STATE OF CONNECTICUT
FREEDOM OF INFORMATION COMMISSION

In the Matter of a Complaint by FINAL DECISION

Len Besthoff,

Complainant

against Docket # FIC 2023-0314

Executive Director, Cromwell Fire District;
and Cromwell Fire District,

Respondents June 12, 2024

The above-captioned matter was heard as a contested case on December 21, 2023, at which time the complainant and the respondents appeared, stipulated to certain facts, and presented testimony, exhibits, and argument on the complaint.

On May 10, 2024, the respondents submitted an affidavit, which has been marked as Respondents' Exhibit 1 (after-filed).

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 May 22, 2023, the complainant requested that the respondents provide him with a copy of a report completed by "an attorney [hired by the respondents] to investigate a series of alleged incidents of sexual misconduct during first responder training in November [2022] …."

3. It is found that by email dated May 23, 2023, the respondents denied the complainant's request, claiming that "[t]he report is exempt from disclosure pursuant to [§1-210(b)(10), G.S.]"

4. By email filed June 20, 2023, the complainant appealed to the Commission, alleging that the respondents violated the Freedom of Information ("FOI") Act by denying the request described in paragraph 2, above.

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 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.

9. It is found that On Scene Training, LLC ("On Scene"), is a private business that provides emergency medical services ("EMS") training. It is found that On Scene is owned by a communications dispatcher employed by the respondents, but that such employee runs On Scene in his private capacity.

10. It is found that in November 2022, pursuant to an oral agreement with the respondents, On Scene conducted EMS training in the respondents' offices. It is further found that such agreement allowed On Scene's students to gain practical experience by riding with employees of the respondents in the back of an ambulance. It is found that at all times relevant to this decision, the owner of On Scene was acting in his capacity as a private business owner.

11. It is found that on or around November 28, 2022, the owner of On Scene notified the Chief of the respondent Cromwell Fire District ("Chief") that students of On Scene had alleged that certain employees of the respondents engaged in inappropriate conversations of a sexual nature during the EMS training described in paragraph 10, above. It is further found that by email dated December 5, 2022, the owner of On Scene provided the Chief with more specific information regarding such allegations.

12. It is found that in response to the allegations described in paragraph 11, above, the respondents retained Attorney Cindy Cieslak of the law firm Rose Kallor, LLP, to conduct an investigation and provide legal advice regarding such allegations. It is further found that during the course of the investigation, Attorney Cieslak gathered relevant documents and interviewed witnesses. It is found that the interviewees included both employees of the respondents and students of On Scene.

13. It is found that on or around March 2, 2023, Attorney Cieslak provided the respondents with an investigative report that set forth the findings of the investigation and provided legal advice regarding actions to be taken based on such findings. It is found that the investigative report was shared only with the Chief and the respondent Executive Director, and was not discussed at any public meetings.

14. Following the December 21, 2023 hearing, the respondents submitted for in camera inspection a copy of the investigative report described in paragraph 13, above. Such report is comprised of 16 pages and will be identified herein as IC-2023-0314-IR-01 through IC-2023-0314-IR-16.

15. On May 10, 2024, pursuant to the order of the hearing officer, the respondents submitted for in camera inspection copies of certain exhibits that were referenced in and attached to the original investigative report. Such exhibits are comprised of 4 pages and will be identified herein as IC-2023-0314-RESP-07 through IC-2023-0314-RESP-10.[1] In addition, it is found that at the time the respondents submitted IC-2023-0314-RESP-07 through IC-2023-0314-RESP-10 for in camera inspection, they also provided the complainant with 43 pages of exhibits from the investigative report for which no exemption was claimed.

**Attorney-Client Privilege**

16. On the in camera index and in their post-hearing brief, the respondents claimed that the investigative report, IC-2023-0314-IR-01 through IC-2023-0314-IR-16, is exempt from disclosure in its entirety pursuant to §1-210(b)(10), G.S., because it is protected by the attorney-client privilege.

