. Co.*, 249 Conn 36, 52 (1999).

² "Work product can be defined as the result of an attorney's activities when those activities have been conducted with a view to pending or anticipated

information. You note that my office has also concluded that the document is privileged, as has the Freedom of Information Commission. *Kovner v. Commissioner, Dept. of Corr.*, FIC #2017-0310, 12/13/2017.

The general authority of your office is set out in Conn. Gen. Stat. § 2-90. As provided in § 2-90(c), the auditors “shall audit . . . the books and accounts of each officer [and] department Each such audit may include an examination of performance in order to determine effectiveness in achieving expressed legislative purposes.” Further, § 2-90(g) provides that “[e]ach state agency . . . , the provisions of any other general statute notwithstanding, shall make all records and accounts available to [the auditors] or their agents upon demand.” The provision in DOC’s contract with its consultant requiring access by the Auditors appears to be in furtherance of this provision.

We also note that Conn. Gen. Stat. § 52-146r(b) provides that “[i]n any civil or criminal case or proceeding or in any legislative or administrative proceeding, all confidential communications shall be privileged and a government attorney shall not disclose any such communications unless an authorized representative of the public agency consents to waive the privilege and allow such disclosure.” Finally, we note that § 2-90(h) provides that “[w]here there are statutory requirements of confidentiality with regard to such records and accounts or examinations of nongovernmental entities which are maintained by a state agency, such requirements of confidentiality and the penalties for the violation thereof shall apply to the auditors and to their authorized representatives in the same manner and to the same extent as such requirements of confidentiality and penalties apply to such state agency.”

Because we conclude that, under applicable law pertaining to the statutory attorney-client privilege described in Conn. Gen. Stat. § 52-146r(b), the document in question must be disclosed to the Auditors but remains fully protected by that privilege, there is no need to analyze the separate question of the effect or applicability of the attorney work product privilege. We also do not further consider DOC’s assertion that the document is “confidential,” and a “draft,”

litigation. The attorney’s work must have formed an essential step in the procurement of the data which the opponent seeks, and the attorney must have performed duties normally attended to by attorneys.” *The Stanley Works v. New Britain Redevelopment Agency*, 155 Conn. 86, 95 (1967) (citations and internal quotation marks omitted).

because there is no privilege that exempts “confidential” or “draft” documents from disclosure to the Auditors.

This Office has answered a similar question in the past. In an opinion to the Auditors of Public Accounts of June 21, 1999, we answered a question from your Office as to whether the Auditors had the legal authority to review all records of the Judicial Selection Commission, in spite of the fact that those records are confidential under Conn. Gen. Stat. § 51-44a(j). We replied in the affirmative. In that opinion, we noted that

In 1983, apparently responding to a reluctance on the part of some agencies to make available to the Auditors records that were confidential under other provisions of the general statutes, the legislature again amended § 2-90 to clarify that the Auditors must be given access to all agency records and accounts, even those that have been deemed confidential for other purposes by other sections of the general statutes. By Public Act No. 83-302, titled “An Act To Ensure the Availability of State Records for Auditing Purposes,” § 2-90 was amended to provide: “Each state agency shall keep its accounts in such form and by such methods as to exhibit the facts required by said auditors and, *the provisions of any other general statute notwithstanding*, shall make *all* records and accounts available to [the Auditors] or their agents, upon demand.” P.A. No. 83-302 [now Conn. Gen. Stat. § 2-90(g)] (Emphasis added.) By inserting the phrase “the provisions of any other general statute notwithstanding,” the Legislature evinced its intent that the Auditor’s disclosure provision take precedence over any confidentiality provision in an audited agency’s authorizing statutes.

