

FREEDOM OF INFORMATION COMMISSION
OF THE STATE OF CONNECTICUT

In the Matter of a Complaint by

FINAL DECISION

Companions and Homemakers, Inc.,

Complainant

against

Docket #FIC 2020-0119

Commissioner, State of Connecticut,
Department of Social Services; and
State of Connecticut, Department of
Social Services,

Respondents

January 12, 2022

The above-captioned matter was heard as a contested case on November 24, 2020, at which time the complainant and the respondents appeared, stipulated to certain facts and presented testimony, exhibits and argument on the complaint. Due to the COVID-19 pandemic and the state's response to it, the hearing was conducted telephonically.¹

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, by email dated January 29, 2020, the complainant requested that the respondents provide it with copies of the following records:

Memoranda, electronic correspondence, voice-recordings, letters, circulars, bulletins, and any other writing generated in 2017, 2018, and 2019 concerning proposed legislation to restrict "non-compete" provisions in home care agency contracts.

3. It is found that, by email dated January 31, 2020, the respondents acknowledged the request.

4. It is found that, by email dated February 18, 2020, the complainant requested that the respondents provide an update on the processing of the request. It is found that the respondents replied "will do" on this same date.

¹ On March 14, 2020, the Governor issued Executive Order 7B, which suspended the requirement to conduct public meetings in person.

5. By email dated and filed March 6, 2020², the complainant appealed to this Commission, alleging that the respondents violated the Freedom of Information (“FOI”) Act by failing to provide it with the requested records.

6. At the time of the request, §1-200(5), G.S., provided:

“[p]ublic 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.³

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

[e]xcept 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.

8. 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.”

9. 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.

10. It is found that, in response to the request, the respondents disclosed redacted records to the complainants. At the contested case hearing, the complainant challenged the redactions in the disclosed records.

² On March 25, 2020, the Governor issued Executive Order 7M, thereby suspending the provisions of Conn. Gen. Stat. §1-206(b)(1), which requires the Freedom of Information Commission to hear and decide an appeal within one year after the filing of such appeal. Executive Order 7M is applicable to any appeal pending with the Commission on the issuance date and to any appeal filed on or after such date, through June 30, 2021. Consequently, the Commission retains jurisdiction over this matter.

³ Section 147 of Public Act 21-2 (June Sp. Sess.) amended the definition of “public records or files” to also include data or information that is “videotaped.”

11. The respondents submitted the records at issue to the Commission without redactions for in camera inspection. The records consist of four pages and shall be referred to herein as IC-2020-0119-D005; IC-2020-0119-D007; IC-2020-0119-D010; and IC-2020-0119-D039.

12. The respondents contended that the redacted portions of in camera records described in paragraph 11, above, are exempt from disclosure pursuant to §1-210(b)(10), G.S., which permits an agency to withhold from disclosure records of “communications privileged by the attorney-client relationship.”

13. In addition, the respondents contended that, to the extent that the privileged communications at issue in this case were shared by the Department of Social Services (“DSS”) and/or its attorneys with other public agencies and/or their attorneys, the information is still exempt from disclosure pursuant to the common law “common interest rule.”

14. 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.

15. 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. . . .

16. The Supreme Court has stated that “both the common law and statutory privileges protect those communication between a public official or employee and an attorney that are confidential, made in the course of the professional relationship that exist between the attorney and his or her public agency client, and relate to the legal advice sought by the agency from the attorney.” Maxwell, 260 Conn. at 149.

17. Generally, “once a privileged communication has been purposely disclosed to a third party, the attorney-client privilege is waived, unless the disclosed material falls under the common interest rule.” Raymond Rd. Assocs., LLC v. Taubman Centers, Inc., No. X02UWYCV075007877S, 2009 WL 4069251, at *8 (Conn. Super. Ct. Oct. 30, 2009), citing United States v. United Techs Corp., 979 F.Supp. 108, 111 (D.Conn. 1997). The common interest rule, also referred to as common interest doctrine, applies “where

the parties are represented by separate attorneys but share a common legal interest.” State Farm Mut. Auto. Ins. Co. v. Hawkins, No. 08-10367, 2010 WL 2287454, at *8 (E.D. Mich. June 4, 2010). Under the doctrine, privileged communication can be exchanged without waiving the privilege, provided that the parties have “an identical legal interest with respect to the subject matter of the communication.” MPT, Inc. v. Marathon Labels, Inc., 2006 WL 314435 slip copy at *6 (N.D. Ohio Feb. 9, 2006) (quoting Libbey Glass, Inc. v. Oneida, Ltd., 197 F.R.D. 342, 347 (N.D. Ohio 1999)). The weight of authority holds that litigation need not be actual or imminent for communications to fall within the common interest doctrine. United States v. BDO Seidman, LLP, 492 F.3d 806, 816 n.6 (7th Cir. 2007). See generally Ford Motor Co. v. Michigan Consol. Gas Co., No. 08-CV-13503, 2015 WL 6470830, at *5 (E.D. Mich. Oct. 27, 2015).

