

STATE OF CONNECTICUT
FREEDOM OF INFORMATION COMMISSION

In the Matter of a Complaint by

FINAL DECISION

Jacques Jean,

Complainant

against

Docket # FIC 2023-0436

Commissioner, State of Connecticut,
Department of Developmental Services; and
State of Connecticut, Department of
Developmental Services,

Respondents

August 14, 2024

The above-captioned matter was heard as a contested case on April 25, 2024, 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 letter dated August 11, 2023, the complainant requested that the respondents provide him with copies of “any communication, email or otherwise, between DDS representatives, including but not limited to Gerald Gore, Kathleen Murphy, Subrina Persaud, and hearing Officer Helen Apostolidis regarding Mr. Jacques Jean’s eligibility proceedings.”
3. By complaint filed August 25, 2023, the complainant appealed to the Commission, alleging that the respondents violated the Freedom of Information (“FOI”) Act by denying his request for the records described in paragraph 2, above.¹
4. 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

¹ The Commission notes that the complaint in this matter also alleged that the respondents violated the FOI Act by failing to provide records responsive to a request made by the complainant on or about May 8, 2023. However, the complainant did not introduce evidence of such request and the alleged denial at the April 25, 2024, hearing. Consequently, such request and corresponding allegations in the complaint shall not be addressed further herein.

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.

5. 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.

6. 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.”

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

8. It is found that, prior to the hearing, the respondents provided the complainant with copies of approximately 200 pages of responsive records without redaction. It is found that the respondents also provided the complainant with copies of responsive records that were partially redacted.

9. At the hearing, the complainant disputed that the redacted portions of the responsive records are exempt from disclosure. The complainant also contended that the respondents did not provide all non-exempt responsive records that exist and are maintained.

10. On April 25, 2024, the respondents submitted to the Commission an unredacted copy of fourteen pages of records, along with an Index to Records Submitted for In Camera Inspection (“Index”).² Such records shall hereinafter be identified as IC-2023-0436-1 through IC-2023-0436-14.

11. On the Index, the respondents contended that portions of IC-2023-0436-1 through IC-2023-0436-14 are exempt from disclosure pursuant to §1-210(b)(10), G.S., because such portions are protected by the attorney-client privilege.

12. Section 1-210(b)(10), G.S., provides, in relevant part, that nothing in the FOI Act requires the disclosure of “communications privileged by the attorney-client relationship....”

13. Section 52-146r(b), G.S., provides that “[i]n any civil or criminal case or proceeding or in any legislative or administrative proceeding, all confidential communications shall be

² The Commission notes that in addition to submitting an Index and unredacted copies of the records at issue, the respondents also submitted redacted copies of the in camera records to enable the hearing officer to review the particular redactions.

privileged and a government attorney shall not disclose any such communications unless an authorized representative of the public agency consents to waive the privilege and allow such disclosure.”

14. The Supreme Court has adopted a four part test to determine whether communications are subject to the attorney-client privilege: “(1) the attorney must be acting in a professional capacity for the agency; (2) the communications must be made to the attorney by current employees or officials of the agency; (3) the communications must relate to the legal advice sought by the agency from the attorney; and (4) the communications must be made in confidence.” *Shew v. FOI Commission*, 245 Conn. 149, 159 (1998).

15. “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.” *Blumenthal v. Kimber Manufacturing, Inc.*, 265 Conn. 1, 10 (2003). However, “[n]ot every communication between attorney and client falls within the privilege.” *Clerk of Common Council v. FOI Commission*, 215 Conn. App. 404, 426 (2022). “Because the application of the attorney-client privilege tends to prevent the full disclosure of information and the true state of affairs, it is both narrowly applied and strictly construed.” *Harrington v. FOI Commission*, 323 Conn. 1, 12 (2016). “Accordingly [the privilege] protects only those disclosures—necessary to obtain informed legal advice—which might not have been made absent the privilege.” *Shew*, supra, 245 Conn.157-58.

16. It is found that the respondents’ sole witness, an administrative assistant to the respondents, did not testify regarding the applicability of §1-210(b)(10), G.S., to the in camera records. It is well settled that “the burden of establishing the applicability of the privilege rests with the party invoking it.” *Harrington*, supra, 323 Conn. 12. However, if it is clear from the face of the records, extrinsic evidence is not required to prove the existence of the attorney-client privilege. *Lash v. FOI Commission*, 300 Conn. 511, 516-17 (2011).

17. With respect to the redacted portions of IC-2023-0436-1, although the respondents claimed that such information is exempt from disclosure pursuant to §1-210(b)(10), G.S., at the hearing, respondents’ counsel argued that such information is not responsive to the complainant’s request because it consists of the names of individuals, other than the complainant, who were seeking eligibility determinations from the respondents. In response, complainant’s counsel indicated that the complainant was not seeking to obtain such information. Consequently, the redacted portions of IC-2023-0436-1 shall not be addressed further herein.

