DOCKET NO. HHB-CV-21-6070256-S	:	**SUPERIOR COURT**
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TOWN OF AVON, ET AL.	:	**JUDICIAL DISTRICT**
	:	**OF NEW BRITAIN**
VS.	:	**ADMINISTRATIVE APPEALS**
	:	
JOSEPH SASTRE, ET AL.	:	**SEPTEMBER 20, 2022**

MEMORANDUM OF DECISION

INTRODUCTION:

This matter is an administrative appeal by the Town of Avon (the town) and its Town Manager (plaintiffs) of a November 23, 2021 final decision (Final Decision) of the Freedom of Information Commission (FOIC) in FOIC Docket no. FIC 2020-0133 finding that the plaintiffs violated the Freedom of Information Act and ordering the plaintiffs to provide a certain document, which was reviewed in camera by the FOIC, to Joseph Sastre (complainant). The court held a hearing on this appeal on September 19, 2022.

FACTS AND PROCEDURAL HISTORY:

The following facts are relevant to a decision in this appeal and are contained in the record. By email dated February 10, 2020, the complainant requested, pursuant to the Freedom of Information Act (FOIA), that the plaintiffs provide the complainant with any records relating to accusations of misconduct concerning the town's Chief of Police, Mark Rinaldo. The plaintiffs provided the complainant with some records which were responsive to the

Electronic notice sent to all counsel of record
mailed to Mr. Sastre.
D. Jordanopulos, clerk 9/20/22

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complainant's request, including a copy of a November 11, 2019 memorandum and a copy of a severance agreement with Chief Rinaldo. Neither the memorandum nor the severance agreement fully explained the underlying reasons why Chief Rinaldo left the employ of the town. The plaintiffs however did not provide a log prepared by a managerial employee of the town for the employee's personal use which logged detailed observations made by that employee of certain work related activities of Chief Rinaldo (the "log"). [1]

In November of 2019, the employee of the town met with the Town Manager to discuss certain incidents involving Chief Rinaldo from June 20, 2018 through October 25, 2019. The Town Manager contacted the plaintiffs' attorney to obtain legal advice concerning the incidents described by the employee. The plaintiffs' attorney requested that the Town Manager inquire whether or not the employee had any notes, and if so, whether the employee would provide any notes that the employee had concerning the incidents to the attorney. The employee complied with the attorney's request by providing a copy of the log to the Town Manager who then provided the log to the attorney. The Town Manager did not retain a copy of the log, but the attorney did. Accordingly, the employee's log ultimately remained solely with the employee and

[1] The employee's log is an eleven page document with the employee's personal observations of work related activities of Chief Rinaldo from June 20, 2018 through October 25, 2019. The hearing officer found, and it appears undisputed, that the log was prepared by the employee for the employee's own personal purposes.

the plaintiffs' attorney. [2] The plaintiffs' attorney provided legal advice to the town based in part upon the log.

Via the November 11, 2019 memorandum, Chief Rinaldo was placed on administrative leave by the Town Manager. Thereafter, the Town Manager and Chief Rinaldo negotiated and executed a severance agreement.

If the employee's log qualifies as a public record under FOIA and if it is not protected by the attorney-client privilege, then the record would be responsive to the complainant's request and is disclosable under FOIA. The plaintiffs' attorney provided a copy of the log to the FOIC for in camera review. The employee's log is the only document at issue in this appeal.

The plaintiffs are aggrieved because they appeal from an adverse final decision of the FOIC finding that the plaintiffs violated FOIA and ordering the plaintiffs to produce the employee's log to the complainant.

STANDARD OF REVIEW:

This appeal is brought pursuant to the Uniform Administrative Procedure Act (UAPA), General Statutes § 4-183. [3] Judicial review of an administrative decision in an appeal under the

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[2] The plaintiffs' attorney returned the original log to the Town Manager who returned it to the employee. The plaintiffs' attorney retained a copy of the log, but the Town Manager did not.

[3] 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

UAPA is limited. *Murphy* v. *Commissioner of Motor Vehicles*, 254 Conn. 333, 343, 757 A.2d 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." (Internal quotation marks omitted.) *Dept. of Public Safety* v. *Freedom of Information Commission*, 298 Conn. 703, 716, 6 A.3d 763 (2010).

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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."

ANALYSIS:

The analysis in this matter turns upon two potential issues. First, a determination must be made as to whether or not the employee's log is a public record disclosable within the meaning of FOIA. [4] Second, a determination must be made concerning whether the employee's log is exempted from disclosure under FOIA as a communication protected by the attorney-client privilege.

A. Public Record

The first issue requires consideration of General Statutes §§ 1-210 (a), 1-212 (a), and 1-200 (5). Section 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." (Emphasis added.)

