

FREEDOM OF INFORMATION COMMISSION  
OF THE STATE OF CONNECTICUT

In the Matter of a Complaint by

FINAL DECISION  
AFTER REMAND

Ian Cooke,

Complainant

against

Docket # FIC 2019-0707

Commissioner, State of Connecticut,  
Department of Emergency Services and  
Public Protection; and State of Connecticut,  
Department of Emergency Services and  
Public Protection,

Respondents

October 9, 2024

The above-captioned matter was heard as a contested case on August 25, 2020, February 17, 2021, and April 26, 2021, at which times 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, all hearings were conducted telephonically.<sup>1</sup>

A Report of Hearing Officer, dated January 25, 2022, was considered by the Commission at its regular meeting of February 23, 2022. At such meeting, the Commission voted unanimously to remand the matter to staff<sup>2</sup> to reconsider the respondents' claims that communications with the Commission's ombudsman and records of attorney work product were exempt from disclosure, and to consider the complainant's claim that the respondents waived the protections of the attorney-client privilege and attorney work product doctrine.

On November 10, 2022, the complainant withdrew his claim that he was entitled to receive copies of communications with the ombudsman.

After reconsideration 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.

---

<sup>1</sup> On March 14, 2020, the Governor issued Executive Order 7B, which suspended the requirement to conduct public meetings in person.

<sup>2</sup> At the time the Commission considered the Report of Hearing Officer at its February 23, 2022 regular meeting, the hearing officer was no longer in the employ of the Commission.

2. In a letter to the respondents dated April 11, 2019, the complainant requested a search of the email accounts of the following employees or former employees of the respondent from March 8, 2017, to the present (April 11, 2019): Lucinda Lopes-Phelan, Alison Rau, Christina Lussier, Merritt D'Amico, Kristin Sasinouski, Guy Vallaro, Terrance O'Neill, Joy Reho, Lawrence Tytla, and Ken Zerci. However, for former employee Ken Zercie, the complainant requested the dates were to include April 1, 2012, to the present (April 11, 2019). The complainant requested copies of emails from the above listed accounts that included the following keywords in any combination: Cooke, 06-1544, 2006-05224, 17-0818, 17-0228, 17-818, and 17-228.

3. It is found that on May 24, 2019, the respondents conducted a search of the email records of the employees or former employees listed in the complainant's April 11, 2019, letter.

4. It is found that in a letter dated July 23, 2019, the respondents informed the complainant that they had identified a total of 304 pages of records responsive to his request and would send him such records upon receipt of payment in the amount of \$76.00.

5. It is found that on October 23, 2019, the respondents disclosed 72 pages of records responsive to the complainant's request. Additionally, it is found that the respondents informed the complainant that redactions were made to the disclosed records pursuant to §§1-210(b)(2) and 1-210(b)(10), G.S.

6. It is found that in a letter dated November 5, 2019, the complainant acknowledged receiving the 72 pages of records. The complainant requested a privilege log to better understand the redactions. The complainant questioned why he received only 72 pages of records when the respondents initially informed him of the existence of 304 pages of responsive records. Additionally, the complainant renewed his request for all responsive records.

7. By letter of complaint filed November 22, 2019,<sup>3</sup> the complainant appealed to the Commission, alleging that the respondents violated the Freedom of Information ("FOI") Act by failing to fully disclose records pursuant to his request as described in paragraph 2, above. Additionally, the complainant requested that the Commission consider the imposition of a civil penalty against the respondents.

8. At the time of the request, §1-200(5), G.S., provided:

"Public 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,

---

<sup>3</sup> On March 25, 2020, the Governor issued Executive Order 7M, thereby suspending the provisions of §1-206(b)(1), G.S., which requires the Commission to hear and decide an appeal within one year after the filing of such appeal. Executive Order 7M is applicable to any appeal pending with the Commission on the issuance date through June 30, 2021. Consequently, the Commission retains jurisdiction.

typed, tape-recorded, printed, photostated, photographed or recorded by any other method.<sup>4</sup>

9. Section 1-210(a), G.S., provides, in relevant part:

Except 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 the provisions of section 1-212.

10. Section 1-212(a), G.S., provides in relevant part: "Any person applying in writing shall receive, promptly upon request, a plain, facsimile, electronic or certified copy of any public record."

11. It is concluded that the requested records, to the extent such records are maintained by the respondents, are public records within the meaning of §§1-200(5) and 1-210(a), G.S.

