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SUPERIOR COURT

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DOCKET NO. HHB-CV24-6088967-S

SUPERIOR COURT

TOWN MANAGER, TOWN OF GROTON
AND TOWN OF GROTON

JUDICIAL DISTRICT
NEW BRITAIN

JUDICIAL DISTRICT OF
NEW BRITAIN

v. : AT NEW BRITAIN
FREEDOM OF INFORMATION COMMISSION : MARCH 12, 2026

MEMORANDUM OF DECISION

This administrative appeal by the defendant town of Groton (the town) arose as follows. Two residents of the town sought documents relating to the town's position on short term rental property (STR) and such property's relationship with the town's zoning regulation.¹ The two residents were not satisfied by the response of the town to their request and made a complaint to the FOIC. The FOIC designated a hearing officer to hear the complaint. He issued a decision that was adopted by the FOIC on May 8, 2024.

In the final decision, the FOIC, based on the hearing officer's findings, set forth a series of documents that were submitted in camera by the town with a claim that these documents were protected from disclosure by the attorney-client privilege.

The hearing officer and the final decision held that the documents were subject to the attorney-client privilege, but in large measure this privilege has been waived by the town. The

¹ These residents who later became complainants at the freedom of information commission (FOIC) were given notice of an appeal by the town from the final decision of the FOIC but have not intervened in this administrative appeal.

*Electronic notices sent to pt attys K. Kelly / R. Cody and
FOIC acty N. Smarra. A. Jordanopoulos, Officer 3/12/26*

town's public statements about these documents had caused a waiver. There were a minority of the documents for which the privilege had not been waived and these were properly withheld. The final decision ordered the town to provide the documents not subject to privilege and to follow the requirements of the FOIA in the future.

The town has brought an administrative appeal from this final decision. Because of the order of disclosure of certain records, the court finds that the town has standing to bring this appeal. Conn. Gen. Stat. § 4-183 (a).

The issues raised by the town in its appeal are reviewed under the following standard, taken from *Chief of Police v. FOIC*, Superior Court, judicial district of New Britain, Docket No. HHB-CV-23-6081763-S (2025):

“Our resolution of [administrative appeals] is guided by the limited scope of judicial review afforded by the Uniform Administrative Procedure Act; General Statutes § 4-166 et seq.; to the determinations made by an administrative agency. We must decide, in view of all of the evidence, whether the agency, in issuing its order, acted unreasonably, arbitrarily or illegally, or abused its discretion. . . . Even as to questions of law, the court's ultimate duty is only to decide whether, *in light of the evidence*, the agency has acted unreasonably, arbitrarily, illegally, or in abuse of its discretion. . . . Conclusions of law reached by the administrative agency must stand if the court determines that they resulted from a correct application of the law to the facts found and could reasonably and logically follow from such facts. . . . Although the interpretation of statutes is ultimately a question of law . . . it is the well established practice of this court to accord great deference to the

construction given a statute by the agency charged with its enforcement.” (Citations omitted; emphasis in original; internal quotation marks omitted). *Rocque v. Freedom of Information Commission*, 255 Conn. 651, 658, 774 A.2d 957 (2001).

“Our review of an agency’s factual determination is constrained by . . . § 4-183 (j), which mandates that a 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 . . . (5) clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record. . . . This limited standard of review dictates that, with regard to questions of fact, it is neither the function of the trial court nor of this court to retry the case or to substitute its judgment for that of the administrative agency. . . . An agency’s factual determination must be sustained if it is reasonably supported by substantial evidence in the record taken as a whole.” (Citations omitted; internal quotation marks omitted). *Id.*, 658-59.

“It must be noted initially that there is an overarching policy underlying [the Freedom of Information Act] . . . favoring the disclosure of public records. . . . It is well established that the general rule under the act is disclosure, and any exception to that rule will be narrowly construed in light of the general policy of openness expressed in the . . . legislation [comprising the act]. . . . The burden of establishing the applicability of an exemption clearly rests upon the party claiming the exemption. . . . This burden requires

the claimant of the exemption to provide more than conclusory language, generalized allegations or mere arguments of counsel. Rather, a sufficiently detailed record must reflect the reasons why an exemption applies to the materials requested.” (Citations omitted; internal quotation marks omitted). Id. 660-61.

The first issue raised by the town is that the hearing officer erred in expanding the complainants’ request from a single document to a series of documents.

