FREEDOM OF INFORMATION COMMISSION
OF THE STATE OF CONNECTICUT

In the Matter of a Complaint by FINAL DECISION

William Bellock,

Complainant

against Docket #FIC 2022-0290

Commissioner, State of Connecticut, Department of Energy and Environmental Protection; and State of Connecticut, Department of Energy and Environmental Protection,

Respondents June 28, 2023

The above-captioned matter was heard as a contested case on November 14, 2022, December 16, 2022, and April 24, 2023, at which times the complainant and the respondents appeared and presented exhibits and argument on the complaint. The complainant also presented testimony. No witness appeared at the hearings on behalf of the respondents to offer testimony.

Subsequent to the November 14th contested case hearing, the respondents submitted an after-filed exhibit, which has been admitted into evidence, without objection, and marked as:

Complainant's Exhibit A (after-filed): Complainant's FOI Request, dated January 25, 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 June 9, 2022 ("June 9th request"), the complainant requested copies of the following records, among others no longer at issue: two unredacted emails sent on May 8, 2018 to Department of Energy and Environmental Protection ("DEEP") employee Jamie Sydoriak ("Sydoriak") from Office of the Attorney General employee Jeffrey Zeman.

3. It is found that, by email dated June 15, 2022, the complainant requested the following records, among others no longer at issue:

(a) "a full copy" of an email sent on September 22, 2016 by Sydoriak that begins "Remember this?.."; and

(b) "any notes or correspondence to and from Mr. Collette regarding this matter."

4. It is found that, by email dated June 16, 2022, the complainant requested the following records, among others no longer at issue:

(a) "any internal correspondence relative to" a series of meetings that Sydoriak had in 2015 and 2016 related to the complainant's underlying permitting issue with DEEP.

5. It is found that, by email dated June 10, 2022, the respondents acknowledged the complainant's June 9th request, described in paragraph 2, above, and informed the complainant that the redacted information in the requested emails was exempt from disclosure pursuant to the attorney-client privilege, protected attorney work product, and the pending claims or pending litigation exemptions.

6. By letter of complaint, dated June 27, 2022 and filed July 6, 2022, the complainant appealed to this Commission, alleging that the respondents violated the Freedom of Information ("FOI") Act by failing to provide the records, described in paragraphs 2, 3 and 4, above.

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

"[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 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:

[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: "[a]ny 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, at the November 14th contested case hearing, the parties stipulated to a continuance due to the respondents' ongoing production of responsive records. It is also found that, at the December 16th contested case hearing, the complainant requested a continuance in order to allow him the opportunity to review additional records disclosed by the respondents and potentially narrow his complaint regarding such records. Such continuance request was granted by the hearing officer without opposition from the respondents.

12. At the April 24th hearing in this matter, the respondents represented, and it is found, that they provided the complainant with copies of all responsive records, with the final disclosure having been made on or around December 7, 2022.[1] It is also found that the respondents redacted certain information from such records.

13. The complainant challenged the redactions described in paragraph 12, above, and argued that the claimed exemptions were not properly applied to the records at issue. It is found that the complainant and the respondents requested that the hearing officer conduct an in camera inspection of such records.

14. On May 9, 2023, the respondents submitted to the Commission an unredacted copy of the records for an in camera inspection, along with an in camera index. Such records shall be identified hereinafter as IC-2022-0290-1A through IC-2022-0290-22A.

15. On the in camera index, the respondents contended that the information redacted from the in camera records is exempt from disclosure under §§1-210(b)(1), 1-210(b)(10), and 1-210(e)(1), G.S.

16. With regard to the respondents' claim that certain portions of the in camera records are exempt from disclosure pursuant to §1-210(b)(10), G.S., that statute permits a public agency to withhold from disclosure records of "communications privileged by the attorney-client relationship."

17. 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) ("Maxwell"). 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.

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

[1] In their post-hearing brief, the respondents also asserted that records previously withheld pursuant to §1-210(b)(4), G.S., as described in paragraph 5, above, were disclosed to the complainant in this final production due to the conclusion of related litigation in August of 2022.

> 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. . . .

19. 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 at 149.

