

DOCKET NO. HHB-CV-19-6055845 : SUPERIOR COURT
 :
 LINDA REED, CLERK OF THE : JUDICIAL DISTRICT
 COMMON COUNCIL : OF NEW BRITAIN
 : ADMINISTRATIVE APPEALS
 VS. : SESSION
 :
 FREEDOM OF INFORMATION :
 COMMISSION, ET AL : SEPTEMBER 3, 2020

MEMORANDUM OF DECISION

INTRODUCTION:

This is an administrative appeal seeking review of a decision of the Freedom of Information Commission (FOIC) in the matter of Gerald Daley v. Clerk of the Common Council of the City of Middletown, et al in FOIC docket no. FIC 2018-0603. The Clerk of the Common Council of Middletown (Clerk of the Common Council), a defendant in the underlying administrative proceeding, has brought this appeal. Gerald Daley was a member of the Common Council of the City of Middletown (Common Council), which was also a defendant below.

FACTS AND PROCEDURAL HISTORY:

In December of 2017, a city employee complained that the mayor had unlawfully harassed her. Further, around the same time, the city also received a complaint from a union representing city employees alleging that the mayor had been improperly soliciting campaign contributions from city employees. In response to the complaints, the Common Council hired the

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JUDICIAL DISTRICT OF
 NEW BRITAIN

*Electronic notice sent to attorneys Harrington and McGee.
 mailed to self-rep Gerald Daley
 mailed to Reporter of Judicial Decisions. A. Jurdanopoulos,
 et al
 9/3/20*

law firm of LeclairRyan to conduct an investigation and to report findings and recommendations to the Common Council.

On September 7, 2018, Gerald Daley (Daley) sent an email to the Clerk of the Common Council requesting the following public records:

“[T]he complete billing statements and invoices, including all non-privileged supporting documentation, submitted by LeClairRyan, a Professional Corporation . . . between January 25, 2018 and August 13, 2018.”

The Clerk of the Common Council maintained the records responsive to the foregoing request.

On November 15, 2018, after seeking legal advice, the Clerk of the Common Council produced the requested records to Daley with the names of city employees, and the times and locations of meetings that occurred between the city employees and attorneys from LeClairRyan, redacted. The city had provided advance notice, as specified in General Statutes § 1-214(b)(1), to the city employees whose names appeared in the legal documents of the potential disclosure, and the city employees, through their union representatives, objected to disclosure of their names and identity as provided for in General Statutes § 1-214(c).

Daley filed a complaint with FOIC and a contested case hearing was held. At the hearing, Daley indicated that he was not challenging the redaction of the names of current city employees except for any redactions of the name of the Clerk of the Common Council. Daley further indicated that he was challenging the redactions of the times and places of meetings that

involved city employees and LeClairRyan attorneys. The hearing officer inspected the documents in question in camera.

In its final decision, the FOIC ordered that the responsive documents must be produced with the names and titles of all current city employees, except for the Clerk of the Common Council, redacted. The FOIC further ordered that the responsive documents be produced without the redactions of the times and places of meetings between LeClairRyan attorneys and city employees.

The Clerk of the Common Council appealed the final decision of the FOIC to this court. The Clerk of the Common Council was and remains a city employee.

STANDARD OF REVIEW:

This appeal is brought pursuant to the Uniform Administrative Procedure Act (UAPA), General Statutes § 4-183.¹ Judicial review of an administrative decision in an appeal under the UAPA is limited. *Murphy v. Commissioner of Motor Vehicles*, 254 Conn. 333, 343, 757 A.2d

¹ Section 4-183 (j) provides in relevant part: "The court shall not substitute its judgment for that of the agency as to the weight of the evidence on questions of fact. The court shall affirm the decision of the agency unless the court finds that substantial rights of the person appealing have been prejudiced because the administrative findings, inferences, conclusions, or decisions are: (1) in violation of constitutional or statutory provisions; (2) in excess of the statutory authority of the agency; (3) made upon unlawful procedure; (4) affected by other error of law; (5) clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record; or (6) arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion. If the court finds such prejudice, it shall sustain the appeal and, if appropriate, may render a judgment under subsection (k) of this section or remand the case for further proceedings."