18. With respect to IC-2023-0436-2 and IC-2023-0436-10, it is found that such in camera records were provided to the complainant without redaction. Consequently, IC-2023-0436-2 and IC-2023-0436-10 shall not be addressed further herein.

19. With respect to the redacted portions of IC-2023-0436-9, although the respondents contended that such information is exempt from disclosure pursuant to §1-210(b)(10), G.S., at the hearing, respondents’ counsel stated that such information related to the transcriptionist service utilized by the respondents and conceded that the redacted portions were already

provided to the complainant. Complainant's counsel acknowledged that such information had already been provided to the complainant through her office. Consequently, the redacted portions of IC-2023-0436-9 shall not be addressed further herein.

20. Finally, with respect to the remaining in camera records, namely, IC-2023-0436-3 through IC-2023-0436-8 and IC-2023-0436-11 through IC-2023-0436-14, it is found that such records constitute e-mail communications between a current employee or public official of the respondents, acting in the performance of his or her duties or within the scope of his or her employment, and a government attorney acting in a professional capacity for the respondents.

21. It is found that the redacted portions of IC-2023-0436-3 through IC-2023-0436-6 relate to legal advice sought from the respondents' attorney. It is also found that such communications were made in confidence.

22. It is therefore concluded that the redacted portions of IC-2023-0436-3 through IC-2023-0436-6 are exempt from disclosure pursuant to §1-210(b)(10), G.S.

23. However, it is found that the redacted portions of IC-2023-0436-7, IC-2023-0436-8, and IC-2023-0436-11 through IC-2023-0436-14, do not relate to legal advice sought from or provided by the respondents' attorney. It is therefore concluded that such portions of the in camera records are not exempt from disclosure pursuant to §1-210(b)(10), G.S.

24. Accordingly, it is concluded that the respondents violated the disclosure provisions of §§1-210(a) and 1-212(a), G.S., by failing to provide copies of the redacted portions of IC-2023-0436-7, IC-2023-0436-8, and IC-2023-0436-11 through IC-2023-0436-14 to the complainant.

25. With respect to the contention that the respondents did not provide copies of all non-exempt responsive records, as already found in paragraph 16, above, an administrative assistant for the respondents appeared and testified in this matter. It is found, based on the witness's testimony, that she conducted a search for responsive records, but that such search was limited in scope. It is also found that at least two other individuals, namely, Gerald Gore and Kathleen Murphy, conducted their own searches for responsive records, but neither individual appeared nor testified in this matter. It is found that the respondents' witness offered no testimony about the nature or scope of the searches conducted by Gore and Murphy.

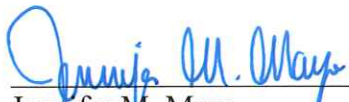
26. Based on the foregoing, it is found that the respondents failed to prove that they conducted a reasonable and diligent search for records. It is therefore found that the respondents failed to prove that they provided the complainant with all non-exempt records that are responsive to the request described in paragraph 2, above.

27. Accordingly, it is concluded that the respondents violated the disclosure provisions of the FOI Act, §§1-210(a) and 1-212(a), G.S., 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. Within 30 days of the date of the Notice of Final Decision, the respondents shall provide the complainant with an unredacted copy of IC-2023-0436-7, IC-2023-0436-8, and IC-2023-0436-11 through IC-2023-0436-14, free of charge.
2. Within 30 days of the date of the Notice of Final Decision in this matter, the respondents shall conduct a new search for records responsive to the request described in paragraph 2, above. The respondents are encouraged to engage the assistance of information technology staff, if available, to assist with the search. If responsive records that have not already been provided are located, the respondents shall provide copies of such records to the complainant, free of charge.
3. Within 30 days of the date of the Notice of Final Decision in this matter, the respondents shall provide the complainant with an affidavit setting forth their efforts to comply with the Order set forth in paragraph 2, above, including the specific nature and scope of any individual searches conducted by Gerald Gore, Kathleen Murphy, and any other individuals.
4. Henceforth, the respondents shall comply with the disclosure provisions of the FOI Act.

Approved by Order of the Freedom of Information Commission at its regular meeting of August 14, 2024.

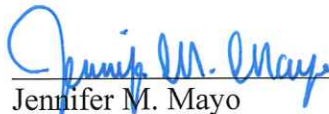

Jennifer M. Mayo
Acting Clerk of the Commission

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:

JACQUES JEAN, c/o Attorney Kelly Barrett, Federal Public Defender Office, District of Connecticut, 265 Church Street, Suite 702, New Haven, CT 06510 and Attorney Marisol Orihuela, Jerome N. Frank Legal Services, c/o Yale Law School, PO Box 209090, New Haven, CT 06520

COMMISSIONER, STATE OF CONNECTICUT, DEPARTMENT OF DEVELOPMENTAL SERVICE; AND STATE OF CONNECTICUT, DEPARTMENT OF DEVELOPMENTAL SERVICES, c/o Attorney Jonathan W. Ruhe, DDS Staff Attorney, 460 Capitol Avenue, Hartford, CT 06106



Jennifer M. Mayo
Acting Clerk of the Commission