**I. First In Camera Submission**

12. It is found that by letter dated February 18, 2020, after the complaint in this matter was filed, the respondents provided the complainant with a redaction log as previously requested. Additionally, such letter informed the complainant that the count of 304 pages of responsive records previously referenced in the July 23, 2019, letter was inaccurate. The respondents' witness testified at the August 25, 2020, hearing, that in the course of the respondents' search for responsive records, a search was inadvertently conducted on the email account of Terrance O'Neill. It is found that Terrance O'Neill is an attorney with the Connecticut Office of Attorney General and, therefore, such email account is not among the email accounts maintained by the respondent agency. It is found that when the emails from the account of Terrance O'Neill were removed from the 304 pages of responsive records, 72 pages of responsive records remained.

13. At the August 25, 2020, hearing in this matter, the complainant stated that he was not challenging the redactions to the portions of the records contained in the February 18, 2020 production of records described in paragraph 12, above, that the respondents claimed to be attorney-client communications. However, the complainant challenged redactions to email messages between the respondents' counsel and the FOI Commission's ombudsman. Additionally, the complainant alleged for the first time that communications between the respondents' counsel and the FOI Commission's ombudsman were improper ex parte communications.

14. On September 16, 2021, in accordance with an order of the hearing officer, the respondents submitted eight records for in camera inspection ("First In Camera Submission"). On the in camera index, the respondents identified each record contained in the First In Camera

---

<sup>4</sup> Public Act 21-2 (June Sp. Sess.) amended the definition of "public records or files" to include data or information that is "videotaped." Such amendment was effective June 23, 2021.

Submission as “settlement/mediation discussion with [the Commission’s] ombudsman,” and claimed that such records were exempt from disclosure pursuant to §§1-210(b)(4) and 1-210(b)(10), G.S.

15. As noted in the introduction on page 1, however, the complainant withdrew his claim that he was entitled to communications between the respondents and the FOI Commission’s ombudsman. Accordingly, the Commission need not address whether the respondents violated the FOI Act by denying the complainant’s request for such records.<sup>5</sup>

16. During the first hearing in this matter, the complainant identified inconsistencies between the records disclosed to him as part of the current request and records that had been disclosed to him as the result of a previous records request. The respondents were unable to explain the inconsistencies and agreed to conduct another search of their records. As a result, a second hearing was scheduled.

## **II. Second In Camera Submission**

17. At the second hearing in this matter held on February 17, 2021, it was revealed that shortly after the August 25, 2020, hearing, the respondents disclosed approximately 740 pages additional records to the complainant. It is found that after reviewing the newly disclosed records, the complainant identified several inconsistencies in the numbering of pages throughout the disclosed records. As a result of such inconsistencies, the complainant alleged that additional records were being withheld in spite of the respondents’ contention that all records responsive to the complainant’s request were included among the approximately 740 pages.

18. Additionally, the complainant challenged the redactions made throughout the 740 pages of records. At the conclusion of the hearing on February 17, 2021, the hearing officer ordered the respondents to submit any records for which they were claiming an exemption to disclosure, in whole or in part, for in camera inspection. On April 20, 2021,<sup>6</sup> the respondents submitted a total of 728 pages for in camera inspection along with an index describing the exemptions claimed (“Second In Camera Submission”). Such records will be identified herein as IC2019-0707a-001 through IC2019-0707a-0728. However, it is of note that of the 728 records submitted for in camera inspection, portions of only 156 records were redacted. The remaining pages were disclosed in whole to the complainant. Because of the complainant’s allegation of a discrepancy in page numbering, the respondents submitted the entirety of the responsive records in an effort to maintain the integrity of their page numbering scheme.

---

<sup>5</sup> With respect to the complainant’s claim that communications between the Commission’s ombudsman and the respondents constituted improper ex parte communications, the Commission notes that such communications are specifically authorized by the Commission’s regulations. See §1-21j-29(d) of the Regulations of Connecticut State Agencies (“[T]he ombudsman may communicate ex parte with the parties or their representatives and conduct informal conferences in person or otherwise. Neither the ombudsman nor any party in a contested case shall communicate the contents of any communication made or received in the course of the ombudsman process without the express consent of all parties.”).

<sup>6</sup> The February 17, 2021, order directed the respondents to submit the in camera records no later than April 9, 2021, however, due to the COVID-19 pandemic and the subsequent closing of state facilities, the respondents were granted an extension of time for delivery.