17. Section 1-210(b)(10), G.S., provides in relevant part that "[n]othing in the [FOI] Act shall be construed to require the disclosure of ... communications privileged by the attorney-client relationship ...."

18. 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 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."

19. 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*, 245 Conn. at 159. "The burden of establishing the applicability of the privilege rests with the party invoking it." *Harrington v. FOI Commission*, 323 Conn. 1, 12 (2016). If it is clear from the face of the records, extrinsic evidence is not required to prove the

[1] The numbering of the in camera records set forth in paragraphs 13 and 14, above, is in accordance with the page numbers that appear on such records as submitted by the respondents.

existence of the attorney-client privilege. *Lash v. FOI Commission*, 300 Conn. 511, 516-17 (2011).

20. "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*, 323 Conn. at 12. "Accordingly [the privilege] protects only those disclosures—necessary to obtain informed legal advice—which might not have been made absent the privilege." *Shew v. FOI Commission*, 245 Conn. 149, 157-58 (1998).

21. Documents or communications received from third parties generally are not protected by the attorney-client privilege, even if they are provided to the attorney in connection with the representation of the client. See *State v. Kosuda-Bigazzi*, 335 Conn. 327, 345 (2020) ("A preexisting document does not become privileged merely because it is transferred to or routed through an attorney." (Quotation marks omitted.)); *Matter of Grand Jury Subpoenas*, 959 F.2d 1158, 1165 (2d Cir. 1992) ("Documents created by and received from an unrelated third party and given by the client to his attorney in the course of seeking legal advice do not thereby become privileged."); Restatement (Third) of the Law Governing Lawyers § 70 (2000) ("Statements made by third persons who are not clients or agents of the client or lawyer are not covered by the attorney-client privilege."). However, such documents or communications may become privileged if they are "somehow transformed for the purpose of seeking legal advice and communicated or intended to be communicated to an attorney." *Kosuda-Bigazzi*, 335 Conn. at 345. Similarly, "if the communication from a nonprivileged person is incorporated in a protected communication from which it cannot be separated, the entire communication is privileged." Restatement (Third) of the Law Governing Lawyers § 70 (2000).

22. It is found that an attorney-client relationship existed between Attorney Cieslak and the respondents, and that Attorney Cieslak was acting in her professional capacity as an attorney in connection with the investigation and the investigative report. It is therefore found that the first prong of the *Shew* test is satisfied with respect to the entire investigative report, IC-2023-0314-IR-01 through IC-2023-0314-IR-16. See *Clerk of Common Council*, 215 Conn. App. at 426 (first prong of *Shew* test satisfied when law firm hired to "investigate the complaints and to provide legal advice").

23. It is also found that Attorney Cieslak's investigation and the investigative report related to the legal advice sought by the respondents. It is therefore found that the third prong of the *Shew* test is satisfied with respect to the entire investigative report, IC-2023-0314-IR-01 through IC-2023-0314-IR-16. See *Shew*, 245 Conn. at 160 (third prong satisfied where information obtained by attorney during investigation "was needed to supply a basis for legal advice"); *Clerk of the Common Council*, 215 Conn. App. at 427 (information obtained by attorney hired to investigate allegations against mayor "related to the investigation … and was

needed to supply a basis for legal advice concerning any future steps taken by the common council").

24. With respect to second prong of the *Shew* test, namely, whether the records constitute communications between counsel and employees or officials of the respondents, it is found that the following portions of the investigative report consist of excerpts of emails from a third party to an employee of the respondents[2]:

(a) IC-2023-0314-IR-002, lines 4 through 22 and lines 31 through 34
(b) IC-2023-0314-IR-003, lines 1 through 26

25. It is also found that the following portions of the investigative report consist of excerpts of emails between two third parties:

(a) IC-2023-0314-IR-007, lines 7 through 23 and lines 27 through 36
(b) IC-2023-0314-IR-008, line 1
(c) IC-2023-0314-IR-012, lines 7 through 16

26. It is found that the third-party senders and recipients of the emails described in paragraphs 24 and 25, above, were not acting as employees or agents of the respondents or Attorney Cieslak, and were not otherwise within the scope of the attorney-client privilege. It is further found that the excerpts of such emails appear in the investigative report as verbatim block quotes, rather than as a summarization written by counsel. It is also found that such portions are not incorporated into the investigative report in such a manner that they cannot be separated from the rest of the investigative report.

