

FREEDOM OF INFORMATION COMMISSION
OF THE STATE OF CONNECTICUT

In the Matter of a Complaint by

FINAL DECISION

Nathaniel Clark,

Complainant

against

Docket # FIC 2022-0226

William Tong, Attorney General; State of
Connecticut, Office of the Attorney General;
and State of Connecticut, Office of the
Attorney General,

Respondents

March 8, 2023

The above-captioned matter was heard as a contested case on January 26, 2023, at which time the complainant and the respondents appeared and presented testimony, exhibits and argument on the complaint.

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 April 20, 2022, the complainant requested that the respondents provide him with access to all:

(a) records regarding the decision to defend Louis Bucari and Jon Biello in their individual capacities in the matter of Clark v. Boughton et al. (3:21-cv-01372-SRU); and

(b) direction given by the respondent Attorney General regarding the lawsuit brought against individual capacity defendants in the case described in paragraph 2(a), above, and as general policy.

(hereinafter “requested records”).

3. It is found that by email dated April 26, 2022, the respondents acknowledged receipt of the request, described in paragraph 2(a) and 2(b), above, and informed the complainant that they were in the process of searching their records to determine whether they maintained responsive records and would contact him as soon as the process was completed.

4. It is found that by email dated May 17, 2022, the complainant followed up with the respondents and inquired when the requested records would be available for review.

5. By email dated and filed with the Freedom of Information (FOI) Commission (Commission) on May 23, 2022, and supplemented by emails dated May 24, 2022 and July 18, 2022, the complainant appealed, alleging that the respondents violated the FOI Act by failing to provide him with access to inspect the requested records. In his complaint, the complainant requested that the Commission conduct an in camera inspection of the records at issue¹, and impose a civil penalty upon the respondent Attorney General.

6. 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 section 1-218, whether such data or information be handwritten, typed, tape-recorded, videotaped, printed, photostated, photographed or recorded by any other method.

7. 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 (1) inspect such records promptly during regular office or business hours... or (3) receive a copy of such records in accordance with section 1-212.

8. Section 1-212(a), G.S., in relevant part, further provides: “[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 concluded that the requested records, to the extent they exist, are “public records” within the meaning of §§ 1-200(5) and 1-210(a), G.S.

10. With respect to the request described in paragraph 2(b), above, it is found that by email dated May 24, 2022, the respondents provided the complainant with a one-page record entitled, “3. Representation of State Officers and Employees as Individuals”. It is found that such record was responsive to the request. At the hearing in this matter, the complainant contended that he believed there should be additional records responsive to such request.

¹ Following the testimony of Assistant Attorney General Nancy Brouillet in this matter, the complainant informed the Commission that he wished to withdraw his request for an in camera inspection.

11. However, based on the credible testimony of the respondents, it is found that they conducted a thorough search of their records and determined that they do not maintain any other records responsive to such request.

12. With respect to the request described in paragraph 2(a), above, it is found that the respondents maintain three records responsive to such request. At the hearing in this matter, the respondents provided the complainant with one of the three records, and testified that they were no longer claiming an exemption for such record because they recently determined it was introduced in a Connecticut Superior Court case and therefore in the public realm. The respondents claimed, however, that the two remaining records that they withheld are exempt from disclosure pursuant to the attorney-client privilege, as set forth in §§1-210(b)(10) and 52-146r, G.S.

13. Section 1-210(b)(10), G.S., permits a public agency to withhold from disclosure records of “communications privileged by the attorney-client relationship.”

14. The applicability of the §1-210(b)(10), G.S., exemption is governed by established Connecticut law defining the privilege. That law is set forth in Maxwell v. FOI Commission, 260 Conn. 143 (2002), and 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 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.

17. In addition, the Supreme Court 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.

18. It is found that the two remaining records, described in paragraph 12 above, are written communications from Assistant Attorney General Nancy Brouillet (an attorney employed by the respondent department) who is counsel of record to John Biello and Louis Bucari (two state Department of Revenue Services (DRS) employees), pertaining to the pending litigation, Nathaniel Clark v. Commissioner of Revenue Services, Mark Boughton, John Biello, Louis Bucari, Jr., United States District Court, District of Connecticut, Civil Action No. 3:21-cv-01372-SRU. It is also found that such communications were transmitted in confidence from Assistant Attorney General Brouillet to her two DRS employee clients, Mr. Biello and Mr. Bucari. It is further found that Assistant Attorney General Brouillet was acting in her professional capacity as legal counsel to Mr. Biello and Mr. Bucari when she transmitted those communications to them, and also that such communications related to legal advice sought by, and being provided to, Mr. Biello and Mr. Bucari. In addition, it is found that the communications were not disclosed to third parties and therefore, the privilege was not waived.

19. It is therefore concluded that the records at issue, described in paragraph 18, above, constitute communications privileged by the attorney-client relationship, within the meaning of §§1-210(b)(10) and 52-146r, G.S.²

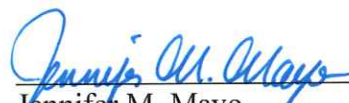
20. Consequently, it is concluded that the respondents did not violate the FOI Act as alleged when they withheld such records.

21. Because there was no violation, the Commission need not consider the complainant’s request for the imposition of a civil penalty.

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

1. The complaint is dismissed.

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



Jennifer M. Mayo
Acting Clerk of the Commission

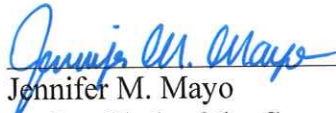
² The respondents also claimed that the written communications (found to be exempt from disclosure in paragraph 19, above, pursuant to the attorney-client privilege) were also exempt pursuant to §1-210(b)(4), G.S. However, in light of the conclusion reached in paragraph 19, above, there is no need to address such further claim of exemption.

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:

NATHANIEL CLARK, 19 Country Club Road, South Glastonbury, CT

WILLIAM TONG, ATTORNEY GENERAL, STATE OF CONNECTICUT, OFFICE OF THE ATTORNEY GENERAL; AND STATE OF CONNECTICUT, OFFICE OF THE ATTORNEY GENERAL, c/o Assistant Attorney General Abhishek Mukund, Office of the Attorney General, 165 Capitol Avenue, 5th Floor, Hartford, CT 06106



Jennifer M. Mayo
Acting Clerk of the Commission