A. Ombudsman Communications

19. With regard to the Second In Camera Submission, the respondents claimed that the records identified in endnote I were exempt from disclosure pursuant to §1-210(b)(10), G.S., because they were communications between respondents' counsel and the Commission's ombudsman. As explained in paragraph 15, above, however, the complainant withdrew his claim that he was entitled to communications between the respondents and the Commission's ombudsman. Accordingly, the Commission need not address whether the respondents violated the FOI Act by denying the complainant's request for such records.

B. Section 1-210(b)(18), G.S.

20. The respondents contended that portions of IC2019-0707a-0228, IC2019-0707a-0255, IC2019-0707a-0256 and IC2019-0707a-0257 were exempt from disclosure pursuant to §1-210(b)(18), G.S., because such information constituted the names of inmates.

21. Section 1-210(b)(18), G.S., states:

[n]othing in the Freedom of Information Act shall be construed to require disclosure of ... [r]ecords, the disclosure of which the Commissioner of Correction...has reasonable grounds to believe may result in a safety risk, including the risk of harm to any person or the risk of an escape from, or a disorder in, a correctional institution or facility under the supervision of the Department of Correction or Whiting Forensic Hospital....

22. It is found that the names of inmates are not exempt from disclosure pursuant to §1-210(b)(18), G.S., absent a determination by the Commissioner of Correction that the disclosure of such names would result in a safety risk. It is found that the respondents presented no evidence with regard to any determination made by the Commissioner of Correction about the contents of the requested records. It is found, therefore, that the respondents failed to prove that the in camera records identified in paragraph 20, above, were exempt from disclosure pursuant to §1-210(b)(18), G.S. Accordingly, it is concluded that the respondents violated §§1-210(a) and 1-212(a), G.S., when they failed to disclose IC2019-0707a-0228, IC 2019-0707a-0255, IC2019-0707a-0256 and IC2019-0707a-0257 or portions thereof, to the complainant.

C. Section 1-210(b)(10), G.S.

23. Section 1-210(b)(10), G.S., provides in relevant part that public agencies are not required to disclose "communications privileged by the attorney-client relationship ... or any other privilege established by the common law or the general statutes ...."

24. The respondents claimed that certain records contained in the Second In Camera Submission were exempt from disclosure pursuant to §1-210(b)(10), G.S., because they were protected by the attorney-client privilege and/or the attorney work product doctrine. The complainant contested such claims of exemption, and further claimed that the respondents waived any such claims of privilege by disclosing certain communications related to the same subject matter.

Waiver

25. The complainant claimed that the respondents waived the protections of the attorney-client privilege and attorney work product doctrine with respect to the records contained in the Second In Camera Submission by voluntarily disclosing certain privileged communications in connection with a prior records request. The complainant further contended that such waiver extended to any communications or records related to the same subject matter.

26. As a general matter, when a communication or document protected by the attorney-client privilege or attorney work product doctrine is voluntarily disclosed outside the attorney-client relationship, such disclosure “constitutes a waiver of [the] privilege as to those items.” *Harp v. King*, 266 Conn. 747, 767 (2003). In certain circumstances, however, such waiver extends beyond the specific communications or documents actually disclosed, and is deemed to “constitute[] waiver of the privilege as to all other such communications on the same subject.” *Ghio v. Liberty Insurance Underwriters, Inc.*, 212 Conn. App. 754, 770 (2022). This “subject matter waiver” rule is intended “to discourage the use of the privilege as a litigation weapon in the interest of fairness.” *Id.* “Courts have characterized this reasoning as the sword and the shield approach, in that a litigant should not be able to disclose portions of privileged communications with his attorney to gain a tactical advantage in litigation (the sword), and then claim the privilege when the opposing party attempts to discover the undisclosed portion of the communication or communications relating to the same subject matter.” *Id.* at 770-71.

27. In *Ghio*, the Appellate Court held that subject matter waiver applies “when the [tribunal] determines that the waiver was intentional and that fairness dictates that the disclosed and undisclosed communications be considered together.” *Id.* at 775-76. To determine whether subject matter waiver applies, “a [tribunal] must review the relevant disclosed and undisclosed communications to determine whether a subject matter waiver has occurred and, upon finding waiver, to define the scope of the waiver. In this regard, the central question for the [tribunal] is whether the disclosed and undisclosed communications ought in fairness to be considered together.” (Citation & quotation marks omitted.) *Id.* at 776.