561 (2000). “[R]eview of an administrative agency decision requires a court to determine whether there is substantial evidence in the administrative record to support the agency’s findings of basic fact and whether the conclusions drawn from those facts are reasonable. . . . Neither [the Supreme Court] nor the trial court may retry the case or substitute its own judgment for that of the administrative agency on the weight of the evidence or questions of fact. . . . Our ultimate duty is to determine, in view of all of the evidence, whether the agency, in issuing its order, acted unreasonably, arbitrarily, illegally or in abuse of its discretion.” (Internal quotation marks omitted.) *Id.*

Although the courts ordinarily afford deference to the construction of a statute applied by the administrative agency empowered by law to carry out the statute’s purposes, “[c]ases that present pure questions of law . . . invoke a broader standard of review than is . . . involved in deciding whether, in light of the evidence, the agency has acted unreasonably, arbitrarily, illegally or in abuse of its discretion.” *Dept. of Public Safety v. Freedom of Information Commission*, 298 Conn. 703, 716, 6 A.3d 763 (2010).

ANALYSIS:

A. Aggrievement and Standing

The FOIC challenges the plaintiff’s standing and aggrievement. However, the FOIC’s challenge in this regard is misplaced. The FOIC argues that the plaintiff has brought this appeal

in her personal capacity only. Such is clearly not the case. The complaint, writ and summons in this matter name the plaintiff as the Clerk of the Common Council. The Clerk of the Common Council was a named defendant in the administrative proceeding below. Clearly, the plaintiff's position in this appeal includes her capacity as the Clerk of the Common Council as noted in the complaint, writ and summons, and in the same capacity as she participated in the administrative proceeding below.

The FOIC further challenges the plaintiff's authorization to bring this appeal. In doing so, the FOIC attempts to introduce an unverified hearsay letter from an unknown source which was not part of the record below. The letter presents unsupported opinions without reasoning or supporting evidence. This hearsay letter was not subject to discovery, cross examination or testing of any kind. Accordingly, the court credits it with no weight as competent evidence. Further, whether the plaintiff had authority to bring this appeal or not is really beside the point. The plaintiff clearly brought this appeal as the Clerk of the Common Council just as she participated as a defendant below. Her internal authorization to do so has not been litigated and has not effectively been brought forward as an issue in this appeal.

Further, clearly the plaintiff is aggrieved. She appeals from a final decision of the FOIC adverse to her² in that it orders that documents concerning an internal legal investigation of complaints of harassment in the workplace be produced without redaction of her name, even though she participated in the investigation as a manager of it, and potentially as a witness, complainant and whistleblower.³ Notably, the final decision allows redaction of the names and titles of all city employees other than the plaintiff's.

The plaintiff has standing to bring this appeal and is aggrieved.

B. Introduction

The plaintiff asserts that, to extent that it is included in the responsive documents, her name and title should be redacted as was done with all other current city employees to prevent an unwarranted invasion of her personal privacy. Further, the plaintiff asserts that the times and

² The FOIC found that the Clerk of the Common Council had not violated FOIA because she was placed in an untenable position between the mayor and the Common Council with differing interests and instructions. Thus the FOIC did not ascribe a violation of FOIA to her, instead ascribing the violation to the city itself and the Common Council, but it did find that the Clerk of the Common Council acted inconsistently with the act by providing redacted documents when she should have provided un-redacted documents. It is notable that the FOIA request was directed to the Clerk of the Common Council. Accordingly, the city's and the Common Council's assessed violation of FOIA arose as a result of the actions of the Clerk of the Common Council. In this regard it is important to note that it was the Clerk of the Common Council who maintained the documents at issue here, and it was the Clerk of the Common Council who arranged for the documents to be reviewed, redacted and produced in response to the FOIA request she received.

³ Since she (along with the other employees affected) objected to the disclosure of her identity, General Statutes § 1-204(c) prevents disclosure of her identity unless ordered by the FOIC.

places of meetings between city employees, including herself, and LeClairRyan attorneys should be redacted to preserve the attorney-client privilege.

General Statutes § 1-210 (a) provides in relevant part:

“Except as otherwise provided by any federal law or state statute, all records maintained or kept on file by any public agency . . . 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.”

General Statutes § 1-212 (a) provides in relevant part:

“Any person applying in writing shall receive, *promptly* upon request, a plain, facsimile, electronic or certified copy of any public record.”
(Emphasis added.)

Thus, FOIA makes all records kept or maintained by any public agency public records subject to inspection or copy by members of the public unless such records are exempt by federal or state law. Accordingly, there is a presumption that all public records are open to the public unless an exemption is found in law. Further, FOIA has a promptness standard requiring that FOIA requests be promptly handled.

