

STATE OF CONNECTICUT
FREEDOM OF INFORMATION COMMISSION

In the Matter of a Complaint by

FINAL DECISION

Russell Zimmerman,

Complainant

against

Docket # FIC 2022-0220

Comptroller, 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 September 20, 2022, at which time the complainant and the respondents appeared, stipulated to certain facts, 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 29, 2022, the complainant requested that the respondents provide him with a copy of the following:
 - (a) All documents provided to the Medical Examining Board from any entity (not supplied by the complainant) related to the following disability applicants: William Kenney; Michael Vogt; Paul Cicarella; Linda Cicarella; and Jacqueline Lawrence; and
 - (b) All documents provided to the State Employees Retirement Commission from its counsel or any other entity related to the evaluation of disability for the following disability applicants: William Kenney; Michael Vogt; Paul Cicarella; Linda Cicarella; and Jacqueline Lawrence.¹
3. It is found that, by email dated May 2, 2022, the respondents acknowledged the complainant's request.

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

4. By letter of complaint filed May 19, 2022, the complainant appealed to the Commission, alleging that the respondents violated the Freedom of Information (“FOI”) Act by denying his request for certain public records.

5. 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.

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 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), G.S.

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.”² 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.

² 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...”).

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, in addition to the credible testimony of the respondents' witnesses, the Retirement Services Division Director John Harrington, and the General Counsel/Assistant State Comptroller for the Office of the State Comptroller, Yamuna Menon, 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 or about May 25, 2022, the respondents provided several records responsive to the request identified in paragraph 2, above, but otherwise denied the complainant's request.

15. At the hearing, the respondents contended that certain responsive records were permissibly 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 to the Commission the records referenced in paragraph 15, above, along with an Index to Records Submitted for In Camera Inspection ("Index"). On the Index, the respondents described each record as an attorney-client privileged communication exempt from disclosure pursuant to §1-210(b)(10), G.S. In their post-hearing brief, the respondents further described the in camera records as follows:

Record 1: November 8, 2021 Memorandum from Cindy M. Cieslak, Esq. to SERC re: Paul Cicarella appeal;

Record 2: June 8, 2020 Memorandum from Cindy M. Cieslak, Esq. to SERC; Legal & Personnel Subcommittee re: Linda Cicarella;

Record 3: June 8, 2020 Memorandum from Cindy M. Cieslak, Esq. to SERC; Legal & Personnel Subcommittee re: Jacqueline Lawrence;

Record 4: March 7, 2022 Memorandum from Melinda A. Powell, Esq., to SERC; Legal & Personnel Subcommittee re: Michael Vogt Appeal of MEB Decision to SERC;

Record 5: December 3, 2020 Email from Cindy M. Cieslak, Esq. to Annette Sadlowski re: Linda Cicarella;³ and

Record 6: January 10, 2022 Memorandum from Michael J. Rose., Esq. and Andrew B.F. Carbanuci, Esq. to SERC; Legal & Personnel Subcommittee re: William Kenney Appeal re: MEB decision.

17. Section 1-210(b)(10), G.S., provides, in relevant part, that nothing under the FOI Act requires the disclosure 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 records at issue, it is found that each in camera record constitutes a written communication by an attorney with the law firm of Rose Kallor, LLP, which law firm serves as general counsel to SERC and the MEB.

22. It is further found that the in camera records identified by the respondents as Record 1 through Record 4, and Record 6, each constitute a written legal memorandum by an attorney of Rose Kallor, LLP, to its client, SERC.

³ The Commission notes that the in camera record at issue herein is also at issue in Docket #FIC 2021-0045; Russell Kimberlin v. State Employee Retirement Commission, State of Connecticut, Office of the State Comptroller; and State of Connecticut, Office of the State Comptroller.

23. With respect to the in camera record identified by the respondents as Record 5, it is found that such record constitutes an email communication by an attorney with the law firm of Rose Kallor, LLP, wherein legal advice sought is provided to SERC and the MEB.

24. During the hearing and in a post-hearing brief, the complainant argued that the attorney-client privilege does not attach to any of the in camera records because such records constitute policy documents and not legal advice. On the contrary, it is found that each in camera record 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 each in camera record relates to the legal advice provided to SERC or the MEB.

25. Finally, the complainant contended that the "made in confidence" prong of the attorney-client privilege has not been met and therefore the in camera records are not exempt from disclosure pursuant to §1-210(b)(10), G.S. With respect to the in camera records identified by the respondents as Record 1 through Record 4, and Record 6, the complainant contended that the Assistant Director of the Retirement Division had access to the memoranda when he was invited into the Executive Sessions convened by SERC, wherein such memoranda were reviewed. Similarly, the complainant contended that because the in camera record identified by the respondents as Record 5 was an email communication between counsel and Retirement Services Division staff, such communication also was not made in confidence. The complainant contended that disclosure to such individuals constituted a "third party disclosure" and therefore, the in camera records are not exempt from disclosure pursuant to §1-210(b)(10), G.S.

26. However, the complainant's argument, set forth in paragraph 25, 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 SERC and MEB. It is found that the Retirement Services Division employees with access to the in camera records were acting in their capacity as administrative support to the MEB and SERC. Accordingly, arguments with regard to a "third party disclosure" are not applicable to the facts and circumstances of this case.

27. 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 records were otherwise disclosed to any third party. It is therefore found that each 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.

28. Finally, the complainant contended that, if the attorney-client privilege is applicable to the in camera records, there is a "fiduciary exception" that prevents the respondents or their attorneys from withholding the in camera records from state or municipal employee retirement services members.⁴

⁴ 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.

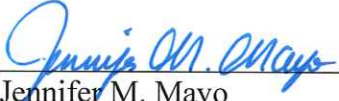
29. However, even if such contention were true, the Commission is a creature of statute with limited jurisdiction. It can only administer and enforce the provisions of the FOI Act, which ensures that the *public* has the right to access records maintained by a public agency. The Commission does not have 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.

30. Accordingly, it is concluded that the records at issue are 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.

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.



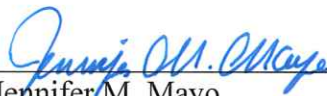
Jennifer M. Mayo
Acting Clerk of the Commission

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

**COMPTROLLER, STATE OF CONNECTICUT, OFFICE OF THE STATE
COMPTROLLER; AND STATE OF CONNECTICUT, OFFICE OF THE STATE
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Jennifer M. Mayo
Acting Clerk of the Commission