STATE OF CONNECTICUT
FREEDOM OF INFORMATION COMMISSION

In the Matter of a Complaint by FINAL DECISION

Attorney Paul Testa,

Complainant

against Docket # FIC 2023-0468

Executive Director, State of Connecticut, Commission on Human Rights and Opportunities; and State of Connecticut, Commission on Human Rights and Opportunities,

Respondents August 28, 2024

The above-captioned matter was heard as a contested case on April 19, 2024, at which time the complainant[1] and the respondents appeared, stipulated to certain facts, and presented testimony, exhibits, and argument on the complaint.

At the April 19, 2024 hearing, pursuant to the order of the hearing officer, Attorney Paul Testa was substituted as complainant in place of the City of Bridgeport ("City").

Pursuant to the order of the hearing officer, the matter was reopened for the purpose of taking additional evidence. The reopened hearing was held on July 26, 2024, at which time the complainant and the respondents appeared and presented additional 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 the complainant and his firm, Berchem Moses P.C., represent the City in connection with a complaint pending before the respondent Commission on Human Rights and Opportunities ("CHRO") alleging racial discrimination by the Bridgeport Police Department ("CHRO Complaint").

[1] As explained below, by order of the hearing officer dated April 19, 2024, Attorney Testa was substituted as complainant in place of the City of Bridgeport. All references in this decision to "the complainant" refer to Attorney Testa.

3. It is found that by letter dated August 16, 2023, the complainant, on behalf of the City, requested that the respondents provide him with copies of the following records related to the CHRO Complaint:

(a) Any and all documents, emails, and other written communications in any medium pertaining to the decision to file the complaint, including but not limited to, communications provided to or considered by the [CHRO] in connection with the meeting agenda item on which the [CHRO] voted to file the complaint;

(b) Any and all documents, emails, and other written communications in any medium between any Commission member or employee relating to the decision to investigate this complaint;

(c) Any and all documents, emails, and other written communications in any medium between any Commission member or employee relating to the investigation of this complaint;

(d) Any and all documents, emails, and other written communications in any medium relating in any way to the decision to initiate CHRO Case No. 2220370;

(e) Any and all documents, emails and other written communications in any medium sent to, received by, or created by any Commission member or employee prior to June 9, 2022, that mention or refer to the Connecticut Racial Profiling Prohibition Project [("Project")] "Traffic Stop Analysis & Findings, 2019";

(f) Any and all documents, emails, and other written communications in any medium between any Commission member or employee, and any member, employee, board member, or agent of the Project, including but not limited to, Ken Barone, James Fazzalaro, Jesse Kalinowski, Ph.D, and Matthew Ross, Ph.D;

(g) Any and all documents concerning or referring to research done in preparation for the filing of the complaint;

(h) Any and all communications or documents regarding the investigation of the complaint by any Commission official or employee other than such documents already served on or sent to the [City] or its attorneys;

(i) The complete investigation file of the Commission in CHRO Case No. 2220370, excluding privileged and attorney work product documents;

(j) All statements of witnesses, parties and former parties taken or provided during the Commission's investigation of CHRO Case No. 2220370; and

(k) Audio recordings and transcripts of all statements and interviews of all witnesses taken or provided during the Commission's investigation of CHRO Case No. 2220370.

4. It is found that by email dated August 21, 2023, the respondents acknowledged the complainant's request.

5. It is found that by letter dated August 25, 2023, the respondents notified the complainant that "your request is currently being reviewed and will be processed once the information you've requested [has] been compiled."

6. By letter of complaint filed September 13, 2023, the complainant, on behalf of the City, appealed to the Commission, alleging that the respondents violated the Freedom of Information ("FOI") Act by failing to comply with the request described in paragraph 2, above.

7. 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.

8. 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.

9. 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."

10. It is concluded that the records described in paragraph 2, above, to the extent they exist and are maintained by the respondents, are public records within the meaning of §§1-200(5) and 1-210(a), G.S.