18. A party relying on the common interest doctrine to shield communications from disclosure has the burden of establishing all of the elements of the attorney-client privilege, see ¶ 15, above, as well as the burden of establishing that a common legal interest exists between the entities who are raising the protection. Moreover, “for the common-interest doctrine to apply, the underlying shared communication *must be privileged.*” Ford Motor Co., 2015 WL at *5 (emphasis in original). “The mere fact that an attorney authored a document or was a recipient, along with others, is not sufficient to classify a document as privileged.” Doctor’s Assocs., Inc. v. QIP Holders LLC, No. 3:06CV01710(VLB), 2009 WL 1668573, at *2 (D. Conn. June 15, 2009), citing Walsh v. Northrop Grumman Corp., 165 F.R.D. 16, 18 (E.D.N.Y. 1996) (“To extend the common interest doctrine that far would mean that a party could shield from disclosure any discussions it had with another person about a matter of common interest simply by discussing that matter first with its attorneys. . . the attorney-client privilege should be strictly confined within the narrowest possible limits underlying its purpose .”) ”

19. It is found that the attorneys for DSS deal with legal matters and legislation in the areas of home healthcare and homemaker services and agencies.

20. It is found that the Office of Policy and Management (“OPM”) also deals with legal matters and legislation in the areas of home healthcare and homemaker services and agencies.

21. It is found that Ann Foley, Under Secretary of OPM, sought legal advice from counsel for DSS concerning a home healthcare and/or homemaker services matter. It is found that counsel for DSS has expertise in this legal area and provided legal advice to Under Secretary Foley.

22. It is found that DSS and OPM often work together on matters when they share a common legal interest in such matters. It is further found that, in the instant matter, DSS and OPM had an identical common legal interest in legal matters and legislation concerning home healthcare and homemaker services and agencies.

23. After careful in camera inspection, it is found that the information redacted from IC-2020-0119-D005; IC-2020-0119-D007; and IC-2020-0119-D010 is the legal advice that public agencies sought and/or received from public agency attorneys. It is

found that the public agencies were acting within the scope of their duties with regard to current agency business when they sought and/or received this advice.

24. It is further found that the communications were either made in confidence between DSS and its legal counsel or that such communications were shared between attorneys and parties (that is, DSS and OPM) in the course of an ongoing common interest regarding a legal matter and were intended to further such common interest.

25. Accordingly, it is concluded that the attorney-client privilege has not been waived with respect to the information referenced in paragraph 23, above. It is therefore concluded that the respondents did not violate §§1-210(a) and 1-212(a), G.S., when they declined to disclose certain portions of such records to the complainants.

26. It is found that IC-2020-0119-D039 is an email communication from Governor Dannel P. Malloy's office to the respondent agency.

27. It is found that the respondents failed to prove that the respondent agency shared a common interest in a particular legal matter with the office of the former governor.

28. Accordingly, it is concluded that the information redacted from IC-2020-0119-D039 is not exempt from disclosure by either the attorney-client privilege or the common interest doctrine.

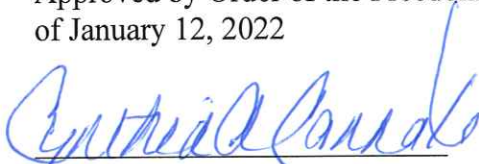
29. It is further concluded that the respondents violated §§1-210(a) and 1-212(a), G.S., by withholding the unredacted version of IC-2020-0119-D039 from the complainant.

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 disclose IC-2020-0119-D039 to the complainant, free of charge, without redactions.

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

Approved by Order of the Freedom of Information Commission at its regular meeting of January 12, 2022



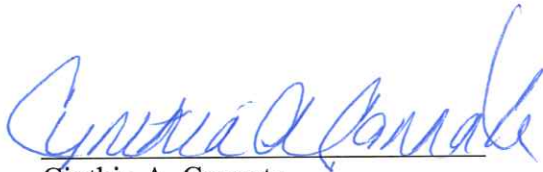
Cynthia A. Cannata
Acting Clerk of the Commission

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:

COMPANIONS AND HOMEMAKERS, INC., c/o Attorney J. Martin Acevedo,
613 New Britain Avenue, Farmington, CT 06032

COMMISSIONER, STATE OF CONNECTICUT, DEPARTMENT OF SOCIAL SERVICES; AND STATE OF CONNECTICUT, DEPARTMENT OF SOCIAL SERVICES, c/o Assistant Attorney General Shawn Rutchick, State of Connecticut, Office of the Attorney General, 165 Capitol Avenue, P.O. Box 120, Hartford, CT 06141-0120



Cynthia A. Cannata
Acting Clerk of the Commission