

FREEDOM OF INFORMATION COMMISSION  
OF THE STATE OF CONNECTICUT

In the Matter of a Complaint by

FINAL DECISION

Gerald Daley,

Complainant

against

Docket #FIC 2018-0603

Mayor, City of Middletown;  
Clerk, Common Council, City  
of Middletown; City Clerk, City  
of Middletown; Common Council,  
City of Middletown; and City of  
Middletown,

Respondents

September 11, 2019

The above-captioned matter was heard as a contested case on January 3, 2019, at which time the complainant and the respondents appeared, stipulated to certain facts and presented testimony, exhibits and argument on the complaint. For purposes of hearing, the matter was consolidated with Docket #FIC 2018-0604; Gerald Daley v. Mayor, City of Middletown; Director of Information, City of Middletown; City Clerk, City of Middletown; and City of Middletown.

After consideration of the entire record, the following facts are found and conclusions of law are reached:

1. The respondents are public agencies within the meaning of §1-200(1), G.S.
2. It is found that the Common Council is the City of Middletown's legislative body, which is comprised of twelve members.
3. It found that at the time of the contested case hearing, the complainant was a member of the Common Council.
4. It is found that, in December 2017, a city employee complained that the mayor had unlawfully harassed her. It is further found that, around the same time, the city also received a complaint letter from a union representing city employees alleging that the mayor had been improperly soliciting campaign contributions from city employees.
5. It is found that, in response to these complaints, the Common Council passed a resolution authorizing the hiring of an outside law firm to assist it in conducting an

investigation into both the harassment complaint and the union complaint.

6. It is found that, in the wake of the allegations referenced in paragraph 4, above, the Common Council also created a special investigation subcommittee (the “subcommittee”). It is found that the subcommittee is comprised of the following three members: Councilwoman Mary Bartolotta, Councilman Sebastian Giuliano, and Councilman Thomas Serra.

7. It is found that the Common Council chose to interview only attorneys to assist it with the investigation and ultimately hired the law firm of LeClairRyan. Attorney Margaret Mason of LeClairRyan served as lead counsel on the investigation.

8. It is found that, by email dated September 7, 2018, the complainant sent the City Clerk and the Clerk of the Common Council the following public records request:

I am requesting an opportunity to inspect or obtain copies of public records comprising the 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.<sup>1</sup>

9. It is found that, by email dated September 10, 2018, Ashley A. Flynn, the City Clerk, acknowledged the request.

10. It is found that, by email dated September 11, 2018, Linda S. K. Reed, Clerk of the Common Council, acknowledged the request.

11. It is found that, by email dated October 5, 2018, the Mayor for the City of Middletown instructed the Clerk of the Common Council to disclose the requested records to outside counsel for the city so that the records could be reviewed for exempt material and then be disclosed to the complainant.

12. It is found that, by email dated October 10, 2018, some members of the respondent council urged the clerk not to follow the mayor’s instruction.

13. By letter dated and filed October 23, 2018, the complainant appealed to this Commission, alleging that the respondents violated the Freedom of Information Act (“FOI Act”) by failing to provide him with copies of the records described in paragraph 8, above.

14. With regard to the allegations that the respondents failed to disclose responsive, public records to the complainant, §1-200(5), G.S., provides:

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<sup>1</sup> The Commission notes that the complainant did not send the instant request to the Mayor for the City of Middletown and therefore the Mayor is removed a respondent.

“Public records or files” means 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.

15. Section 1-210(a), G.S., provides in relevant part that:

Except as otherwise provided by any federal law or state statute, all records maintained or kept on file by any public agency, whether or not such records are required by any law or by any rule or regulation, 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.

16. Section 1-212(a), G.S., provides in relevant part that “[a]ny person applying in writing shall receive, promptly upon request, a plain, facsimile, electronic or certified copy of any public record.”

17. It is found that the requested records are public records within the meaning of §§1-200(5), 1-210(a), and 1-212(a), G.S.

18. It is found that the records requested in paragraph 8, above, are the invoices for legal services submitted to the Common Council by LeClairRyan.

19. It is found that the City Clerk does not maintain the invoices. Accordingly, the complaint is dismissed against the City Clerk.

20. The remaining respondents, which are the Common Council and the Clerk of the Common Council, did, at all times relevant to this matter, maintain the requested invoices.

21. It is found that, on November 15, 2018, the complainant received the requested records with the names of city employees and the times and locations of the meetings that occurred between the employees and the attorneys at LeClairRyan redacted.