27. Based on the foregoing, it is found that the portions of the in camera records identified in paragraphs 24 and 25, above, are not protected by the attorney-client privilege. 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., and that the respondents violated the FOI Act by failing to provide the complainant with such records.

28. Other than the portions of the investigative report identified in paragraphs 24 and 25, above, it is found that the remainder of the investigative report, IC-2023-0314-IR-01 through IC-2023-0314-IR-16, consists of communications from Attorney Cieslak to the respondents. It is further found that such communications were made in confidence. It is therefore found that the second and fourth prongs of the *Shew* test are satisfied.

29. Based on the foregoing, it is concluded that the investigative report, IC-2023-0314-IR-01 through IC-2023-0314-IR-16, is exempt from disclosure pursuant to §1-210(b)(10), G.S., except for the portions identified in paragraphs 24 and 25, above.

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[2] The Commission notes that because the in camera records were submitted without line numbers, the hearing officer inserted line numbers in pencil where necessary to avoid confusion regarding the portions of the in camera records referenced in this decision. See Regs. Conn. State Agencies §§ 1-21j-37(f)(8) & (9).

**Invasion of Personal Privacy**

30. On the in camera index, the respondents claimed that IC-2023-0314-RESP-07 through IC-2023-0314-RESP-10, are exempt from disclosure pursuant to §1-210(b)(2), G.S., which provides that public agencies are not required to disclose "[p]ersonnel or medical files and similar files the disclosure of which would constitute an invasion of personal privacy."

31. To prove that a public record is exempt from disclosure pursuant to §1-210(b)(2), G.S., the party claiming the exemption must establish that the records in question are personnel, medical, or similar files, and that disclosure of such records would constitute an invasion of personal privacy. *Perkins v. Freedom of Information Commission*, 228 Conn. 158, 168 (1993). "The burden of establishing the applicability of an exemption ... requires the claimant ... to provide more than conclusory language, generalized allegations or mere arguments of counsel. Rather, a sufficiently detailed record must reflect the reasons why an exemption applies to the materials requested." *Id.* at 176.

32. The determination of whether a record is similar to a personnel file "requires a functional review of the documents at issue." *Connecticut Alcohol & Drug Abuse Commission v. FOI Commission*, 233 Conn. 28, 41 (1995) ("*CADAC*"). A record is similar to a personnel file if it "contains material ... that under ordinary circumstances would be pertinent to traditional personnel decisions," such as "whether an individual should'... be promoted, demoted, given a raise, transferred, reassigned, dismissed or subject to other such traditional personnel actions ...." *Id.*

33. On the in camera index, the respondents identified IC-2023-0314-RESP-07 through IC-2023-0314-RESP-10 as "[e]mail[s] from sex[ual] harassment witness[es] to [the owner of On Scene]," and a "[d]rawing from sex[ual] harassment witness to Attorney Cieslak." In an affidavit, the respondents stated that such records "contain identifying information from witnesses and victims of alleged sexual harassment." As noted in paragraph 15, above, the emails contained in IC-2023-0314-RESP-07 through IC-2023-0314-RESP-10 were referenced in and attached to Attorney Cieslak's investigative report relating to the allegations made by students of On Scene against employees of the respondents.

