

FREEDOM OF INFORMATION COMMISSION
OF THE STATE OF CONNECTICUT

In the Matter of a Complaint by

FINAL DECISION

Leah Cantor,

Complainant

against

Docket #FIC 2022-0091

Commissioner, State of Connecticut,
Department of Consumer Protection;
and State of Connecticut, Department
of Consumer Protection,

Respondents

February 8, 2023

The above-captioned matter was heard as a contested case on June 24, 2022, at which time the complainant and the respondents appeared 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 through the use of electronic equipment (remotely) pursuant to §149 of Public Act 21-2 (June Special Session). A continued hearing was held in-person on September 12, 2022, at which time the respondents appeared and presented additional testimony, exhibits and argument on the complaint. The complainant did not appear at such hearing.¹

On September 22, 2022, and January 6, 2023, pursuant to separate Orders of the hearing officer, the respondents submitted three after-filed exhibits which have been marked as follows: Respondents' Exhibit 4: Series of Emails (most recent dated February 16, 2022); and Respondents' Exhibit 5: Email Exchange (most recent dated August 2, 2020); and Respondents' Exhibit 6: Affidavit of David Cousins, dated December 28, 2022.

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 November 4, 2021, the complainant requested from the

¹ Subsequent to the continued hearing, the Commission received from the complainant various requests and objections, including, but not limited to, objections to the testimony provided by the respondents' witness at the continued hearing. Although afforded the opportunity to present additional evidence and to cross-examine witnesses at the continued hearing, the complainant chose not to appear at such hearing. Therefore, such requests and objections are hereby denied.

respondents a copy of the case file for Department of Consumer Protection (“DCP”) Case No. 2019-609 (“November 4th request”).² It is found that such file concerns an investigation of Right at Home Health Care and Assistance, a homemaker-companion agency, which was the subject of several complaints filed with the respondents.

3. It is found that, by email dated January 14, 2022, the respondents provided the complainant with copies of responsive records.

4. It is found that, by email dated February 16, 2022, the complainant renewed her November 4th request for DCP Case No. 2019-609. More specifically, the complainant requested from the respondents a copy of:

all documents relevant to case 2019-609 including but not limited to: any and all notes, details, summaries, findings, conclusions, any and all supporting documentation, photos, copies of all identification cards, employment and employment eligibility forms, job description forms, etc. that FOI entitles release of. This shall include the following:

[1] Any/all documentation provided to any/all DCP employees by: Any/all Right at Home Wethersfield employees, any of its corporate office employees, and Attorney Maddaloni (then Counsel for Right at Home), or Frank Szalagyi (current counsel) [;]

[2] All documents listed in “Screen Shots 2019-609 (attached) on p. 109 of 113 (aka 55 of 57) as e-mailed in two separate e-mails to A. Barton by both Maddaloni and Scandura on 5/31/19 [;]

[3] Complete document “Screen Shot 2019-609” (attached). Even numbered pages missing of 113 [;]

[4] Operable document “Exhibits” (attached) e-mailed by Attny Cousin[s] to Attny Simon. Unable to open: Message: “The file is damaged and cannot be repaired.” Was able to open once – 115 blank pages [; and]

² In her November 4th request, the complainant also requested that the respondents provide her with copies of the case files for DCP Case Nos. 2019-1396 and 2020-2494. It is found that the complainant did not appeal with regard to such case files. Accordingly, it is found that such case files are not at issue and will not be further addressed herein.

[5] Complete document “all emails 2019-1396” (attached) e-mailed by Attny Cousins to Attny Simon on 1/21/22. There is one e-mail in the one page document.³ [Emphasis in original].

5. It is found that by emails sent between February 16 and February 22, 2022, the respondents provided the complainant with copies of responsive records.

6. By letter of complaint received February 22, 2022, the complainant appealed to the Commission, alleging that the respondents violated the Freedom of Information (“FOI”) Act by failing to comply with her request described in paragraph 4, above.

7. Section 1-200(5), G.S., provides that:

“[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, videotaped, printed, photostated, photographed or recorded by any other method.

8. 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 . . .(3) receive a copy of such records in accordance with section 1-212.

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

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

11. It is found that as of March 2, 2022, the respondents had provided approximately

³ In her February 16th request, the complainant also requested that the respondents provide her “the date when my case #2019-609 was closed” and “an explanation as to why the DCP failed to inform me of its closure at the time the investigation was complete as promised....” It is found that such requests are not requests for records, and that the respondents are not required to answer questions under the FOI Act.

5,000 pages of responsive records to the complainant.⁴ It is found that the respondents redacted certain records, or portions thereof, claiming that such records were attorney-client privileged communications exempt from disclosure pursuant to §1-210(b)(10), G.S.

12. At the June 24, 2022 hearing, the complainant contended that the respondents failed to provide her with copies of all records responsive to her request for DCP Case No. 2019-609, and challenged the redactions made to certain records, including the header information (i.e., “From”, “Sent”, “To”, “CC” and “Subject” lines) contained in emails.

13. On September 22, 2022, and January 6, 2023, pursuant to separate Orders of the hearing officer, the respondents submitted unredacted copies of records for in camera inspection, along with separate in camera indices.⁵ Such in camera records consist of emails and attachments thereto.