22. At the hearing, the complainant indicated that he was not challenging any redactions concerning the names of current city employees from the records, with the exception of the name of the Clerk of the Common Council. The complainant further indicated that he was challenging the redactions of the times and the places of the

meetings that involved city employees and LeClairRyan attorneys.

23. In response, the respondent Common Council contended that the portions of the records that have been withheld are exempt from public disclosure pursuant to §1-210(b)(2), G.S., (invasion of personal privacy); or §1-210(b)(10), G.S., (attorney-client privilege).

24. At the conclusion of the contested case hearing, the hearing officer ordered the respondents to submit all of the records at issue to the Commission for an in camera inspection. On January 15, 2019, the respondents submitted such records to the Commission. Such records shall be referred to as IC-2018-0603-1 through IC-2018-0603-18.

25. Section 1-210(b)(2), G.S., provides that nothing in the FOI Act shall be construed to require the disclosure of “[p]ersonnel or medical files and similar files the disclosure of which would constitute an invasion of personal privacy.”

26. The Supreme Court set forth the test for the exemption contained in §1-210(b)(2), G.S., in Perkins v. FOI Comm’n, 228 Conn. 158, 175 (1993). The claimant must first establish that the files in question are personnel, medical or similar files. Second, the claimant must show that disclosure of the records would constitute an invasion of personal privacy. In determining whether disclosure would constitute an invasion of personal privacy, the claimant must establish both of two elements: first, that the information sought does not pertain to legitimate matters of public concern, and second, that such information is highly offensive to a reasonable person.

27. Section 1-214, G.S., provides in relevant part that:

(b) Whenever a public agency receives a request to inspect or copy records contained in any of its employees’ personnel or medical files and similar files and the agency reasonably believes that the disclosure of such records would legally constitute an invasion of privacy, the agency shall immediately notify in writing (1) each employee concerned, provided such notice shall not be required to be in writing where impractical due to the large number of employees concerned and (2) the collective bargaining representative, if any, of each employee concerned. Nothing herein shall require an agency to withhold from disclosure the contents of personnel or medical files and similar files when it does not reasonably believe that such disclosure would legally constitute an invasion of personal privacy.

(c) A public agency which has provided notice under subsection (b) of this section shall disclose the records requested unless it receives a written objection from

the employee concerned or the employee's collective bargaining representative. . . . Upon the filing of an objection as provided in this subsection, the agency shall not disclose the requested records unless ordered to do so by the Freedom of Information Commission pursuant to section 1-206.

28. It is found that the respondents notified the city employees whose names appear in the legal invoices referenced in paragraph 8, above, and that such employees' union representatives filed timely objections to disclosure, within the meaning of §1-214, G.S.

29. It is found that all of the records referenced in paragraph 8, above, are legal bills issued from LeClairRyan to the Common Council in connection with work performed by LeClairRyan attorneys on the investigation referred to in paragraph 5, above.

30. It is found these legal bills do not constitute "personnel" or "similar" files within the meaning of §1-210(b)(2), G.S.

31. Accordingly, it is concluded that the Clerk of the Common Council's name, and dates and the locations contained within the invoices are not exempt from disclosure pursuant to §1-210(b)(2), G.S.

32. Finally, the respondents contend that the redacted portions of the legal bills are pursuant to the attorney-client privilege.

33. In this regard, §1-210(b)(10), G.S., permits the nondisclosure of "communications privileged by the attorney-client relationship...."

34. The applicability of the exemption contained in §1-210(b)(10), G.S., is governed by established Connecticut law defining the privilege. That law is well set forth in Maxwell v. FOI Commission, 260 Conn. 143 (2002). In that case, the Supreme Court stated that §52-146r, G.S., which established a statutory privilege for communications between public agencies and their attorneys, merely codifies "the common-law attorney-client privilege as this court previously had defined it." Id. at 149.

35. Section 52-146r(2), G.S., defines "confidential communications" as:

all oral and written communications transmitted in confidence between a public official or employee of a public agency acting in the performance of his or her duties or within the scope of his or her employment and a government attorney relating to legal advice sought by the public agency or a public official or employee of such public agency from that attorney, and all records prepared by the government attorney in furtherance of the rendition of such legal advice. . . .

36. The Supreme Court has stated that “both the common-law and statutory privileges protect those communications between a public official or employee and an attorney that are confidential, made in the course of the professional relationship that exists between the attorney and his or her public agency client, and relate to legal advice sought by the agency from the attorney.” Maxwell, supra. at 149.