28. It is found that on or around April 18, 2018, in connection with Docket #FIC 2017-0818, *Ian Cooke v. Commissioner, State of Connecticut, Department of Emergency Services and Public Protection, et al.*,<sup>7</sup> the respondents provided the complainant with copies of certain unredacted emails. It is further found that the respondents notified the complainant that they were providing such emails “in the interest of full disclosure and to obviate the need for in-camera review by the hearing officer.” It is found that included among such emails was an email dated September 26, 2017 from a staff attorney for the respondents to the director of the respondents’ Division of Scientific Services, copying an assistant attorney general who represented the respondents, concerning the respondents’ preparations for the contested case hearing in another prior Commission case. It is found that such email stated in relevant part:

I’m handling the above FOIA case involving an Ian Cooke, who is incarcerated for a 2006 homicide at Garner CI and requested various forensic info from his case. We provided

---

<sup>7</sup> The Commission takes administrative notice of the record in Docket #FIC 2017-0818.

what was responsive and available, but he's looking for data/documentation on ballistics/firearms evidence that is not at the Lab because a disgruntled former lab employee (Gerard Petillo) apparently walked off with it in 2011 and was never prosecuted. He went on to form his own forensic company but has since passed away, and it's anyone's guess who has the records or where they might be. The Lab says that they would retest the weapon in question if necessary if a CSAO were to request it.

I'm sure the Hearing Officer is going to be asking a bit about this history and the records. I've been in touch with both Kristin and Lucinda but would like to ask you a. which one might have the most knowledge who could attend the hearing next Tuesday and provide testimony, and b. if you feel that you would like to attend as well.

29. It is found that the respondents' voluntary disclosure of the email referenced in paragraph 28, above, constituted a waiver of the attorney-client privilege as to such email.

30. It is found that the following in camera records are identical copies of the email described in paragraph 28, above: IC2019-0707a-415 lines 10-27; IC2019-0707a-583 lines 23-32; and IC2019-0707a-585 lines 11-21.

31. It is found that because the respondents waived any privilege with respect to the email described in paragraph 28, above, the records identified in paragraph 30, above, are not exempt from disclosure pursuant to §1-210(b)(10), G.S. It is therefore concluded that the respondents violated §§1-210(a) and 1-212(a), G.S., by denying the complainant's request for such records.

32. However, with respect to the complainant's claim that the privilege waiver extended to all records and communications concerning the same subject matter, it is found, based on a careful in camera inspection, that fairness does not require the remaining records to be disclosed to the complainant. Subject matter waiver generally does not apply "where, as here, disclosures of privileged information are made extrajudicially and without prejudice to the opposing party" because "disclosures made in public rather than in court—even if selective—create no risk of *legal* prejudice until put at issue in the litigation by the privilege-holder." *In re von Bulow*, 828 F.2d 94, 103 (2d Cir. 1987) (criminal defense attorney's publication of book containing communications with client did not waive privilege as to other communications on same subject matter in later civil suit). See also *US Pain Found., Inc. v. DaPonte*, 2023 WL 2495739, at \*7 (Conn. Super. Mar. 10, 2023) (company disclosed privileged communications to tax authorities in effort to mitigate damage caused by former employee's alleged financial misconduct; no subject matter waiver in civil suit against attorney and accountant allegedly involved in employee's wrongdoing because disclosures "were not designed with an intent to obtain a tactical advantage in the present action").

33. It is found that the respondents' disclosure of the email described in paragraph 28, above, did not give the respondents an unfair litigation advantage, and did not otherwise result in

any unfairness to the complainant that would require disclosure of the remaining records. It is found, rather, that the respondents disclosed the email in question in response to the complainant's public records request. It is further found that although the respondents disclosed the email in question while a contested case was pending before the Commission, there is no evidence that such disclosure was "designed with an intent to obtain a tactical advantage" in that proceeding. *US Pain Found., Inc. v. DaPonte*, 2023 WL 2495739, at \*7.

34. Based on the foregoing, it is found that the respondents' waiver of the attorney-client privilege with respect to the email described in paragraph 28, above, did not extend to all communications and records concerning the same subject matter. It is therefore found that the respondents did not waive the protections of the attorney-client privilege and the attorney work product doctrine with respect to the in camera records other than those identified in paragraph 30, above.

#### Attorney-Client Privilege

35. The respondents claimed that the records contained in the Second In Camera Submission that are identified in endnote II were exempt from disclosure pursuant to §1-210(b)(10), G.S., because they were protected by the attorney-client privilege.

36. The applicability of the exemption contained in §1-210(b)(10), G.S., is governed by established Connecticut law defining the privilege. That law is well set forth in *Maxwell v. FOI Commission*, 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.

37. 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....

38. 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 at 149.