Along with this change, in order to allay the concerns of audited agencies and to ensure that confidential records were not disclosed by the Auditors, Public Act 83-302 also made the Auditors subject to the same requirements of confidentiality pertaining to confidential records as the agency that they are auditing, with the same penalties for breach. The relevant portion, now codified as subsection (h) of Conn. Gen. Stat. § 2-90, provides:

Where there are statutory requirements of confidentiality with regard to such records and accounts or examination of

nongovernmental entities which are maintained by a state agency, such requirements of confidentiality and the penalties for the violations thereof shall apply to the auditors and to their authorized representatives in the same manner and to the same extent as such requirements of confidentiality and penalties apply to such agency.

....

Accordingly, it is apparent from the plain language of Conn. Gen. Stat. §§ 2-90(g) and (h) and the legislative history of these sections that the legislature intended to and did provide the Auditors full access to the records of all state agencies and commissions, even those designated as confidential by other provisions of the general statutes, for the dual purposes of ensuring the proper handling and expenditure of all state funds and of reviewing each agency's "performance to determine the effectiveness in achieving expressed legislative purposes."

....

The Legislature has made a clear policy choice – that all State agencies are subject to audit pursuant to Conn. Gen. Stat. § 2-90, and that audited agencies must make "*all* records and accounts," even otherwise confidential ones, available to the Auditors "upon demand." The Legislature considered and addressed the legitimate concerns of agencies, like the Commission, regarding disclosure of confidential records by subjecting the Auditors to the same confidentiality provisions and penalties as the agencies themselves. Absent specific statutory language exempting an agency's confidential records from disclosure to the Auditors, the agency is subject to the disclosure provisions of section 2-90(g).

1999 Conn. Op. Atty Gen. 008, 1999 WL 1581419 (June 21, 1999).

Legally, the question you ask appears to present essentially the same question as the one we answered in 1999. As nothing in the applicable law has changed since that opinion, our analysis and answer remain the same: State agencies are required to provide the Auditors with any materials the Auditors request, and the Auditors are required to maintain the privileged and confidential nature of documents that are subject to a legal privilege.

There is one additional potential issue we did not discuss in our 1999 Opinion, but which we consider here. Even though Conn. Gen. Stat. § 2-90(g)

clearly requires that DOC provide the document to the Auditors, someone might argue that nevertheless the act of providing the document to the Auditors constitutes a waiver of the attorney-client privilege by the agency. Such an argument is not supportable under Connecticut's statutes.

The basic purpose of the attorney-client privilege is to insure that clients may speak candidly to their attorneys in order to obtain sound legal advice without exposing confidential facts to public view in a way that could be detrimental to the client.

The attorney-client privilege is the oldest of the privileges for confidential communications known to the common law. 8 J. Wigmore, Evidence § 2290 (McNaughton rev. 1961). Its purpose is to encourage full and frank communication between attorneys and their clients and thereby promote broader public interests in the observance of law and administration of justice. The privilege recognizes that sound legal advice or advocacy serves public ends and that such advice or advocacy depends upon the lawyer's being fully informed by the client.

Upjohn Co. v. U.S., 449 U.S. 383, 389 (1981). "The privilege exists to protect not only the giving of professional advice to those who act on it but also the giving of information to the lawyer to enable him [or her] to give sound and informed advice." *Shew v Freedom of Information Com'n*, 245 Conn. 149, 157 (1998).

While the preceding discussion of the general principles of attorney-client privilege refers to the common law privilege, developed by the courts, rather than the specific statutory privilege created by Conn. Gen. Stat. § 52-146r(b), that is a distinction of no legal significance. As explained by Representative Doyle, the sponsor of the bill that became § 52-146r(b), 1999 Conn. Legis. Serv. P.A. 99-179 (S.H.B. 5432), the statute was intended simply to clarify that the common law attorney-client privilege, which the Connecticut Supreme Court had recently determined [presumably in *Shew v. FOIC, supra*] applied fully to communications between municipal officials and their attorneys, also applied to communications between state officials and their attorneys. Conn. Gen. Assembly Proceedings, 42 H.R. Proc., Pt. 10, 1999 Sess., pp. 3609-10 (June 1, 1999) (remarks of Representative Doyle).