20. The Commission recognizes that "[w]here legal advice of any kind is sought from a professional legal adviser in his capacity as such, the communications relating to that purpose, made in confidence by the client, are at his instance permanently protected from disclosure by himself or by the legal adviser, except the protection be waived." Rienzo v. Santangelo, 160 Conn. 391, 395 (1971); see also Olson v. Accessory Controls & Equipment Corp., 254 Conn. 145, 159, 757 A.2d 14 (2000) ("Olson"). Moreover, 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. . .. The privilege fosters full and frank communications between attorneys and their clients and thereby promote[s] the broader public interests in the observation of law and [the] administration of justice." PSE Consulting, Inc. v. Frank Mercede & Sons, Inc., 267 Conn. 279, 329-30 (2004). However, the privilege only applies when necessary to achieve its purpose; it is not a blanket privilege. Harrington v. FOI Commission, 323 Conn. 1, 12 (2016). Further, a party can establish that a document is privileged by showing that the document itself is the record or memorialization of a communication between the client and the attorney; by showing that the document was created with the intent to communicate the contents to an attorney, and the client actually communicated the contents to the attorney; or by showing that the document was somehow transformed for the purpose of seeking legal advice and communicated or intended to be communicated to an attorney. See State v. Kosuda-Bigazzi, 335 Conn. 327 (2020) ("Kosuda-Bigazzi").

21. With regard to claims of privilege involving documents, "[t]he privilege must be established for 'each document separately considered' and must be narrowly applied and strictly construed." Id. at 342-43. However, if it is clear from the face of the records, extrinsic evidence is not always required to prove the existence of the attorney-client privilege. Lash v. FOI Commission, 300 Conn. 511, 516 (2011) ("Lash").

22. Based upon a careful in camera inspection of the records identified in paragraph 14, above, it is found that the following records constitute written communications, transmitted in confidence, between a public official or employee of a public agency, acting within the scope of

their employment, and their attorney(s), and that such communications are related to legal advice sought:

IC-2022-0290-1A;

IC-2022-0290-1B;

IC-2022-0290-2 through IC-2022-0290-5;

IC-2022-0290-7 through IC-2022-0290-8;

IC-2022-0290-10 through IC-2022-0290-13;

IC-2022-0290-15;

IC-2022-0290-17 through IC-2022-0290-24;

IC-2022-0290-14A;

IC-2022-0290-20A; and

IC-2022-0290-22A.[2] [3]

In addition, it is found that no evidence was provided by the complainant to rebut the presumption that such communications were made in confidence. See Blumenthal v. Kimber Mfg., Inc., 265 Conn. 1, 15 (2003). It is found that the respondents did not waive the attorney-client privilege.

23. It is concluded therefore that such records are exempt from disclosure pursuant to §1-210(b)(10), G.S., and that the respondents did not violate the FOI Act by withholding the records described in paragraph 22, above, from disclosure.

24. In his post-hearing brief, the complainant argued that, even if such redacted information falls within the attorney-client privilege, it should be disclosed pursuant to the "crime-fraud exception" to such exemption.[4]

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[2] The respondents also claimed that IC-2022-0290-20, IC-2022-0290-22, IC-2022-0290-14A, IC-2022-0290-20A, and IC-2022-0290-22A are exempt from disclosure pursuant to §§1-210(b)(1) and 1-210(e)(1), G.S. However, in light of the conclusion reached in paragraph 22, above, the Commission need not address any further claims of exemption with respect to such records.

[3] The respondents also claimed, generally, that some redacted records are exempt from disclosure because they are "protected attorney work product". In light of the conclusions reached in paragraph 22, above, the Commission need not address such argument with respect to the records identified in paragraph 22, above.

[4] The Commission notes that the complainant also asserts in his post-hearing brief additional legal arguments that are outside of this Commission's jurisdiction. See Dept. of Public Safety v. Freedom of Information Commission, 103 Conn. App. 571, 577 (2007) (the Commission is a creature of statute with limited jurisdiction; it can only administer and enforce the provisions set forth in the FOI Act).