39. After careful in camera examination of such records, it is found that all of the records identified in endnote II are "confidential communications" as defined in §52-146r, G.S., and therefore exempt from disclosure as contended by the respondents, with the exception of the following: IC2019-0707a-009 lines 06-22, IC2019-0707a-099 lines 07.5-13 and 20-31, IC2019-



0707a-111 lines 06-41.5, IC2019-0707a-136 lines 26-31 and 35-45, IC2019-0707a-229 lines 06-07, 12-13, and 18-19; and IC2019-0707a-433 lines 36-45.5. Accordingly, it is concluded that the respondents did not violate §§1-210(a) and 1-212(a), G.S., when they refused to disclose such records to the complainant.

40. With regard to IC2019-0707a-009 lines 06-22 and IC2019-0707a-0229 lines 06-07, 12-13, and 18-19, it is found that such records do not contain any communication between the respondents and their attorneys relating to legal advice sought by the respondents or any of the respondents' employees from such attorney. Therefore, it is concluded that such records are not exempt from disclosure pursuant to §1-210(b)(10), G.S., as contended by the respondents.

41. With regard to IC2019-0707a-099 lines 07.5-13 and 20-31, it is found that such communication is between the respondents and the respondents' attorneys, however such communication does not seek legal advice, nor does it pertain to any legal advice sought by the respondents. Therefore, it is concluded that such record is not exempt from disclosure pursuant to §1-210(b)(10), G.S., as contended by the respondents.

42. With regard to IC2019-0707a-111 lines 06-41.5, IC2019-0707a-136 lines 26-31 and 35-45, and IC2019-0707a-433 lines 36-45.5, it is found that such communications are between the Commission's ombudsman and the respondents' attorney. As explained in paragraph 15, above, the complainant withdrew his claim that he was entitled to communications between the respondents and the Commission's ombudsman. Accordingly, the Commission need not address whether the respondents violated the FOI Act by denying the complainant's request for such records.

43. Based on the foregoing, it is concluded that the respondents violated §§1-210(a) and 1-212(a), G.S., when they failed to disclose the records identified in paragraphs 40 and 41, above.

#### Attorney Work Product

44. The respondents claimed that the following records contained in the Second In Camera Submission were exempt from disclosure pursuant to §1-210(b)(10), G.S., because they were protected by the attorney work product doctrine:

IC2019-0707a-015 lines 04-45<sup>8</sup>; IC2019-0707a-059 lines 04-10; IC2019-0707a-060 lines 04-16; IC2019-0707a-124 lines 4.5-13; IC2019-0707a-146 lines 12.5-26.5; IC2019-0707a-194 lines 27-29; IC2019-0707a-195 lines 03-06 and 28-31; IC2019-0707a-197 lines 22.5-24; IC2019-0707a-198 lines 00-03 and 24-27; IC2019-0707a-210 lines 08-17; IC2019-0707a-280 lines 06-19; and IC2019-0707a-486 lines 4.5-10.

---

<sup>8</sup> On the in camera index, the respondents described IC2019-0707a-015 lines 04-45 as attorney-client privileged communications. However, based on a careful review of the in camera records, it is clear that IC2019-0707a-015 lines 04-45 consists of attorney work product, rather than attorney-client privileged communications.

45. Attorney work product is “the result of an attorney’s activities when those activities have been conducted with a view to pending or anticipated litigation.” *Stanley Works v. New Britain Redevelopment Agency*, 155 Conn. 86, 95 (1967). “The work product rule protects an attorney’s interviews, statements, memoranda, correspondence, briefs, mental impressions, personal beliefs, and countless other tangible and intangible items.” (Citation & quotation marks omitted.) *Ullmann v. State*, 230 Conn. 698, 714 (1994). For a document to be considered work product, “[t]he attorney’s work must have formed an essential step in the procurement of the data which the opponent seeks, and the attorney must have performed duties normally attended to by attorneys.” *Stanley Works*, 155 Conn. at 95.

46. As noted in paragraph 23, above, §1-210(b)(10), G.S., exempts from mandatory disclosure records that are protected by, among other things, “any ... privilege established by the common law or the general statutes ...” In previous cases, the Commission concluded that the work product doctrine was not a “privilege established by the common law or the general statutes,” within the meaning of §1-210(b)(10), G.S., because the protection for attorney work product during the discovery process is governed by the rules of practice, not by statute or common law. See Practice Book §13-3. The Commission therefore concluded that records of attorney work product were not exempt from disclosure pursuant to §1-210(b)(10), G.S. See *Matthews v. Commissioner, et al.*, Docket #FIC 2015-794, Final Decision After Remand, ¶14 (March 14, 2018); *Sola v. Director of Legal Services, et al.*, Docket #FIC 2017-0080, ¶¶31-33 (Aug. 9, 2017); *McCarthy v. First Selectman, et al.*, Docket #FIC 2023-002, ¶¶37-42 (Nov. 13, 2013).