Even though the attorney-client privilege serves an important purpose, the voluntary sharing of attorney-client privileged material beyond the attorney and

the client and their staffs may constitute a waiver of the privilege. *State v. Taft*, 258 Conn. 412, 421 (2001); *Harp v. King*, 266 Conn. 747, 767 (2003). Accordingly, we must consider whether the sharing of the report in question with the Auditors, as required by Conn. Gen. Stat. § 2-90, would waive the attorney-client privilege created or clarified by Conn. Gen. Stat. § 52-146r(b). We conclude that the answer is “no.”

We consider the relationship of these two statutes, Conn. Gen. Stat. § 2-90 and Conn. Gen. Stat. § 52-146r(b), in light of basic rules of statutory construction. In general, the legislature is presumed to have created a harmonious and consistent body of law. *Allen v. Comm’r of Revenue Servs.*, 324 Conn. 292, 309 (2016); *State v. Menditto*, 315 Conn. 861, 869 (2015). To put it slightly differently, statutes should be read to harmonize with each other, and not to conflict with each other. *State v. Victor O.*, 320 Conn. 239, 251 (2016); *Efstathiadis v. Holder*, 317 Conn. 482, 492-93 (2015); *In re Justice W.*, 308 Conn. 652, 671 (2012); *Brown & Brown, Inc. v. Blumenthal*, 297 Conn. 710, 734 (2010). Stated yet another way, if two statutes appear to be in conflict but can be construed as consistent, a court must give effect to both; if possible, two statutes must be read to construe each to leave room for the meaningful operation of the other. *Dorry v. Garden*, 313 Conn. 516, 531-32 (2014).

Applying this basic rule of statutory construction, however phrased, makes it plain that the legislature could not have intended the nonsensical result of requiring that privileged materials be provided to the Auditors subject to the privilege, but that nevertheless, providing those privileged materials would constitute a waiver of the important statutory privilege acknowledged in Conn. Gen. Stat. § 52-146r(b). As discussed above, the purpose of the attorney-client privilege is to ensure that clients, specifically including state agencies and officials, can receive sound legal advice. It is obvious that one of the benefits of sound legal advice for state officials is the protection of the interests, financial and otherwise, of the state and its citizen taxpayers. Similarly, it is obvious that the basic purpose of the legislature in creating the Auditors of Public Accounts and giving that office essentially unfettered access to privileged documents, subject to the privilege, was also to protect citizen taxpayers by providing broad independent review and oversight of the actions of state officials. In light of the facts that both the powers of the Auditors under Conn. Gen. Stat. § 2-90, and the privilege created by Conn. Gen. Stat. § 52-146r(b), were enacted by the legislature to protect the State and its taxpayers, it is inconceivable that the legislature could have intended to undermine the attorney-client privilege by

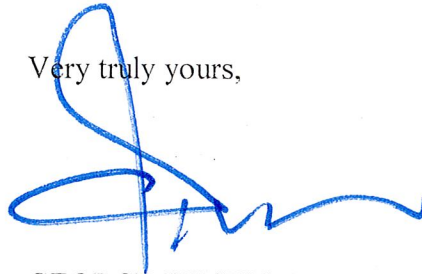
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requiring the disclosure of privileged documents to the Auditors. Such a result would require construing the two statutes to destroy the protections they were intended to provide. That would not be a reasonable construction.

In light of the facts and legal analysis described above, I conclude that the APA is entitled to review and copy the report, but it must do so subject to all applicable legal privileges, and thus may not further distribute or reveal the report or its contents.

Finally, we note that while Conn. Gen. Stat. § 2-90 provides the Auditors with access to privileged materials, it does not provide any enforcement mechanism if an agency fails to provide requested materials. The statute appears to be premised on the assumption that agencies will comply with its requirements. If they do not, the Auditors are free to bring that refusal to public attention, or to seek such action by the General Assembly as they may deem appropriate.

Very truly yours,



GEORGE JEPSEN
ATTORNEY GENERAL