CV 17 6039551 S	:	SUPERIOR COURT
CITY OF DERBY BOARD OF POLICE COMMISSIONERS	:	JUDICIAL DISTRICT
V.	:	OF NEW BRITAIN
FREEDOM OF INFORMATION COMMISSION AND PATRICIA COFRANCESCO	:	NOVEMBER 27, 2018

MEMORANDUM OF DECISION

The plaintiff board, City of Derby Board of Police Commissioners, brings this administrative appeal[1] from a June 14, 2017 final decision of the freedom of information commission (FOIC), holding that the board must release a report regarding the town's police chief.[2]

The record shows that Attorney Cofrancesco wrote to the board on October 13, 2016 asking for records arising from a previous matter that she had brought to the board that had resulted in the discipline of the police chief. On November 2, 2016, the board disclosed certain

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[1]The defendant FOIC has ruled against the board; therefore it is aggrieved under General Statutes § 4-183 (a).

[2]A complainant, also named as a defendant in this appeal, attorney Patricia Cofrancesco, has received permission from the court to withdraw from this case as an attorney and she did not file a brief in the appeal.

mailed to official Reporter of Judicial Decisions
electronic notice sent to all counsel of record.
A. Jordanopoulos, ct officer 11-27-18

records, but refused Attorney Cofrancesco's request as to a report developed during the prior proceedings. Attorney Cofrancesco then filed a complaint with the FOIC that was presented at a hearing on February 23, 2017. The hearing officer issued a preliminary ruling on April 10, 2017. The FOIC issued its final decision in favor of Attorney Cofrancesco on June 14, 2017.

The final decision provides in part as follows:

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2. It is found that by letter dated October 13, 2016, the complainant requested from the respondents . . . (c) a copy of any report/investigation/findings rendered by the City of Derby and/or its representative to the Derby Board of Police Commissioners arising out of the conduct of Gerald Naroski over the past five years.

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4. By letter dated November 15, 2016, and filed November 18, 2016, the complainant appealed to this Commission alleging that the respondents violated the Freedom of Information ("FOI") Act by denying the request for the report.

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9. It is concluded that the report is a public record within the meaning of §§ 1-200(5) and 1-210(a), G.S.

10. It is found that a complaint was filed by a former city employee against the Derby police chief alleging misconduct by the chief. It is found that upon receipt of the complaint, the chairman of the commission initially sought legal advice from the city's corporation counsel regarding the process that should be followed to investigate the complaint, and to ensure that all legal requirements related to that process were followed. It is found that corporation counsel informed the chairman that we could not advise him due to a conflict, and suggested the chairman obtain outside counsel. It is found that at its December 14, 2015 meeting, the commission voted to hire Attorney Eric Brown to conduct an investigation of the allegations contained in the complaint, and to provide legal advice to the commission with respect to the complaint specifically, and the process generally.

11. It is found that Attorney Eric Brown conducted an investigation into the allegations contained in the complaint and issued a written report containing the results of his investigation (i.e., fact finding), and his legal advice. The complainant requested, and was denied, a copy of this report.

12. It is found that by letter dated March 8, 2016, in advance of the commission's March 16, 2016 special meeting at which the report was to be discussed, the commission provided a

copy of the report to the police chief. It is found that the police chief is not a member of the commission.[3]

13. It is found that at a special meeting on March 16, 2016, the commission, after discussing the report in executive session, voted in open session to find that the police chief had violated § 2.2.3.1 of the Derby Police Department's Social Media Policy, to notify the police chief in writing of this finding, and to place a copy of such written notification in the police chief's personnel file. The commission further voted that the written notification should be removed from the chief's personnel file on October 20, 2016.

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17. Based upon the evidence offered at the hearing, it is found that with regard to the communication at issue, i.e., the report, Attorney Eric Brown acted in his professional capacity as an attorney on behalf of the commission. In addition, the chairman testified, and it is found, that the commission would not have hired Attorney Brown to conduct the investigation and to prepare the report had he not been an attorney. Furthermore, it is found that the communication to the legal advice sought by the commission and the communication were made in confidence.

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[3]The Commission's attorney's letter did not set forth the charges against the chief, summarize the Brown report, or quote a few lines from the report. It merely attached the report with notice of the hearing date, March 16, 2016. (Return of Record, p. 86).

18. It is concluded, based upon the foregoing, that, initially, the report was a privileged communication between Attorney Brown and the commission.

19. However, the privilege is waived when the communications are voluntarily disclosed to third parties. . . .

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21. The Commission does not question the assertion that the police chief was entitled to due process before he was disciplined. However, it is found that the respondents failed to prove that due process required that the chief receive a copy of the report.

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23. As noted in paragraph 13 above, the police chief was disciplined, not dismissed. Based upon the plain language of § 7-278, G.S., it is concluded that such statute applies only in situations in which there is a dismissal of a police chief. Moreover, even if § 7-278, G.S. applied in a situation in which a police chief is disciplined and not dismissed, it is concluded that such statute did not require the commission to provide a copy of the report to the police chief, but rather, required only that the commission provide notice "in writing of the specific grounds for such dismissal."

24. Based upon the foregoing, it is concluded that the commission voluntarily disclosed the report to the police chief, and it is concluded that such disclosure constituted a waiver of the attorney-client privilege.

25. Accordingly, it is concluded that the respondents violated §§ 1-210(a) and 1-212(a), G.S., by denying the request described in paragraph 2(c) 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 a copy of the record described in paragraph 2(c), above, to the complainant free of charge.

2. Henceforth, the respondents shall strictly comply with the disclosure requirements in §§ 1-210(a) and 1-212(a), G.S. (Return of Record, pp. 187-191)

The sole issue in this appeal is whether the attorney-client privilege, allowed by the FOIC as a exception to the release of a record[4], was waived by the board's furnishing a copy of the report to the police chief. The court must decide this issue under the following standard.