37. The Supreme Court has further stated that, “[i]n 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. Olson v. Accessory Controls and Equipment Corp., et al., 254 Conn. 145, 157 (2000). As a general rule, “communications between client and attorney are privileged when made in confidence for the purpose of seeking legal advice.” Id.; citation omitted.

38. In the context of billing records, the Commission notes that it is generally accepted that an attorney’s billing statement and time records are protected by the attorney-client privilege only to the extent that they reveal litigation strategy and/or the nature of the services performed. See Bruno v. Bruno, FA0540049006S, 2009 WL 2451005 (Conn. Super. Ct. July 10, 2009). However, “. . . bills, . . . and time records which also reveal the motive of the client in seeking representation, litigation strategy, or the specific nature of the services provided, such as researching particular areas of law, fall within the privilege.” Id. at \*2; see also New Haven v. FOIC, et al., 4 Conn. App. 216, 220, 493 A.2d 283, 285 (1985) (trial court found, after conducting an in camera review of the billing records, that there was nothing in such records to suggest they came within the purview of the attorney-client privilege).

39. After a careful in camera inspection of the records, it is found that none of the redactions in this case are “oral or written communications” within the meaning of §52-146r(2), G.S. It is further found that the redacted information does not reveal the motive of the Common Council in seeking representation, litigation strategy or the specific nature of the services provided.

40. Accordingly, it is concluded that the date and place of the legal meetings and the name of the Clerk of the Common Council (to the extent such name is contained in the in camera records) are not exempt from disclosure pursuant to §1-210(b)(10), G.S.

41. Finally, as it has been found above, the Clerk of the Common Council did maintain the requested records. See ¶ 20, above. It is found that the Clerk of the Common Council reports to the Common Council and is a city employee under the Mayor. It is found that some members of the Common Council did not want the records at issue to be disclosed without redactions, while some members of the Common Council, such as the complainant (and the Mayor), were demanding that the clerk disclose the records without redactions. It is found that the Clerk of the Common Council was in an untenable position. Ultimately, it is found that the clerk chose not to disclose the requested records without redactions and to await the advice of counsel. It is concluded that the violation in this case cannot be attributed to the Clerk of the Common Council and the complaint is dismissed against her.

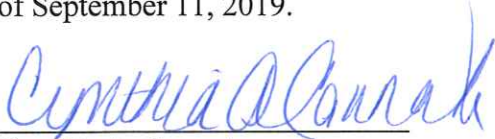
42. It is concluded that the remaining respondents violated the disclosure provisions of the FOI act when they disclosed the record at issue with the date and place of the legal meetings and the name of the Clerk of the Common Council (if such name is contained in the records) redacted.

The following order by the Commission is hereby recommended on the basis of the record concerning the above-captioned complaint.

1. The respondents shall forthwith provide the complainant with a copy of the legal invoices. In complying with this order, the respondents may redact from such records the names of any current city employees<sup>2</sup> or such employees' titles, with the exception of the name of the Clerk of the Common Council, to the extent such name appears in the invoices.

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

Approved by Order of the Freedom of Information Commission at its regular meeting of September 11, 2019.



Cynthia A. Cannata  
Acting Clerk of the Commission

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<sup>2</sup> For purposes of this case, the phrase "current city employees" means those individuals who were employed by the City of Middletown at the time the request for records in this case was made.

PURSUANT TO SECTION 4-180(c), G.S., THE FOLLOWING ARE THE NAMES OF EACH PARTY AND THE MOST RECENT MAILING ADDRESS, PROVIDED TO THE FREEDOM OF INFORMATION COMMISSION, OF THE PARTIES OR THEIR AUTHORIZED REPRESENTATIVE.

THE PARTIES TO THIS CONTESTED CASE ARE:

**GERALD DALEY**, 70 Autumn Lane, Middletown, CT 06457-4787

**MAYOR, CITY OF MIDDLETOWN; CLERK, COMMON COUNCIL, CITY OF MIDDLETOWN; COMMON COUNCIL, CITY OF MIDDLETOWN;** c/o Attorney Michael C. Harrington, FordHarrison LLP, CityPlace II, 185 Asylum Street, Suite 610, Hartford, CT 06103; **CITY CLERK, CITY OF MIDDLETOWN;** c/o Attorney Nicholas R. Bamonte, Berchem Moses PC, 1221 Post Road East, Westport, CT 06880; **AND CITY OF MIDDLETOWN,** c/o Attorney Mark J. Sommaruga, Pullman & Comley, LLC, 90 State House Square, Hartford, CT 06106



Cynthia A. Cannata  
Acting Clerk of the Commission