[4] The court notes that the plaintiffs did not timely challenge the status of the log as a public record in the agency proceeding below. When the log was requested by the hearing officer for in-camera review, the plaintiffs' attorney voluntarily provided the log on behalf of the town. The only defense to disclosure effectively asserted below was the attorney-client privilege.

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 public records[5] kept or maintained by any public agency subject to inspection or copy by members of the public unless such records are exempt by federal or state law. There is a presumption that all public records are open unless an exemption is found in law.

The definition of a public record in § 1-200 (5) is very broad. It is undisputed that the log relates to the conduct of the public's business. The log contains the town employee's observations of what the employee believed was misconduct by the town's chief of police. [6] It is also clear that the log was received and used by the town in the function of the town's operations. The log was voluntarily provided by the employee to the Town Manager and then to the town attorney to assist the town in analyzing and addressing potential issues of misconduct by its chief of police. The Town Manager certainly requested the log from the employee so that

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[5] Public records are defined in General Statutes § 1-200 (5) as "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."

[6] The court notes that the employee was a managerial level employee of the town who was recording in the log what the managerial level employee believed to be misconduct by the town's Chief of Police. In the town's reply brief at page 8, the town actually argues that this managerial level employee of the town was "an agent of the Town . . . acting in their official capacity" when creating the log. Pls.' Reply, p. 8. This argument further supports the conclusion that the log was a public record maintained or kept on file by the town.

the log could be used in the town's investigation and decision-making process. Whether the log formed a basis for the town attorney's subsequent advice or not, it was clearly requested and used to assist the town in its investigation and decision-making process. It is also undisputed in this matter that the employee log was created by the employee for the employee's own personal use. However, the use of the document was transformed into a public use once the document was voluntarily provided to the Town Manager and the town attorney for use in the town's business. In November of 2019, upon request of the plaintiffs' attorney,[7] the employee provided a copy of the log to the Town Manager who then provided it to the attorney. The Town Manager did not keep a copy of the log. The plaintiffs' attorney provided a copy of the log to the FOIC for in camera review. In view of all of the foregoing, the court concludes that the log is a public document within the definition provided for in § 1-200 (5) because the information contained in the log relates to the conduct of the public's business and was voluntarily provided to the Town Manager and the town attorney who used the log in the conduct of the public's business.

Accordingly, pursuant to §§ 1-210 (a) and 1-212 (a), the complainant was entitled to the log in response to his FOIA request if the log was "maintained or kept on file by any public agency." In this case the log was voluntarily given by the employee[8] to the Town Manager and

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[7] The town's attorney is an independent attorney who is not an employee of the Town of Avon.

[8] The court notes that the employee was a managerial level employee within the town who voluntarily initiated the actions of the town by proactively approaching the Town Manager to discuss the employee's concerns about the

the town attorney for the purpose of using the log in the public's business. [9] The town attorney used the log to advise the town and then the town acted on the advice of the attorney in suspending, negotiating a severance agreement with, and severing the employment of its chief of police. [10] Thus, the Town Manager, the town attorney and the town all acted upon the information contained in the log. The town attorney kept and maintained a copy of the log, but returned the original to the Town Manager, who returned the original to the employee. The town attorney provided a copy of the log to the FOIC. [11] The court interprets "maintained or kept on file" in § 1-210 (a) as meaning within the possession, custody or control of the public agency. Under the circumstances of this matter, where the employee voluntarily gave the log to the Town Manager and the town attorney for use in the public business, the log was actually used in the

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town's chief of police. It appears reasonable to infer that the employee had the intention of provoking town action if such action was deemed appropriate. Further, it should be noted that the employee voluntarily provided the log to the Town Manager for the very purpose of using the log in the town's investigation and decision-making process.

[9] It appears indisputable that the employee understood that he was providing the log so that the town could investigate and act on the alleged misconduct detailed in the log if such action was deemed appropriate by the town. Accordingly, the employee understood that the employee was providing the log so that it could be used in the public's business. The suspension and severing of employment with the town's chief of police as a result of alleged misconduct is certainly a substantive and important act within the public's business.

[10] The causal connections are reasonable inferences from the evidence and from the sequence and timing of events, and become very clear when the log itself is considered.

[11] In this regard, it should be noted that the employee provided the log to the Town Manager. The attorney received the log from the Town Manager, not the employee. Accordingly, the town and the Town Manager, as the provider of the log to the attorney, remain capable of directing their own attorney concerning further provision of the log. This is confirmed by the fact that the attorney actually provided a copy of the log to the FOIC on behalf of the town, the attorney not being a party to the administrative proceeding himself.

public business, and a copy of the log remains in the file of the town attorney who was provided with the log by the Town Manager, the court concludes that the town maintained or kept the log on file within the meaning of §§ 1-210 (a) and 1-212 (a). In view of the foregoing, the log is disclosable under FOIA unless an exemption covers the document.