47. Upon further consideration, however, the Commission recognizes that protection for attorney work product existed as a common law privilege prior to its incorporation into the Practice Book. Specifically, the Practice Book rule protecting attorney work product from discovery was not added until 1973. See Practice Book (rev. 1975) §167. Prior to the adoption of such rule, however, the Connecticut Supreme Court recognized the attorney work product doctrine under the common law in its 1967 decision in *Stanley Works*, 155 Conn. at 95. See also *Jacques v. Cassidy*, 28 Conn. Supp. 212, 214-15 (Conn. Super. July 11, 1969); *Prizio v. Penachio*, 19 Conn. Supp. 381, 384-85 (Conn. Super. June 1, 1955).

48. In addition, while it appears that Connecticut courts have never addressed the issue, courts in other jurisdictions “have recognized that even where [the rules of discovery] might not technically apply ..., work product protection might still be available under the common law work product doctrine.” *O’Connell v. Cowan*, 332 S.W.3d 34, 41-42 (Ky. 2010) (prosecutor’s work product protected from disclosure in subsequent litigation even though prosecutor was not involved as party or counsel in such litigation). See also *In re Grand Jury Subpoenas*, 318 F.3d 379, 384 (2d Cir. 2003) (“we have entertained work product challenges to grand jury subpoenas even though neither [civil nor criminal discovery rules] strictly appl[y] in that context”); *Estate of Dabela v. Town of Redding*, 2018 WL 1445577, at \*2 (D. Conn. Mar. 23, 2018) (“The common law work product doctrine ... extends to nonparties” (quoting *Tankleff v. County of Suffolk*, 2011 WL 5884218, at \*1-2 (E.D.N.Y. Nov. 22, 2011)); *Allied Irish Banks, P.L.C. v. Bank of America, N.A.*, 252 F.R.D. 163, 173 (S.D.N.Y. 2008) (“courts have recognized that the inapplicability of Rule 26(b)(3) does not preclude granting similar immunity under the common-law work-product doctrine” (Citation & quotation marks omitted)).

49. Accordingly, it is concluded that the attorney work product doctrine is a “privilege established by the common law,” within the meaning of §1-210(b)(10), G.S.<sup>9</sup> In accordance with the Supreme Court’s formulation in *Stanley Works*, 155 Conn. at 95, a public record is protected by the work product doctrine, and therefore exempt from mandatory disclosure pursuant to §1-210(b)(10), G.S., if (1) it was prepared in anticipation of litigation, (2) the attorney was performing duties normally attended to by attorneys in connection with the creation of the record in question, and (3) if the record was not created by an attorney, the attorney’s work formed an essential step in the creation of such record.

50. It is found that it is not apparent on the face of the following records that such records were prepared in anticipation of litigation:

- (a) IC2019-0707a-124 line 4.5 through the number “9” on line 9.5;
- (b) IC2019-0707a-124 line 9.5 starting with the word “Review” through line 13;
- (c) IC2019-0707a-146 line 17 starting with the word “MOUs” through line 19 ending with the word “work”;
- (d) IC2019-0707a-146 line 25 beginning with the word “Greco” through line 26.5 ending with the word “emergencies.”<sup>10</sup>

51. Accordingly, it is found that the records described in paragraph 50, above, are not protected by the attorney work product doctrine. It is therefore concluded that such records are not exempt from disclosure pursuant to §1-210(b)(10), G.S., and that the respondents violated §§1-210(a) and 1-212(a), G.S., by denying the complainant’s request for such records.

52. It is further found that other than the records described in paragraph 50, above, all of the remaining records identified in paragraph 44, above, consist of notes and/or emails prepared by an attorney for the respondents in anticipation of litigation, and are the product of an attorney performing duties that are normally attended to by attorneys. It is therefore found that such records are protected by the attorney work product doctrine.

53. Accordingly, it is concluded that except for the records identified in paragraph 50, above, all of the records identified in paragraph 44, above, are exempt from disclosure pursuant to §1-210(b)(10), G.S. It is therefore concluded that the respondents did not violate §§1-210(a) and 1-212(a), G.S., by denying the complainant’s request for such records.

### **III. Civil Penalty**

54. After consideration of the entire record in this case, the Commission declines to consider the imposition of a civil penalty against the respondents.