14. At the hearings and/or on the in camera indices, the respondents claimed that the following in camera records, or portions thereof, are attorney-client privileged communications exempt from disclosure pursuant to §§1-210(b)(10) and 52-146r, G.S.: IC-2022-0091-92 through 93, IC-2022-0091-204 through 308, IC-2022-0091-489 through 490, IC-2022-0091-1028 through 1032, IC-2022-0091-1291 through 1292, IC-2022-0091-1294 through 1295, IC-2022-0091-1305, IC-2022-0091-1323 through 1324, IC-2022-009, 1327 through 1328, IC-2022-0091-1331, IC-2022-0091-1331-A, IC-2022-0091-1342, IC-2022-0091-1615, IC-2022-0091-1615-A, IC-2022-0091-1616, IC-2022-0091-1616-A, IC-2022-0091-1617 through 1618, IC-2022-0091-1620 through 1622, IC-2022-0091-1625 through 1627, IC-2022-0091-1629 through 1631, IC-2022-0091-1633 through 1635, IC-2022-0091-1637 through 1638, IC-2022-0091-1641, IC-2022-0091-1641-A, IC-2022-0091-1642, IC-2022-0091-1645 through 1646, IC-2022-0091-1660, IC-2022-0091-1662 through 1663, IC-2022-0091-1664, IC-2022-0091-1665, IC-2022-0091-1665-A, IC-2022-0091-1666 through 1667, IC-2022-0091-1669, IC-2022-0091-1670, IC-2022-0091-1673 and IC-2022-0091-1682.

15. With respect to the email header information contained in the in camera records, described in paragraph 14, above, on December 14, 2022, the respondents notified the Commission in writing that they were no longer claiming that such information is exempt from disclosure. With respect to IC-2022-0091-489 through 490,⁶ IC-2022-0091-1331-A, IC-2022-0091-1615-A, IC-2022-0091-1616-A, IC-2022-0091-1641-A and IC-2022-0091-1665-A, on January 6, 2023, pursuant to an Order of the hearing officer, the respondents notified the Commission in writing that they were no longer claiming that such records are exempt from disclosure and that they provided unredacted copies of such records to the complainant. In

⁴ It is found that the approximately 5,000 pages of records include records relating to DCP Case Nos. 2019-609, 2019-1396 and 2020-2494.

⁵ On November 22, 2022, pursuant to an Order of the hearing officer, the respondents also submitted a revised index describing the information claimed to be exempt.

⁶ It is found that IC-2022-0091-92 through 93 are identical to IC-2022-0091-489 through 490, which the respondents are no longer claiming are exempt from disclosure.

addition, with respect to IC-2022-0091-1670 and IC-2022-0091-1673, on the in camera index submitted on January 6, 2023, the respondents indicated that they were no longer claiming that such records are exempt from disclosure.

16. However, the respondents did not request to reopen the hearing to submit additional evidence or request to file an after-filed exhibit attesting that such records were provided to the complainant. It is therefore concluded that the respondents violated §§1-210(a) and 1-212(a), G.S., by withholding such in camera records, or portions thereof, from the complainant.

17. With respect to the remaining in camera records, §1-210(b)(10), G.S., permits a public agency to withhold from disclosure records of “communications privileged by the attorney-client relationship.”

18. 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.

19. 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....

20. The Supreme Court has also 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, 260 Conn. 149.

21. 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. Moreover, although Connecticut courts have recognized that “statements made in the presence of third parties are usually not privileged because there is then no reasonable expectation of privacy,” they have also recognized that “the presence of certain

third parties . . . who are agents or employees of an attorney or client, and who are necessary to the consultation, will not destroy the privilege.” Id.

22. Based upon careful inspection of the in camera records, described in paragraph 17, above, and the testimony in the record, it is found that such records are written communications transmitted in confidence between counsel for the respondents and public officials or other employees acting within the scope of their employment. It is also found that such records relate to legal advice sought by the respondents or in furtherance of the rendition of such legal advice, within the meaning of §§1-210(b)(10) and 52-146r(2), G.S. It is further found that the respondents did not waive their claim of privilege with respect to such records.

23. It is therefore concluded that the in camera records, described in paragraph 17, above, are exempt from disclosure pursuant to §1-210(b)(10), G.S. It is further concluded that the respondents did not violate §§1-210(a) and 1-212(a), G.S., by withholding such records from the complainant.

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

1. Within fourteen (14) days of the date of the Notice of Final Decision in this matter, the respondents shall forthwith disclose to the complainant, free of charge, an unredacted copy of the records described in paragraph 15 of the findings, above.

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

Approved by Order of the Freedom of Information Commission at its regular meeting of February 8, 2023.



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:

LEAH CANTOR, 199 North River Road, Shelburne Falls, MA 02451

COMMISSIONER, STATE OF CONNECTICUT, DEPARTMENT OF CONSUMER PROTECTION; AND STATE OF CONNECTICUT, DEPARTMENT OF CONSUMER PROTECTION, c/o Attorney Julianne Avallone, 450 Columbus Boulevard, Suite 901, Hartford, CT 06103 and Assistant Attorney General Kim Carlson McGee, Office of the Attorney General, 165 Capitol Avenue, Suite 4000, Hartford, CT 06106



Cynthia A. Cannata
Acting Clerk of the Commission