“The overarching legislative policy of the FOIA is one that favors the open conduct of government and free public access to government records. . . . As we have repeatedly noted, [o]ur construction of the FOIA must be guided by the policy favoring disclosure. . . . As a practical matter, the FOIA is used repeatedly by members of the public who are unschooled in technical, legalistic language distinctions. It would be unreasonable to deny a member of the public access to the FOIA simply because of arguable imperfections in the form in which a request for public records is couched. A talismanic insistence on the use of [certain words] would be inconsistent with the spirit and the policy of the FOIA.” (Citations omitted; internal quotation marks omitted). *Perkins v. Freedom of Information Commission*, 228 Conn. 158, 166-67, 635 A.2d 783 (1993); see also *Commissioner of the Dept. of Education v. Freedom of Information Commission*, Superior Court, judicial district of New Britain, Docket No. HHB-CV-23-6080532-S (March 27, 2025, *Budzik, J.*) (where request was “sufficiently clear to demonstrate the existence of the public records [sought]” and department was “aware of what public records [were being sought],” court would not construe request so narrowly as to preclude disclosure). When “interpreting what constitutes a FOI request, courts must defer to the exercise of

administrative judgment.” *East Lyme Teachers Association v. Freedom of Information Commission*, Superior Court, judicial district of Hartford, Docket No. CV-97-0571973-S (June 5, 1998, *DiPentima, J.*).

Here, the original request used language pulled from a document the town had publicized, seeking a “longstanding opinion of the Town’s Zoning Official and the Town Attorney” relating to short-term rentals. The record shows that this request was contextualized with reference to the town meeting discussing short-term rentals and “anything [the town attorney] has in writing [regarding] [short-term rentals]. . . .” The commission found that the request was sufficiently clear and that the town was aware of what records were being sought and, therefore, that the complainants’ use of the word “longstanding” in part of the request could not be read to prevent the disclosure of opinions the town considered recent or otherwise not “longstanding,” as well as documents that did not contain the exact phrase used in the request.

This conclusion is consistent with *Perkins v. Freedom of Information Commission*, supra, 228 Conn. 158, and *Dept. of Education v. Freedom of Information Commission*, supra, Superior Court, Docket No. HHB-CV-23-6080532-S. To read the request without its accompanying context and preclude disclosure of otherwise responsive documents merely because they did not contain the exact phrase or were not “longstanding,” a nebulous descriptor, would be contrary to *Perkins* and the intent of the Freedom of Information Act. Accordingly, the court defers to the commission per *East Lyme Teachers Association v. Freedom of Information Commission*, supra, Superior Court, Docket No. CV-97-0571973-S.

As for the town’s argument that this interpretation of the request violated their due

process rights regarding notice, the context accompanying the request—namely, the request for “anything [the town attorney] has in writing [regarding] [short-term rentals]”—was sufficient to put the town on notice as to what matters were before the commission.

The second issue is that the FOIC erred by finding that the attorney-client privilege had been waived.

“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. . . . It is undisputed that the privilege was created to encourage full and frank communication between attorneys and their clients and thereby promote broader public interests in the observation of law and administration of justice. . . . Exceptions to the attorney-client privilege should be made only when the reason for disclosure outweighs the potential chilling of essential communications. It is obvious that professional assistance would be of little or no avail to the client, unless his legal adviser were put in possession of all the facts relating to the subject matter of inquiry or litigation, which, in the indulgence of the fullest confidence, the client could communicate. And it is equally obvious that there would be an end to all confidence between the client and [the] attorney, if the latter was at liberty or compellable to disclose the facts of which he had thus obtained possession.” (Citations omitted; internal quotation marks omitted.)

Metropolitan Life Ins. Co. v. Aetna Casualty & Surety Co., 249 Conn. 36, 52, 730 A.2d 51 (1999).

“[V]oluntary disclosure of the content of a privileged attorney communication constitutes

waiver of the [attorney-client] privilege.” *McLaughlin v. Freedom of Information Commission*, 83 Conn. App. 190, 197, 850 A.2d 254, cert. denied, 270 Conn. 916, 853 A.2d 530 (2004). Here, the record shows that the town attorney, in the presence of town official who did not object, discussed the communications for which attorney-client privilege is claimed. The town then published minutes of the town meeting, including a description of what the town attorney said. The town also published a recording of the entire meeting online. Therefore, there was a sufficient factual basis for the commission’s determination that the privilege had been waived and the issue is only how far that waiver extends.

Per *In re von Bulow*, 828 F.2d 94 (2d Cir. 1987), the attorney-client privilege is waived in an extrajudicial context only as to attorney-client matters actually disclosed. In *von Bulow*, an attorney published a book about his client’s trial, appeal, retrial, and eventual acquittal, with the consent and support of the client, who helped promote the book. The book contained extracts of conversations between the attorney and client. The Second Circuit expressly rejected the application of “the fairness doctrine” used in litigation contexts and the holding of the district court that “disclosure of a portion of a privileged conversation entitles an adversary to discovery of the matters discussed in the remainder of the conversation”; *id.*, 101; when the disclosure is an extrajudicial one. The court ultimately held that “the extrajudicial disclosure of an attorney-client communication . . . does not waive the privilege as to the undisclosed portions of the communication,” but only as to “the particular matters *actually disclosed*. . . .” (Emphasis in original.) *Id.*, 101. “[R]elated matters not so disclosed remain confidential.” *Id.*, 103. The court rejected the subject matter waiver rule and determined that “so long as [the] disclosures are and

remain extrajudicial, there is no legal prejudice that warrants a broad court-imposed subject matter waiver.” (Emphasis omitted.) *Id.*, 103.