"We begin with the relevant legal principles and standard of review. This court reviews the trial court's judgment pursuant to the . . . UAPA. . . . Under the UAPA, it is [not] the function . . . of this court to retry the case or to substitute its judgment for that of the

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[4]See § 1-210 (b) (10).

administrative agency. . . . Even for conclusions of law, [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. . . . [Thus] [c]onclusions 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. . . . [Similarly], this court affords deference to the construction of a statute applied by the administrative agency empowered by law to carry out the statute's purposes. . . . Cases that present pure questions of law, however, 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. . . . Furthermore, when a state agency's determination of a question of law has not previously been subject to judicial scrutiny . . . the agency is not entitled to special deference. . . . We have determined, therefore, that the traditional deference accorded to an agency's interpretation of a statutory term is unwarranted when the construction of a statute . . . has not previously been subjected to judicial scrutiny [or to] a governmental agency's time-tested interpretation. Even if time-tested, we will defer to an agency's interpretation of a statute only if it is reasonable; that reasonableness is determined by [application of] our established rules of statutory construction. . . .

"When construing a statute, [o]ur fundamental objective is to ascertain and give effect to the apparent intent of the legislature. . . . In seeking to determine that meaning, General Statutes § 1-2z directs us first to consider the text of the statute itself and its relationship to other statutes. If, after examining such text and considering such relationship, the meaning of such text is plain and unambiguous and does not yield absurd or unworkable results, extratextual evidence of the meaning of the statute shall not be considered. . . . The test to determine ambiguity is whether the statute, when read in context, is susceptible to more than one reasonable interpretation. . . . When a statute is not plain and unambiguous, we also look for interpretive guidance to the legislative history and circumstances surrounding its enactment, to the legislative policy it was designed to implement, and to its relationship to existing legislation and common law principles governing the same general subject matter. . . . The issue of statutory interpretation presented in this case is a question of law subject to plenary review." (Citations omitted; internal quotation marks omitted.) *Commissioner of Emergency Services* v. *FOIC*, 330 Conn. 372, 379-380 (2018).

With regard to issues of fact:

"Our review of the commission's decision is governed by the Uniform Administrative Procedure Act . . . and the scope of that review is very restricted. . . . 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." (Internal quotation marks omitted.) *Lash* v. *FOIC*, 300 Conn. 511, 517 (2011).

There is no dispute in this case that "once the confidence protected has been breached, the privilege has no valid continued office to perform. . . . Similarly, the voluntary disclosure of confidential or privileged material to a third party . . . generally constitutes a waiver of privileges with respect to that material." (Internal quotation marks omitted). *Rosado* v. *Bridgeport Roman Catholic Diocesan Corp.*, 292 Conn. 1, 58 (2009). See also *Berlin Public Schools* v. *FOIC*, Superior Court, judicial district of New Britain, Docket No. CV 15 6029080 (February 2, 2016). There factually, Berlin had voluntarily disclosed a portion of a report in its final decision. There the court held that at a minimum what was "actually disclosed" should be made public as a waiver of the attorney-client privilege. Here factually, the FOIC found in Finding #12 that the full report was "actually disclosed" to the police chief.

The board replies that the disclosure of the report to the police chief was necessitated by the principle that a public employee should not be disciplined without being given notice of the charges against him.[5] The report, according to the board, was essential for that purpose.

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[5]If the report were compelled by law to be released, its disclosure would not amount to a voluntary waiver. See, e.g., *Transamerica Computer Corporation* v. *International Business Machines Corp.*, 573 F.2d 646, 651 (9th Cir. 1978).

Both § 7-278 and Connecticut Supreme Court cases, such as *Clisham* v. *Board of Police Commissioners*, 223 Conn. 354, 358 (1992) do not, however, require the *report* to be released. The statutory protection and the case law required the board to provide notice and a hearing to the police chief.[6] As the Appellate Court noted in *South Windsor* v. *South Windsor Police Union*, 57 Conn. App. 490, 505 (2000), the due process in an administrative hearing is flexible. So long as the chief received notice of the charges followed by a formal hearing, there was no constitutional, statutory or other law requiring him to receive the report.[7]

The *Berlin Public Schools'* decision also indicates that the board had the option of quoting brief passages from the Brown report without risking the full report being disclosed. The court concludes that with the several options other than complete disclosure available to the board, the mailing of the report to the chief was "voluntary."

The court, as did the court in *Berlin*, also rejects a "fairness" approach to disclosure. The public's right to know must prevail here over the non-disclosure of the Brown report, as might be the case in general personnel matters. Discipline was imposed, and taxpayers had funded the Brown report. "In those limited circumstances where the legislature has determined that some other public interest overrides the public's right to know, it has provided explicit

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[6]Of course, as the complainant and the FOIC have noted, the board had not brought a case against the police chief for his dismissal; only possible discipline was being considered.

[7]Finding #24 of the final decision regarding voluntary disclosure is also supported by substantial evidence.

statutory exceptions. . . . We have held that these exceptions must be narrowly construed." *Commissioner of Emergency Services*, supra at 390, quoting *Lieberman* v. *State Board of Labor Relations*, 216 Conn. 253, 266 (1990).

The board also argues that this court should adopt a rule that since the chief alone received the report, the attorney-client privilege should apply to all others seeking the report. This is known as the doctrine of "selective waiver." The "selective waiver" rule has, however, has been rejected by our Supreme Court. *Rosado*, supra at 61.

For the foregoing reasons, the appeal is dismissed.

BY THE COURT

Henry S. Cohn, J.T.R.