---

<sup>9</sup> Prior Commission decisions that reached a contrary conclusion are hereby overruled.

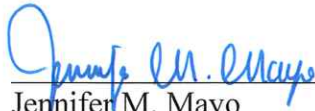
<sup>10</sup> The Commission notes that immediately following the word “emergencies” on IC2019-0707a-146 line 26.5 is a cell phone number for an attorney for the respondents. The Commission in its discretion declines to order the respondents to disclose such information.

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

1. Forthwith, the respondents shall provide the complainant, free of charge, with copies of the records identified in paragraphs 22, 30, 40, 41, and 50, above.

2. Henceforth, the respondents shall strictly comply with the disclosure requirements of §§1-210(a) and 1-212(a), G.S.

Approved by Order of the Freedom of Information Commission at its regular meeting of October 9, 2024.



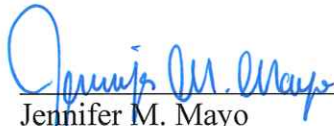
Jennifer M. Mayo  
Acting Clerk of the Commission

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:

**IAN COOKE, #340812**, Cheshire Correctional Institution, 900 Highland Avenue, Cheshire, CT 06410

**COMMISSIONER, STATE OF CONNECTICUT, DEPARTMENT OF EMERGENCY SERVICES AND PUBLIC PROTECTION; AND STATE OF CONNECTICUT, DEPARTMENT OF EMERGENCY SERVICES AND PUBLIC PROTECTION, c/o** Assistant Attorney General Steven M. Barry, Office of the Attorney General, 165 Capitol Avenue, Hartford, CT 06106



Jennifer M. Mayo  
Acting Clerk of the Commission

FIC 2019-0707/FD/JMM/October 15, 2024

---

**End Notes:**

<sup>1</sup> The respondents claimed that the following records were exempt from disclosure because they were communications between the Commission's ombudsman and representatives for the respondents:

IC2019-0707a-009 lines 26.5-47.5, IC2019-0707a-023 lines 12-30.5, IC2019-0707a-045 lines 02-16; IC2019-0707a-050 lines 16-47; IC2019-0707a-052 lines 06.5-36; IC2019-0707a-055 lines 07-26; IC2019-0707a-056 lines 05.5-25; IC2019-0707a-095 lines 08-10 and 14-16; IC2019-0707a-096 lines 07-09; IC2019-0707a-112 lines 15.5-20 and 23.5-46.5; IC2019a-0707a-113 lines 00-10.5; IC2019-0707a-114 lines 05.5-09, 13-16, and 19-35; IC2019-0707a-116 lines 02.5-08 and 11.5-45; IC2019-0707a-118 lines 05-09, 13.5-22, and 42-46; IC2019-0707a-119 lines 00-38; IC2019-0707a-121 lines 06.5-16, 37-42, and 46; IC2019-0707a-122 lines 00-34; IC2019-0707a-133 lines 00-09, 30.5-36, and 40-46; IC2019-0707a-134 lines 00-26; IC2019-0707a-137 lines 00-22; IC2019-0707a-139 lines 18.5-24 and 28-47; IC2019-0707a-140 lines 00-15; IC2019-0707a-148 lines 17-22 and 26-47; IC2019-0707a-149 lines 00-12; IC2019-0707a-151 lines 16.5-22 and 25-47; IC2019-0707a-152 lines 00-12; IC2019-0707a-153 lines 05-16 and 37-42.5; IC2019-0707a-154 lines 01-33.5; IC2019-0707a-156 lines 05-11 and 15-46; IC2019-0707a-157 lines 00-02; IC2019-0707a-158 lines 05-40; IC2019-0707a-171 lines 14.5 and 18.5-28; IC2019-0707a-172 lines 05-15; IC2019-0707a-434 lines 00-30; IC2019-0707a-435 lines

---

20-45.5; IC2019-0707a-436 lines 00-09; IC2019-0707a-437 lines 06-41.5.