In short, under *von Bulow*, “[a]bsent a finding that the subject matter waiver rule applies, only those communications actually revealed have lost their privileged status.” *Ghio v. Liberty Mutual Underwriters, Inc.*, Superior Court, judicial district of Hartford, Docket No. HHD-CV-X07-19-6104759-S (May 12, 2023, *Noble, J.*).

The *von Bulow* standard has not been explicitly adopted by any appellate courts in Connecticut; see *U.S. Pain Foundation, Inc. v. Daponte*, Superior Court, judicial district of Hartford, Docket No. X07-CV-20-6159647-S (March 10, 2023, *Noble, J.*) (“[w]hile there is no appellate authority in this state detailing the parameters of the subject-waiver rule, this court is persuaded that the limitation set forth in *In re von Bulow* is reasonable and justified”); but the Superior Court noted in *Berlin Public Schools v. Freedom of Information Commission*, Superior Court, judicial district of New Britain, Docket No. CV-15-6029080-S (February 2, 2016, *Schuman, J.*), which both parties cite, that *von Bulow* is the leading case in the Second Circuit and nationally on extrajudicial disclosures.

In *Berlin Public Schools v. Freedom of Information Commission*, *supra*, Superior Court, Docket No. CV-15-6029080-S, the court applied and elaborated on *von Bulow*, noting that the “actually disclosed” standard “focuses on the substance rather than the exact wording of the disclosure. . . . [D]isclosure of the substance of a privileged communication [in an extrajudicial context] is as effective a waiver as a direct quotation since it reveals the ‘substance’ of the statement. . . . On the other hand . . . the ‘actually disclosed’ standard is not equivalent to a broad

waiver of communications on the same ‘subject matter.’ . . . [T]he purpose of the inquiry into deciding what was ‘actually disclosed’ should be merely to identify what portion of the attorney-client communication confirms what was actually disclosed.” (Citations omitted; internal quotation marks omitted.) *Berlin Public Schools v. Freedom of Information Commission*, supra, Superior Court, Docket No. CV-15-6029080-S. The court held that the determination of whether a communication has actually been disclosed is a factual one that requires the commission to “compare the disclosure with the [communication], and, under the standards discussed here and employing the procedures it deems appropriate, determine what portion of the [communication] . . . [was] ‘actually disclosed.’” *Id.*

Likewise, in *Derby Board of Police Commissioners v. Freedom of Information Commission*, Superior Court, judicial district of New Britain, Docket No. CV-17-6039551-S (November 27, 2018, *Cohn, J.T.R.*), this court followed the *Berlin* and *von Bulow* “actually disclosed” standard, observing that under this rule, “the [petitioner] had the option of quoting brief passages from the . . . report without risking the full report being disclosed.” The court deferred to the commission’s factual findings of what had actually been disclosed.

Although “[t]he court shall not substitute its judgment for that of the agency as to the weight of the evidence on questions of fact,” per General Statutes § 4-183 (j), whether an exemption applies is a matter of law. See *Lash v. Freedom of Information Commission*, 300 Conn. 511, 517, 14 A.3d 998 (2011) (appellate review of exhibits required to determine whether attorney-client privilege applied); see also *Stamford v. Freedom of Information Commission*, 241 Conn. 310, 317-18, 696 A.2d 321 (1997) (determination of whether exemption applied was “a

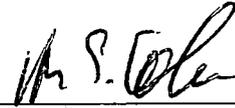
matter of law”). “Under the [Uniform Administrative Procedures Act], it is [not] the function . . . of this court to retry the case or to substitute its judgment for that of the administrative agency. . . . [T]he court’s ultimate duty is only to decide whether, in light of the evidence, the [agency] has acted unreasonably, arbitrarily, illegally, or in abuse of its discretion.” (Internal quotation marks omitted.) *Commissioner of Emergency Services & Public Protection v. Freedom of Information Commission*, 330 Conn. 372, 379, 194 A.3d 759 (2018).

In the present case, the record shows that the disclosure was an extrajudicial one made by the town attorney at a town meeting with no ongoing or anticipated litigation. Thus, the commission correctly determined that the “actually disclosed” standard applies. In an in camera review, the commission compared the disclosure in the meeting minutes with the disputed communications, following the standard set forth in *Berlin*. The commission’s decision, *Freedom of Information Commission*, Docket No. FIC 2023-0248 (April 15, 2024), paragraphs 50-51, reveals that it compared the documents line-by-line; for instance, “lines 280-282, up to and including the comma on line 282” in one document were found to be disclosed, while “line 282, after the comma, and lines 283-285” were not. Ultimately, the commission found that some parts of the documents had actually been disclosed in the meeting minutes and some had not, and ordered the town to produce the parts actually disclosed.

The disputed documents are not in the record, but the commission applied and followed the correct legal standard and does not appear to have acted unreasonably, arbitrarily, illegally, or in abuse of its discretion.

The administrative appeal is therefore dismissed.

So Ordered.

A handwritten signature in black ink, appearing to read "H. S. Cohn", written over a horizontal line.

Henry S. Cohn, JTR