25. The Supreme Court has articulated that "the crime-fraud exception permits abrogation of the attorney-client privilege solely upon a determination ... that there is probable cause to believe that the privileged communications were made with the intent to perpetuate a civil fraud and that the communications were made in furtherance of that fraud." Olson at 174. The Court went on to say that "[e]ven if probable cause exits to believe that the client intended to perpetrate a fraud, the exception is curtailed by the second requirement that the communications sought ... were made in furtherance of the fraud. ... [T]here must be a showing that the communications at issue were 'made with an intent to further an unlawful act.'" Id. at 176 (quoting United States v. White, 887 F.2d 267, 271 (D.C.Cir.1989).

26. Based upon the record and a careful inspection of the in camera records, it is found that there is no evidence in such records of an intent to perpetuate a civil fraud or to further an unlawful act and, therefore, such allegation by the complainant will not be further addressed herein.

27. With regard to the transformation of preexisting documents into a communication that is protected by the attorney-client privilege, "[p]reexisting documents are documents that are *not* created for the purpose of seeking legal advice." Kosuda-Bigazzi at 344 (emphasis in original). Most importantly, "[a] preexisting document does not become privileged merely because it is transferred to or routed through an attorney." Id. at 345 (citations omitted); 1 Restatement (Third), The Law Governing Lawyers § 69, comment (b), p. 525 (2000) ("[a client authored] document that is not a privileged document when originally composed does not become privileged simply because the client has placed it in the lawyer's hands"). However, a preexisting document could become privileged if it were somehow transformed for the purpose of seeking legal advice and communicated or intended to be communicated to an attorney. See Angst v. Mack Trucks, Inc., Docket Nos. 90-3274, 90-4329, 1991 WL 86931, *2 (E.D. Pa. May 14, 1991) (reasoning that plaintiff's handwritten notes made for personal use, not for purpose of securing attorney, would not fall within privilege, but typed compilation and summary created for purpose of securing counsel would fall within privilege). The oft stated shorthand rule for preexisting documents provides: "If the client would have to produce [the document], were the client in possession of [it], then the attorney must produce it; if the client would not have to produce, the attorney would not have to produce." Kosuda-Bigazzi at 345 (citations omitted).

28. After a careful inspection of the in camera records, it is found that it is not "clear from the face of the records"[5] that the following redacted information in such records is exempt from disclosure pursuant to the attorney-client privilege:

IC-2022-0290-6 (lines 17 through 43);

IC-2022-0290-9 (lines 18 through 44);

IC-2022-0290-14 (lines 25 through 129); and

[5] See Lash at 516.

IC-2022-0290-16 (lines 51 through 155).[6]

It is found that it is not clear from the face of the records that such redacted information is written communications, transmitted in confidence, between a public official or employee of a public agency, acting within the scope of their employment, and their attorney(s). It is also found that it is not clear from the face of the records that such redacted information is a document prepared by a public official or employee of a public agency that was created with the intent to share such information with their attorney(s). It is further found that it is not clear from the face of the records that such redacted information is a preexisting document that was transformed into a communication that is protected by the attorney-client privilege.

29. With regard to the respondents' claim, generally, that the in camera records are exempt from disclosure because they constitute "protected attorney work product", this Commission has held in prior decisions, (many of which predate the 2011 legislative amendment to §1-210(b)(10), G.S., expanding such exemption to include "any other privilege established by the common law or the general statutes") that work product is an exception to the federal rules of discovery[7], which exception does not constitute an exemption to disclosure under §1-210(b)(10), G.S. See, e.g., Docket #FIC 81-13, Thaddeus J. Hyjek and Robert S. Cheney v. Chief Administrative Officer, Town of East Hampton; Board of Selectmen, Town of East Hampton; and Town of East Hampton (December 8, 1981); Docket #FIC 86-38, Alex Wood and The Journal Inquirer v. First Selectman, Town of Suffield; and Town of Suffield (March 26, 1986); Docket #FIC 93-226, Jeffrey T. Bantle v. Metropolitan District Commission (February 16, 1994); Docket #FIC 94-8, Edward Peruta v. O.Paul Shew, Rocky Hill Town Manager/Public Safety Director (May 25, 1994); Docket #FIC 1998-014, Huguet P.C. Pameijer v. Mary A Glassman, First Selectman, Town of Simsbury; and Town of Simsbury (August 12, 1998); and Docket #FIC 2013-003, Jean McCarthy v. Assessor, Town of Redding; and Town of Redding (November 13, 2013) (post the 2011 legislative amendment).