One of the exceptions to Freedom of Information Act (FOIA) disclosure involves considerations of personal privacy. Section 1-210 (b) (2) provides in relevant part an exemption from the disclosure requirements of FOIA for “[p]ersonnel or medical files and similar files the

disclosure of which would constitute an invasion of personal privacy.”⁴ Our Supreme Court in *Perkins v. Freedom of Information Commission*, 228 Conn. 158, 635 A.2d 783 (1993), set forth a two part test for determining whether the disclosure of particular information would constitute an invasion of personal privacy within the meaning of the foregoing statutory exemption. In *Perkins*, the Court held that disclosure of information from personnel, medical or similar files constitutes an invasion of personal privacy if (i) the information sought does not pertain to legitimate matters of public concern, and (ii) the disclosure of such information would be highly offensive to a reasonable person. *Id.*, 175. As with most exemptions from FOIA disclosure, the burden of establishing the exemption rests on the person or entity resisting disclosure. *Id.*, 167.

Another exception to FOIA disclosure allows non-disclosure to the extent such non-disclosure is required to preserve the attorney client privilege. This disclosure exception is provided for in § 1-210 (b) (10) as well as in the common law.

⁴ The federal Freedom of Information Act contains a similar exemption. See 5 U.S.C. § 552 (b) (6) (2016).

C. Privacy Interests

The final decision of the FOIC provided that the names and titles of all city employees, except for the Clerk of the Common Council, could be redacted.⁵ In this regard the FOIC found that the responsive documents were not “personnel or similar files” within the meaning of § 1-210 (b) (2) and therefore the disclosure exception concerning invasion of personal privacy did not apply. However, the FOIC’s finding that the responsive documents are not personnel or similar files was clearly erroneous.

The responsive documents in this matter are invoices from the legal firm LeClairRyan. These invoices were produced solely in connection with a personnel investigation. In December of 2017, a city employee complained that the mayor had unlawfully harassed her. Further, around the same time, the city also received a complaint from a union representing city employees alleging that the mayor had been improperly soliciting campaign contributions from city employees. In response to the complaints, the Common Council hired the law firm of LeclairRyan to conduct an investigation and to report findings and recommendations to the Common Council. The invoices in question relate solely to this investigation.

⁵ Curiously, requestor Daley specified that he did not object to the redaction of any current city employee’s name and title except that he did object to any redaction concerning the Clerk of the Common Council.

The investigation conducted by LeClairRyan was a human resources investigation. The purpose of the investigation was to determine whether or not the mayor was illegally harassing city employees, including potentially the Clerk of the Common Council who is a city employee. The results of the investigation were intended to allow the city to take appropriate disciplinary and/or remedial action as necessary. The results of the investigation and any actions taken therefrom are clearly personnel actions. The investigation, its results, and any consequent actions were meant to impact the mayor, the city employees who complained, and city employees generally. The documents contain information that is pertinent to personnel decisions. See *Connecticut Alcohol & Drug Abuse Commission v. Freedom of Information Commission*, 233 Conn. 28, 657 A.2d 630 (1995). Thus, the records generated in this investigation by LeClairRyan, including their invoices⁶, are clearly personnel or similar files within the meaning of § 1-210 (b) (2).

In accordance with § 1-214(b)(1), the city provided advance notice to all employees whose names appeared in the responsive documents.⁷ The notified employees, through their union

⁶ As is typical, these legal invoices provide a reasonably detailed description of the legal services provided and the law firm's efforts in conducting the investigation. The invoices include the names of city employees interviewed in the investigation, and the time, place and time spent for each interview, as well as descriptions of the legal services provided.

⁷ This notification carries with it the city's determination that the responsive records were personnel, medical or similar files, and that the disclosure of the names therein would be an invasion of privacy.

representatives, objected in writing to the disclosure of their identities. Accordingly, the city was precluded from disclosing the identities unless ordered to do so by the FOIC.

The Clerk of the Common Council participated in the investigation to facilitate the investigation on behalf of the Common Council, and also potentially as a witness, whistleblower and/or complainant. Our Supreme Court has recognized the concern associated with disclosing the identifying information of individuals who report harassment or who participate in an investigation concerning allegations of harassment in the workplace. See *Rocque v. Freedom of Information Commission*, 255 Conn. 651, 774 A.2d 957 (2001) and *Perkins v. Freedom of Information Commission*, supra, 228 Conn. 158. This concern is readily apparent, since revealing the identity of such complainants or participants in a harassment investigation in this context could facilitate retaliation and could inhibit people from participating in such investigations. In this case, that concern is heightened because Daley has consented to the redaction of the names of all current city employees except solely for that of the Clerk of the Common Council. This focus on a particular city employee gives an even higher degree of concern.

