

STATE OF CONNECTICUT  
FREEDOM OF INFORMATION COMMISSION

In the Matter of a Complaint by

FINAL DECISION

Russell Zimmerlin,

Complainant

against

Docket # FIC 2021-0045

State Employee Retirement Commission,  
State of Connecticut, Office of the State  
Comptroller; and State of Connecticut,  
Office of the State Comptroller,

Respondents

May 10, 2023

The above-captioned matter was heard as a contested case on August 12, 2021, 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 through the use of electronic equipment (remotely) pursuant to §149 of Public Act 21-2 (June Special Session).

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 letter dated December 28, 2020, the complainant<sup>1</sup> made a request to the respondents for the following:
  - (a) All documents provided to the Medical Examining Board from 2018 to current from the State Employee Retirement Commission, the Retirement Services Division, Attorney General's office or outside counsel, regarding the evaluation of disability retirement claims for state employees, municipal employees, and probate employees.
  - (b) All training material documents provided to the Medical Examining Board from 2018 to current from the State Employee Retirement Commission, the Retirement Services Division, Attorney General's office or outside counsel, regarding evaluation of disability retirement claims for state employees, municipal employees, and probate employees.

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<sup>1</sup> The complainant is an attorney who represents state and municipal retirees with respect to their applications for disability retirement.

- (c) All documents provided to the Medical Examining Board from 2018 to current, regarding the evaluation of Linda Cicarella's and Jacqueline Lawrence's disability retirement claims. Authorizations to disclose have previously been provided.
- (d) Any updates, addendums, or claims procedure manuals regarding processing disability pension claims after the revised procedure manual of March 28, 2019.
- (e) Any memoranda and opinions provided from the State Employee Retirement Commission, the Retirement Services Division or the RSD to the Medical Examining Board from 2018 to current regarding evaluation of disability claims. Please identify all documents being withheld, if any. This includes, but is not limited to, the evaluation of state employees, municipal employees, and probate employees disability claims.
- (f) All memoranda and opinions provided from general counsel, and the Attorney General's office from 2018 to current regarding claims processing or evaluation of disability claims. This includes, but is not limited to, the evaluation of state employees, municipal employees, and probate employee disability claims.

3. It is found that, by email dated December 28, 2020, the respondents acknowledged the complainant's request.

4. By complaint filed January 26, 2021, the complainant appealed to this Commission, alleging that the respondents violated the Freedom of Information ("FOI") Act by denying his request for the records described in paragraph 2, above.

5. 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 1-218, whether such data or information be handwritten, typed, tape-recorded, printed, photostated, photographed or recorded by any other method.<sup>2</sup>

6. 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

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

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.

7. 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.”

8. It is found that the records described in paragraph 2, above, are public records within the meaning of §§1-200(5) and 1-210(a).

9. It is found that the relationship among the Office of the State Comptroller and its Retirement Services Division, the State Employees Retirement Commission (“SERC”), and the Medical Examining Board (“MEB”), is relevant to the request for records identified in paragraph 2, above. Therefore, such relationship is addressed in findings 10 through 13, below.

10. It is found that the general administration and operation of the state and municipal employees retirement systems (among other retirement systems as set forth in statute) is vested in a single board of trustees: SERC. See §5-155a(a), G.S.

11. It is found that SERC is within the Retirement Services Division of the Office of the State Comptroller “for administrative purposes only.”<sup>3</sup> See §5-155a(a), G.S. It is further found that the Comptroller is the secretary of SERC and is obligated to provide SERC with secretarial support. *Id.*

12. It is found that the MEB determines whether applicants for disability retirement are entitled thereto and does so by conducting hearings for SERC. See §5-169 (c), G.S. and Regs., Conn. State Agencies §5-155-8. It is further found that the Retirement Services Division of the Office of the State Comptroller accepts such applications on behalf of the MEB. Regs., Conn. State Agencies §5-155a-2(d). It is further found that the MEB reports its findings with respect to such applications to SERC. See §5-169 (c), G.S. It is further found that an applicant may appeal an adverse decision to SERC. See §5-155a(k), G.S.

13. In light of the statutory and regulatory framework set forth in paragraphs 10 through 12, above, it is found that the Retirement Services Division of the Office of the State Comptroller provides an essential administrative and secretarial function to SERC and the MEB.

14. It is found that on January 26, 2021, the respondents provided the complainant with several records responsive to the request set forth in paragraph 2, above, but otherwise denied the request.

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<sup>3</sup> See §4-38f(b), G.S. (“For administrative purposes only” includes, in relevant part, “administrative and clerical functions for the agency to the extent deemed necessary by the department head...”).

15. At the hearing, the respondents contended that only one responsive record was withheld from the complainant as exempt from disclosure pursuant to the attorney-client privilege exemption set forth in §1-210(b)(10), G.S. The complainant disputed this contention.