B. Attorney-Client Privilege

Protection of the attorney-client privilege is codified in General Statutes § 1-210 (b) (10) which provide in pertinent part as follows:

> "(b) Nothing in the Freedom of Information Act shall be construed to require the disclosure of: . . .
> (10) Records, tax returns, reports and statements exempted by federal law or 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 the general statutes**, including any 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 . . . ." (Emphasis added.)

In general, the attorney-client privilege protects confidential communications between a client, which in this context can include public officials and employees of the town acting in the performance of their duties for the town, and an attorney for the purpose of, or in furtherance of, the provision of legal advice to the client. See *Maxwell* v. *Freedom of Information Commission*, 260 Conn. 143, 794 A.2d 535 (2002). In the administrative proceeding below, it was the

plaintiffs' burden to prove the applicability of the attorney-client privilege to the log and to prove the applicability of the exemption provided for in § 1-210 (b) (10).

In this matter, it is undisputed that the log was created by the employee for the employee's personal use and the log's creation pre-dated the plaintiffs' attorney's request to review the log. In fact, the log pre-existed any consideration of the alleged misconduct by the Chief of Police by the town or the town attorney. Thus, the log was a pre-existing document and was not created for the purpose of a communication between the town and its attorney. It is also undisputed that the log was voluntarily provided to the plaintiffs' attorney at the attorney's request for the purpose of facilitating the attorney's provision of legal advice to the town. Under the foregoing circumstances, it is clear that the log is not a memorialization of a communication between a client and the attorney because the log pre-existed any communication between the town and its attorney concerning the issues at hand. It is also clear that the log was not created with the intent of providing a communication to the town's attorney, because it is undisputed that the employee created the log for the employee's personal purposes and it was only provided to the attorney after the attorney asked for it. Lastly, the hearing officer did not find, and the record contains no evidence indicating, that the log was edited, changed or transformed for the purpose of providing it to the attorney for advice. Instead, the hearing officer found, and the record supports a finding, that the employee merely provided the pre-existing log to the Town Manager at, and because of, the attorney's request. A document that was created prior to any communications with an attorney, which document was created for a purpose other than to

communicate information to an attorney, does not become privileged merely by the provision of that document to an attorney. [12]

The FOIC concluded that the employee log was not protected by the attorney client privilege. In view of the foregoing analysis, the court respectfully agrees with the FOIC's conclusion in this regard. The attorney-client privilege was the only exception to FOIA disclosure requirements that was presented or argued. [13]

In view of the foregoing, the log in the possession of the town's attorney was a public record, kept and maintained by the town, and not exempted from disclosure under FOIA by any exemption asserted to the FOIC by the plaintiffs. Accordingly, the FOIC's decision to order disclosure of the log in response to the complainant's FOIA request was not in error. On appeal, the plaintiffs have failed to meet their burden of establishing that the FOIC's Final Decision was

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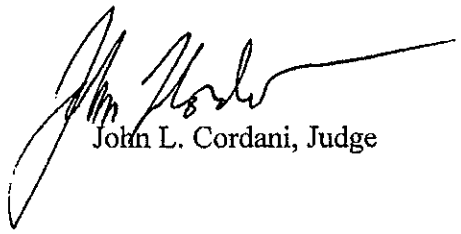
[12] The very fact that the document was provided to an attorney for the purpose of formulating legal advice might have been protected by the work product doctrine. However, this protection has apparently been waived here by the plaintiffs' attorney revealing the foregoing fact in open litigation and directly providing a copy of the log from the attorney's files. Further, the plaintiff has made no argument concerning the work product privilege.

[13] The plaintiffs' brief makes passing mention that the employee desires to keep the log private because it mentions a medical condition of the employee. This claim was not raised by the plaintiffs in the administrative proceeding below and cannot now properly be raised with this court on appeal for the first time. No claim for exemption from disclosure pursuant to § 1-210 (b) (2) was made below. This court reviews agency decisions in accordance with the standard of review but should not act upon issues not presented to or ruled upon by the agency below. The court notes that the employee was not a participant in the administrative proceeding below, is not a party to this appeal and has not raised any privacy concerns regarding the log that the employee voluntarily provided to the Town Manager and the town attorney. Further, no argument was presented that the log was equivalent to a personnel file. See *Dragan* v. *Connecticut Medical Examining Board*, 223 Conn. 618, 632, 613 A.2d 739 (1992); *Ogden* v. *Zoning Board of Appeals*, 157 Conn. App. 656, 665, 117 A.3d 986, cert. denied, 319 Conn. 927, 125 A.3d 202 (2015).

(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. Accordingly, the court must respectfully dismiss the appeal.

ORDER:

The appeal is dismissed.



John L. Cordani, Judge