34. Based on the foregoing, and after a careful in camera inspection, it is found that IC-2023-0314-RESP-07 through IC-2023-0314-RESP-10 are similar to personnel files. See *CADAC*, 233 Conn. at 42 (investigative file relating to sexual harassment complaint was similar to personnel file); *Clerk of the Common Council*, 215 Conn. App. at 417 (portions of attorney billing invoices identifying employee names and dates when employees were interviewed as part of workplace harassment investigation were similar to personnel files); *Almeida v. FOI Commission*, 39 Conn. App. 154, 160 (1995) (investigative file relating to allegations against teacher used to determine whether teacher would be subject to discipline was similar to personnel file).

35. With respect to whether disclosure of the records in question would constitute an invasion of personal privacy within the meaning of §1-210(b)(2), G.S., it is the respondents' burden to establish both (1) "that the information sought by the request both does not pertain to legitimate matters of public concern," and (2) that such information "is highly offensive to a

reasonable person." *Perkins*, 228 Conn. at 175. "[D]isclosures relating to the employees of public agencies are presumptively legitimate matters of public concern." *Id.* at 174. "[W]hen a person accepts public employment, he or she becomes a servant of and accountable to the public. As a result, that person's reasonable expectation of privacy is diminished ...." *Id.* at 177.

36. It is well established that, as a general matter, investigations into allegations of misconduct by public employees are legitimate matters of public concern. See, e.g., *Department of Public Safety v. FOI Commission*, 242 Conn. 79, 89 (1997). Even when such an investigation does not substantiate the allegations in question, disclosure "facilitate[s] the public's understanding and evaluation of the [public agency's] investigative process, decision-making and overall handling of an important matter involving [public employees]." *Tompkins v. FOI Commission*, 136 Conn. App. 496, 509-10 (2012). See also *Department of Public Safety*, 242 Conn. at 89 ("the fact of exoneration is not presumptively sufficient to overcome the public's legitimate concern for the fairness of the investigation leading to that exoneration"); *City of Hartford v. FOI Commission*, 201 Conn. 421, 435 (1986) ("public has a legitimate interest in the integrity of local police departments and in disclosure of how such departments investigate and evaluate citizen complaints of police misconduct").

37. In *Rocque v. FOI Commission*, 255 Conn. 651, 664-665 (2001), the Supreme Court rejected the claim that "the identity of a sexual harassment complainant and other information in a sexual harassment investigation are always exempt under §1-210(b)(2)[, G.S.]," holding that the *Perkins* test "necessarily require[s] an analysis of the facts of each case in which the personal privacy exemption is claimed." The Court concluded that there was a legitimate public concern in much of the information from the investigative records at issue in that case because such records revealed the manner in which the agency investigated allegations of sexual harassment against a public employee. However, the Court further concluded that the complainant's identity and "sexually explicit or descriptive information, such as allegations of sexual contact and sexual improprieties, and details of intimate personal relationships" were not legitimate matters of public concern and would be highly offensive to a reasonable person, because such information "pertains to the private life of the sexual harassment complainant and documents the complainant's private relationships." *Id.* at 665-66.

38. Subsequently, in *Department of Transportation v. FOI Commission*, HHB-CV01-0508810, 2001 WL 1734436 (Dec. 21, 2001), the Superior Court upheld the Commission's determination that records relating to a sexual harassment investigation were not exempt from disclosure pursuant to §1-210(b)(2), G.S. While the records at issue "contain[ed] some instances of what might be described as inappropriate conversation or crude talk," the Court concluded that "under the narrow holding of *Rocque*," the records were not exempt from disclosure because they did "not contain 'sexually explicit or descriptive information, such as allegations of sexual contact and sexual improprieties, and details of intimate personal relationships.'" *Id.* at *4 (quoting *Rocque*, 255 Conn. at 666). See also *Bessette v. General Manager*, #FIC 2018-0089, ¶¶30-32 (July 11, 2018) (identity of sexual harassment complainant exempt from disclosure, but other information not exempt because it did not "pertain to the private life of the complaining witness [or] document the witness's private relationships"); *Cooper, et al. v. Town Administrator, et al.*, #FIC 2017-0480, ¶¶23-28 (May 23, 2018) (identity of complainant and sexually explicit information exempt, but remaining information not exempt because it did not "pertain to sexual contact and sexual improprieties ... [or] details of the complainants' intimate

relationships"); *Regan, et al. v. Commissioner, et al.*, #FIC 2015-422, ¶¶28-30 (Feb. 24, 2016) (records not exempt where they contained information that was not "sexually explicit" and did not "pertain to the complainants' intimate relationships or to the private life of the complainants").