16. Immediately following the hearing, the respondents submitted the record identified in paragraph 15, above, along with an Index to Records Submitted for In Camera Inspection (“Index”). On the Index, the respondents described the record as an attorney-client privileged communication exempt from disclosure pursuant to §1-210(b)(10), G.S.<sup>4</sup>

17. Section 1-210(b)(10), G.S., provides that disclosure is not required of 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 attorney-client privilege. That law is well set forth in Maxwell v. FOI Comm’n, 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 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., 254 Conn. 145, 157 (2000).

21. After careful in camera inspection of the record at issue, it is found that the in camera record constitutes an email communication by an attorney with the law firm of Rose Kallor, LLP, which law firm serves as general counsel to SERC and the MEB, wherein legal advice sought is provided to SERC and the MEB.

22. During the hearing and in a post-hearing brief, the complainant argued that the attorney-client privilege does not attach to the in camera record because it constitutes a policy document and not legal advice. On the contrary, it is found that the in camera record constitutes a

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<sup>4</sup> The Commission notes that the in camera record at issue herein is also at issue in Docket #FIC 2022-0220; Russell Kimberlin v. Comptroller, State of Connecticut, Office of the State Comptroller; and State of Connecticut, Office of the State Comptroller (“Record 5”).

request for legal advice and contains interpretation of legal principles, application of law to the facts set forth therein, and recommendations on how the client should proceed. The complainant's argument in this regard is therefore unavailing. It is found that the in camera record relates to the legal advice sought.

23. Finally, the complainant contended that the "made in confidence" prong of the attorney-client privilege has not been met and therefore the in camera record is not exempt from disclosure pursuant to §1-210(b)(10), G.S. The complainant contended that because the email communication was between counsel and Retirement Services Division staff, such communication was not made in confidence. The complainant contended that disclosure to such individuals constituted a "third party disclosure" and therefore, the in camera record is not exempt from disclosure pursuant to §1-210(b)(10), G.S.

24. However, the complainant's argument, set forth in paragraph 23, above, is also unavailing. As already found herein at paragraphs 9 through 13, above, the Retirement Services Division provides an essential administrative and secretarial function to the MEB and SERC. It is found that the Retirement Services Division staff were acting in their capacity as administrative support to SERC and the MEB in receiving and transmitting the legal advice sought. Accordingly, arguments with regard to a "third party disclosure" are not applicable to the facts and circumstances of this case.

25. It is additionally found that each in camera record is clearly marked, in bold and all caps: "PRIVILEGED ATTORNEY/CLIENT COMMUNICATION" and "NOT SUBJECT TO FREEDOM OF INFORMATION ACT." It is found that no evidence was presented to demonstrate that the in camera record was otherwise disclosed to any third party. It is therefore found that the in camera record constitutes a written communications transmitted in confidence. It is further found that neither SERC nor the MEB waived the attorney-client privilege.

26. Finally, the complainant contended that, if the attorney-client privilege is applicable to the in camera record, there is a "fiduciary exception" that prevents the respondents or their attorneys from withholding the in camera record from state or municipal employee retirement services members.<sup>5</sup>

27. However, even if such contention were true, the Commission is a creature of statute with limited jurisdiction. It can only administer and enforce the provisions of the FOI Act, which ensures that the public has the right to access records maintained by a public agency. The Commission does not have the authority to enforce the alleged individual rights of state or municipal employee retirement services members. Such argument, therefore, shall not be addressed further herein.

28. Accordingly, it is concluded that the record at issue is exempt from disclosure pursuant to §1-210(b)(10), G.S., and the respondents did not violate the disclosure provisions of the FOI Act as alleged in the complaint.

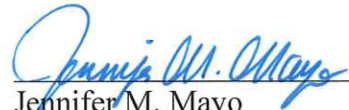
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<sup>5</sup> The Commission notes that in his post-hearing brief, the complainant cites to no applicable legal authority in support of this argument. However, the respondents' post-hearing brief cites to several Connecticut decisions wherein the courts have not recognized a fiduciary exception to the attorney-client privilege.

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

1. The complaint is hereby dismissed.

Approved by Order of the Freedom of Information Commission at its regular meeting of May 10, 2023.

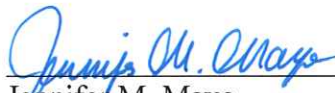
  
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Jennifer M. Mayo  
Acting Clerk of the Commission

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:

**RUSSELL ZIMBERLIN**, Zimmerlin Law LLC, 267 Main Street, Manchester, CT 06042

**STATE EMPLOYEE RETIREMENT COMMISSION, STATE OF CONNECTICUT, OFFICE OF THE STATE COMPTROLLER; AND STATE OF CONNECTICUT, OFFICE OF THE STATE COMPTROLLER**, c/o Attorney Cindy M. Cieslak, Rose Kallor, LLP, 750 Main Street, Suite 309, Hartford, CT 06103



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Jennifer M. Mayo  
Acting Clerk of the Commission