30. It is found that the work product doctrine protects from discovery in litigation an attorney's "interviews, statements, memoranda, correspondence, briefs, mental impressions, personal beliefs and countless other tangible and intangible [items]." Hickman v. Taylor, 329 U.S. 495, 511 (1947). "To be protected under this doctrine, the work of the attorney must be such that it forms an essential step in the procurement of data and must involve duties normally performed by attorneys." Barksdale v. Harris, 30 Conn. App. 754, 761 (1993) (citing Stanley Works v. New Britain Redevelopment Agency, 155 Conn. 86, 95 (1967)). The court has also ruled that three conditions must be met in order for the work product doctrine to apply: "[t]he material must (1) be a document or a tangible thing, (2) that was prepared in anticipation of litigation, and (3) was prepared by or for a party, or by his representative." OneBeacon Professional Partners, Inc. v. Ironshore Holdings (U.S.), Inc., 2009 WL 415623 *2 (Conn. Super. 2009) (Shapiro, J.) (quoting In re Grand Jury Subpoenas, 561 F.Supp. 1247, 1257 (E.D.N.Y.1982)).

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[6] The respondents did not number the lines and words on the in camera records; therefore, the Hearing Officer numbered such lines and words in pencil in order to identify which portion of a particular record is exempt from disclosure.

[7] The doctrine is also set forth in §13-3 of the Connecticut Practice Book.

31. It is further found that the respondents offered no testimony or direct evidence at the hearing in this matter that the redacted information in the records described in paragraph 28, above, is the work of an attorney that "forms an essential step in the procurement of data" or "involves duties normally performed by attorneys", or that such redacted information was "prepared in anticipation of litigation" by or for the respondents or their representatives, nor is it clear from reviewing such information on its face.

32. Based upon the findings in paragraphs 30 and 31, above, it is not necessary for the Commission to make a determination in this case as to whether the work product doctrine constitutes an exemption to disclosure, pursuant to §1-210(b)(10), G.S., because the respondents failed to prove that the redacted information is of the kind that is subject to the doctrine.

33. Accordingly, it is concluded that the respondents failed to prove that the records described in paragraph 28, above, are exempt from disclosure pursuant to §1-210(b)(10), G.S.

34. With regard to the redacted portions of IC-2022-0290-14, the respondents also claimed that such redacted information is exempt from disclosure because it constitutes a preliminary draft or note pursuant to §1-210(b)(1), G.S. Additionally, the respondents contended that the same portions of IC-2022-0290-14 are exempt from disclosure pursuant to §1-210(e)(1), G.S.

35. Section 1-210(b)(1), G.S., provides that disclosure is not required of "[p]reliminary drafts or notes provided the public agency has determined that the public interest in withholding such documents clearly outweighs the public interest in disclosure."

36. The Supreme Court ruled in Wilson v. Freedom of Information Commission, 181 Conn. 324, 332 (1980) ("Wilson"), that:

> [w]e do not think the concept of preliminary, as opposed to final, should depend upon who generates the notes or drafts, or upon whether the actual documents are subject to further alteration....
>
> Instead the term 'preliminary drafts or notes' relates to advisory opinions, recommendations, and deliberations comprising part of the process by which government decisions and policies are formulated....
>
> ...[p]reliminary drafts or notes reflect that aspect of an agency's function that precedes formal and informal decision making. We believe that the legislature sought to protect the free and candid exchange of ideas, the uninhibited proposition and criticism of options that often precedes, and usually improves the quality of, governmental decisions. It is records of this preliminary,

> deliberative and predecisional process the exemption was meant to encompass.

37. The year following Wilson, the Connecticut General Assembly passed Public Act 81-431, which added to the FOI Act the language now codified in §1-210(e)(1), G.S. That provision, which narrowed the exemption for preliminary drafts or notes, provides in relevant part:

> [n]otwithstanding [§1-210(b)(1)], disclosure shall be required of:
>
> [i]nteragency or intra-agency memoranda or letters, advisory opinions, recommendations or any report comprising part of the process by which governmental decisions and policies are formulated, except disclosure shall not be required of a preliminary draft of a memorandum, prepared by a member of the staff of a public agency, which is subject to revision prior to submission to or discussion among the members of such agency.... (emphasis added).