Our Supreme Court in *Perkins v. Freedom of Information Commission*, supra, 228 Conn. 175, set forth a two part test for determining whether the disclosure of particular information in personnel or similar records would constitute an invasion of personal privacy within the meaning of the foregoing statutory exemption. In *Perkins*, the Court held that disclosure of information constitutes an invasion of personal privacy if (i) the information sought does not pertain to

legitimate matters of public concern, and (ii) the disclosure of such information would be highly offensive to a reasonable person. Id. Here the records concern a law firm driven investigation into allegations of harassment in the workplace. The invoices reveal the names and titles of city employees who participated in the investigation, as well as the time spent with each such employee and the date and place of the interview. The public's interest in the foregoing particular information does not justify its disclosure, and the requestor has not expressed any interest that justifies such disclosure. Further, disclosure of the foregoing information would be offensive to a reasonable person because disclosure would facilitate retaliation and would inhibit future participation in such investigations. The public policy also weighs against disclosure because of the high value of fulsome participation in such investigations and the chilling effect disclosure would have.

Accordingly, the court concludes that redaction of the name and title of the Clerk of Common Council from the responsive documents is necessary to prevent the invasion of her personal privacy in violation of § 1-210 (b) (2)⁸.

⁸ The court notes that the FOIC specifically found that the Clerk of the Common Council was placed in an untenable position between the mayor and the Common Council, with each providing her with instructions, concerning production of these documents, that conflicted with the instructions that she received from the other. We now have one member of the Common Council requesting these documents and specifically objecting to the redaction of her name.

D. Attorney-Client Privilege

As noted, § 1-210 (b) (10), as well as the common law, prohibit the disclosure of information covered by the attorney-client privilege. In order to be covered by the attorney-client privilege in this context (i) the attorney must be acting in a professional capacity as an attorney, (ii) the communication must be made to or from current employees or officials, (iii) the communication must relate to legal advice, and (iv) the communication must be made in confidence. Here there is no doubt that the LeClairRyan attorney was acting in her professional capacity as an attorney. The information in question consists of the names of city employees interviewed by the attorney in an official workplace harassment investigation, as well as the time spent on each interview and the date and place of each interview. The foregoing information was contained in the attorney's invoices, which themselves were communications from the attorney to her client. Absent disclosure here, those attorney invoices were confidential communications with the client.

The information in question, the names of city employees interviewed by the attorney in an official workplace harassment investigation as well as the time spent on each interview and the date and place of each interview, clearly relates to legal advice provided by the attorney to her client. The attorney was hired to conduct a workplace harassment investigation. The information in question (i) supports the results of the investigation, (ii) reveals the attorney's thinking and strategy concerning the investigation by revealing her choices of employees to interview and the time spent with each employee, (iii) potentially suggests to the alleged harasser the results of the

investigation by revealing whether or not the correct employees were interviewed, and (iv) reveals the thoroughness of the investigation and the nature of the services provided.

While attorney invoices may not necessarily be entirely privileged, the information contained in the invoices must be analyzed in the same way any communication between the attorney and the client is analyzed for privilege. As noted above, the applicability of the attorney-client privilege to the information in question is apparent from the documents themselves, the context of the harassment allegations, and the attorney's assignment to conduct a workplace harassment investigation. The client here was the Common Council, but the Clerk of the Common Council acted as the Common Council's agent in receiving the invoices and also may have⁹ substantively participated in the investigation. Further, it was the Clerk of the Common Council who received the FOIA request, maintained these documents, arranged for their review by city attorneys for privilege, arranged for the redaction of the documents by the attorneys and produced the redacted documents in response to this FOIA request.

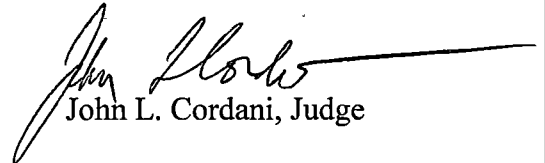
In view of the foregoing, the court concludes that the responsive documents should be redacted to remove the names of city employees interviewed by the attorney as well as the time

⁹ The court purposefully uses the words "may have" to protect the legitimate privacy concerns of the clerk and to preserve the attorney-client privilege.

spent on each interview and the date and place of each interview in order to protect the attorney-client privileged nature of the information¹⁰. Accordingly, the court sustains the appeal.

ORDER:

The appeal is sustained. The responsive documents should be redacted to remove the names of city employees interviewed by the attorney as well as the time spent on each interview and the date and place of each interview in order to protect the attorney-client privileged nature of the information and in order to protect the legitimate privacy interests of the employees who participated in the workplace harassment investigation.


John L. Cordani, Judge

¹⁰ The time spent with each employee gives an indication of the importance of such employee to the investigation. The date and place of the interview may be utilized to identify the employee in question.