39. It is found that the following portions of the in camera records reveal the identity of witnesses to alleged incidents of sexual harassment: IC-2023-0314-RESP-07, lines 8 and 26; IC-2023-0314-RESP-08, line 9; IC-2023-0314-RESP-09, line 2; and IC-2023-0314-RESP-10, lines 9 and 21. It is further found that such witnesses were private individuals who were participating as students in a class run by a private company.

40. It is found that under the facts and circumstances of this case, the identity of the witnesses contained in the portions of the in camera records described in paragraph 39, above, is not a legitimate matter of public concern. It is further found that disclosure of the identity of such witnesses would be highly offensive to a reasonable person. It is therefore found that disclosure of the portions of the in camera records described in paragraph 39, above, would constitute an invasion of personal privacy, within the meaning of §1-210(b)(2), G.S.

41. With respect to the remaining portions of IC-2023-0314-RESP-07 through IC-2023-0314-RESP-10, it is found that as in *Department of Transportation*, such records contain information that might be described as "crude" or "inappropriate," but do "not contain 'sexually explicit or descriptive information, such as allegations of sexual contact and sexual improprieties, and details of intimate personal relationships.'" 2001 WL 1734436 at *4 (quoting *Rocque*, 255 Conn. at 666). It is further found that the information contained in such records is a matter of public concern because the information relates to allegations of misconduct by public employees, disclosure of which may facilitate the public's understanding of the respondents' "investigative process, decision-making and overall handling of an important matter involving [public employees]." *Tompkins v. FOI Commission*, 136 Conn. App. at 509-10. See also *Department of Public Safety*, 242 Conn. at 89.

42. Accordingly, it is found that except for the portions described in paragraph 39, above, disclosure of IC-2023-0314-RESP-07 through IC-2023-0314-RESP-10 would not constitute an invasion of personal privacy within the meaning of §1-210(b)(2), G.S. It is therefore concluded that such records are not exempt from disclosure as claimed by the respondents, and that the respondents violated §§1-210(a) and 1-212(a), G.S., by failing to provide the complainant with copies of such records.

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 notice of final decision in this matter, the respondents shall provide the complainant, free of charge, with copies of the following records, which are further described in paragraphs 24, 25, and 39-42 of the findings and conclusions, above:

   a. IC-2023-0314-IR-002, lines 4 through 22 and lines 31 through 34
   b. IC-2023-0314-IR-003, lines 1 through 26
   c. IC-2023-0314-IR-007, lines 7 through 23 and lines 27 through 36

d. IC-2023-0314-IR-008, line 1
e. IC-2023-0314-IR-012, lines 7 through 16
f. IC-2023-0314-RESP-07, except for lines 8 and 26
g. IC-2023-0314-RESP-08, except for line 9
h. IC-2023-0314-RESP-09, except for line 2
i. IC-2023-0314-RESP-10, except for lines 9 and 21

2. Henceforth, the respondents shall strictly comply with the disclosure provisions 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 12, 2024.

Molly E. Steffes
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:

**LEN BESTHOFF**, 1422 New Britain Avenue, West Hartford, CT 06110

**EXECUTIVE DIRECTOR, CROMWELL FIRE DISTRICT; AND CROMWELL FIRE DISTRICT**, c/o Attorney Michael J. Rose, Rose Kallor, LLP, 750 Main Street, Suite 309, Hartford, CT 06103

Molly E. Steffes
Acting Clerk of the Commission

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