38. In Van Norstrand v. Freedom of Information Commission, 211 Conn. 339, 343 (1989) ("Van Norstrand"), the Supreme Court provided further guidance regarding "preliminary drafts". Citing the dictionary definition, the court stated that the term "preliminary" means "something that precedes or is introductory or preparatory", and "describes something that is preceding the main discourse or business." Id. According to the Court, "[b]y using the nearly synonymous words 'preliminary' and 'draft', the legislation makes it very evident that preparatory materials are not required to be disclosed". Id.

39. Accordingly, §§1-210(b)(1) and 1-210(e)(1), G.S., together, permit nondisclosure of records of an agency's preliminary, predecisional, deliberative process, provided that the agency has determined that the public interest in withholding the records clearly outweighs the public interest in disclosing them and provided further that such records are not interagency or intra-agency memoranda or letters, advisory opinions, recommendations, or reports. See Shew v. Freedom of Information Commission, 245 Conn. 149, 164-166 (1998).

40. With regard to the "balancing test" required by §1-210(b)(1), G.S., it is well established that the responsibility for making the determination as to what is in the public interest is on the agency that maintains the records. See Van Norstrand at 345. The agency must have considered in good faith the effect of disclosure and indicated the reasons for its determination to withhold disclosure, which reasons may not be frivolous or patently unfounded. Id., citing Wilson at 339. See also People for Ethical Treatment of Animals, Inc. v. Freedom of Information Commission, 321 Conn. 805, 816-817 (2016). Thus, the only determination for the FOIC to make is whether the reasons for nondisclosure given by the agency are frivolous or patently unfounded. See Lewin v. Freedom of Information Commission, 91 Conn. App. 521, 522-523 (2005); Coalition to Save Horsebarn Hill v. Freedom of Information Commission, 73 Conn. App. 89, 99 (2002).

41. After a careful inspection of the in camera record described in paragraph 34, above, it is found that the respondents failed to prove that such record is a preliminary draft or note within the meaning of §1-210(b)(1), G.S. It is found, moreover, that the respondents offered no testimony or direct evidence at the hearing in this matter that the respondent agency made a determination that the public interest in withholding any of the in camera record clearly outweighed the public interest in disclosure. It is therefore found that the respondents failed to prove that the record described in paragraph 34, above, is exempt from disclosure pursuant to §1-210(b)(1), G.S.

42. With regard to the respondents' claim that the redacted portions of IC-2022-0290-14 are exempt from disclosure pursuant to §1-210(e)(1), G.S., it is found that the respondents failed to prove that the information redacted from such in camera record is a preliminary draft of a memorandum, prepared by a member of the staff of a public agency, which is subject to revision prior to submission to or discussion among the members of such agency as required by §1-210(e)(1), G.S. It is therefore found that the respondents failed to prove that the record described in paragraph 34, above, is exempt from disclosure pursuant to §1-210(e)(1), G.S.

43. Accordingly, it is concluded that the respondents violated the disclosure provisions of §§1-210(a) and 1-212(a), G.S., by withholding the redacted information in the in camera records, described in paragraph 28, above, from the complainant.

44. It is also found that the respondents included IC-2022-0290-25 in the in camera records, which is described on the in camera index as, "Explanatory Note re: Attachments". After a careful inspection of the in camera records, it is found that such record is not responsive to the complainant's request and will not be further addressed herein.

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 the complainant with copies of the in camera records, described in paragraph 28 of the findings, above, free of charge, with those portions of such records, as identified in paragraph 28 of the findings, above, unredacted.

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 June 28, 2023.

Jennifer M. Mayo
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:

WILLIAM BELLOCK, Bellsite Development LLC, PO Box 2114, Manchester, CT 06045

COMMISSIONER, STATE OF CONNECTICUT, DEPARTMENT OF ENERGY AND ENVIRONMENTAL PROTECTION; AND STATE OF CONNECTICUT, DEPARTMENT OF ENERGY AND ENVIRONMENTAL PROTECTION, c/o Attorney Caleb Hamel, 79 Elm Street, Hartford, CT 06106

Jennifer M. Mayo
Acting Clerk of the Commission

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