<sup>ii</sup> The respondents claimed that the following records were protected by the attorney-client privilege:

IC2019-0707a-007 lines 5-7; IC2019-0707a-008 lines 05-14; IC2019-0707a-009 lines 06-22; IC2019-0707a-011 lines 08-32.5; IC2019-0707a-012 lines 05-27; IC2019-0707a-14 lines 05-27; IC2019-0707a-015 lines 04-45; IC2019-0707a-016 lines 27-48; IC2019-0707a-017 lines 00-02; IC2019-0707a-018 lines 31-48; IC2019-0707a-019 lines 00-07; IC2019-0707a-022 lines 05-32.5; IC2019-0707a-023 lines 06-07 and lines 12-30.5; IC2019-0707a-031 lines 15-18; IC2019-0707a-032 lines 14-17; IC2019-0707a-059 lines 31.5-42; IC2019-0707a-060 lines 04-16; IC2019-0707a-062 lines 24-34 and 42-46; IC2019-0707a-63 lines 00-08; IC2019-0707a-064 lines 09-18 and 27-38; IC2019-0707a-066 lines 07-11 and 16-28; IC2019-0707a-077 lines 08-21; IC2019-0707a-088 lines 12.5-22.5; IC2019-0707a-090 lines 6.5-16; IC2019-0707a-094 lines 07-14; IC2019-0707a-099 lines 7.5-13 and 20-31; IC2019-0707a-111 lines 06-41.5; IC2019-0707a-126 lines 41-42; IC2019-0707a-127 lines 14.5-36; IC2019-0707a-129 lines 19 and 38.5-45; IC2019-0707a-131 lines 7.5-15; IC2019-0707a-132 lines 18-26; IC2019-0707a-135 lines 13-20 and 41.5-46; IC2019-0707a-136 lines 00-04, 26-31, and 35-45; IC2019-0707a-138 lines 05-13 and 34.5-44; IC2019-0707a-147 lines 33-42; IC2019-0707a-150 lines 32.5-42.5; IC2019-0707a-166 lines 19-46; IC2019-0707a-167 lines 00-03 and 24-36; IC2019-0707a-200 lines 05.5-13; IC2019-0707a-229 lines 06-07, 12-13, and 18-19; IC2019-0707a-234 lines 31-37; IC2019-0707a-240 lines 20-27; IC2019-0707a-242 lines 15.5-22; IC2019-0707a-243 lines 36-43; IC2019-0707a-245 lines 08-14; IC2019-0707a-280 lines 06-19; IC2019-0707a-281 lines 01-08; IC2019-0707a-284 lines 14-19; IC2019-0707a-300 lines 01-28; IC2019-0707a-301 lines 02-12; IC2019-0707a-303 lines 00-28; IC2019-0707a-304 lines 00-11; IC2019-0707a-305 lines 39-47; IC2019-0707a-306 lines 00-22 and 43-48; IC2019-0707a-307 lines 00-05; IC2019-0707a-308 lines 39-47; IC2019-0707a-309 lines 00-22 and 42-48; IC2019-0707a-310 lines 01-06; IC2019-0707a-311 lines 33-48; IC2019-0707a-312 lines 01-16 and 36-47; IC2019-0707a-314 lines 32.5-47; IC2019-0707a-315 lines 00-15 and 36-46; IC2019-0707a-333 lines 05-37; IC2019-0707a-334 lines 10.5-20; IC2019-0707a-337 lines 09-18; IC2019-0707a-415 lines 10-27; IC2019-0707a-416 lines 06-11; IC2019-0707a-431 lines 04.5-13 and 19-46; IC2019-0707a-432 lines 00-07; IC2019-0707a-433 lines 36-45.5; IC2019-0707a-452 lines 35-45; IC2019-0707a-453 lines 00-24; IC2019-0707a-454 lines 04-40; IC2019-0707a-507 lines 06.5-20; IC2019-0707a-508 lines 29-47; IC2019-0707a-509 lines 00-09; IC2019-0707a-510 lines 29-46; IC2019-0707a-511 lines 00-10; IC2019-0707a-512 lines 16-43; IC2019-0707a-515 lines 09-40; IC2019-0707a-517 lines 08-37; IC2019-0707a-519 lines 35-45; IC2019-0707a-543 lines 13-19; IC2019-0707a-544 lines 13-19; IC2019-0707a-567 lines 35-47; IC2019-0707a-569 lines 07-15; IC2019-0707a-573 lines 11-26; IC2019-0707a-575 lines 32-36.5; IC2019-0707a-576 lines 00-09.5; IC2019-0707a-583 lines 23-32; IC2019-0707a-584 lines 17-21.5; IC2019-0707a-585 lines 11-21; IC2019-0707a-586 lines 05-09; IC2019-0707a-587 lines 22-32; IC2019-0707a-590 lines 30.5-40; IC2019-0707a-592 lines 17-26; IC2019-0707a-593 lines 21-30; IC2019-0707a-595 lines 11-21; IC2019-0707a-596 lines 11-21; IC2019-0707a-599 lines 29.5-33; IC2019-0707a-601 lines 11-15; and IC2019-0707a-602 lines 11-15.