11. The respondents claimed that the complaint should be dismissed on the basis that neither the City nor Attorney Testa had standing to pursue this appeal. The respondents also claimed that they were not obligated to comply with the request because it was submitted on behalf of the City, which the respondents contended had no right under the FOI Act to obtain copies of the requested records. Finally, the respondents claimed that they properly withheld the records at issue because such records were (1) protected by the attorney-client privilege and therefore exempt from disclosure pursuant to §1-210(b)(10), G.S., (2) records of strategy and negotiations with respect to pending claims or litigation exempt from disclosure pursuant to §1-

210(b)(4), G.S., and/or (3) confidential pursuant to §46a-83(j), G.S., which prohibits the CHRO from disclosing "what has occurred in the course of the [CHRO]'s processing of a complaint ...." Additional facts and procedural history relevant to each issue described above will be set forth below as necessary.

Standing

12. On January 18, 2024, the respondents filed a "Petition for Relief," in which they claimed that the case should be dismissed on the basis that the Commission lacked jurisdiction.[2] Specifically, the respondents contended that the complaint was filed by the City, not Attorney Testa, and that the City lacked standing to pursue this appeal because it is not a "person," within the meaning of the FOI Act. Prior to and at the April 19, 2024 hearing, the respondents further contended that such lack of standing could not be cured by substituting Attorney Testa as the complainant.

13. At the outset of the April 19, 2024 hearing, the parties presented argument regarding the standing issue raised by the respondents. Following argument, the hearing officer denied the respondents' request to dismiss the case. As noted on page 1, above, the hearing officer also issued an order substituting Attorney Testa as complainant in place of the City.

14. In their post-hearing brief, in addition to renewing their claim that the City lacked standing, the respondents also claimed that Attorney Testa lacked standing.

The City's Standing

15. Section 1-206(b)(1), G.S., provides in relevant part:

> Any ***person*** denied the right to inspect or copy records under [§1-210, G.S.] ... or denied any other right conferred by the [FOI] Act may appeal therefrom to the [FOI] Commission, by filing a notice of appeal with said [C]ommission. (Emphasis added.)

16. Section 1-200(4), G.S., defines "person" to mean "natural person, partnership, corporation, limited liability company, association or society."

17. Accordingly, as relevant here, to file a complaint with the Commission, a complainant must (1) be a "person" within the meaning of §1-200(4), G.S., and (2) have been

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[2] The Petition for Relief claimed that the Commission should refuse to schedule the case for a hearing pursuant to §1-206(b)(2), G.S., which provides that "[i]f the [E]xecutive [D]irector of the [C]ommission has reason to believe an appeal under [§1-206(b)(1) or (c), G.S.] (A) presents a claim beyond the [C]ommission's jurisdiction; (B) would perpetrate an injustice; or (C) would constitute an abuse of the [C]ommission's administrative process, the [E]xecutive [D]irector shall not schedule the appeal for hearing without first seeking and obtaining leave of the [C]ommission." On March 11, 2024, the hearing officer denied such request but ordered the parties to submit briefs addressing the issues raised by the respondents. On March 12, 2024, the respondents filed a Motion for Reconsideration of the denial of the Petition for Relief, in which they claimed that the decision whether to schedule a hearing over their objection should be referred to the full Commission. On March 28, 2024, the Executive Director denied the respondents' request to refer the Petition for Relief to the full Commission.

"denied the right to inspect or copy records under [§1-210, G.S.] … or denied any other right conferred by the [FOI] Act."

18. In *Town of Rocky Hill v. SecureCare Options, LLC*, Docket #FIC 2013-303 (April 23, 2014), the Commission concluded that a municipal corporation is a "corporation," and therefore a "person," within the meaning of §1-200(4), G.S. In further support of its conclusion that the complainant had standing, however, the Commission went on to note "that, in any event, the request [at issue] was made, and the complaint was filed, by Attorney Morris Borea on behalf of the town, and Attorney Borea is certainly a person within the meaning of §1-200(4), G.S." In addition, the Commission ultimately dismissed the appeal after concluding that it lacked jurisdiction because the respondent was not a "public agency" within the meaning of the FOI Act. Thus, the Commission's conclusion that a municipality is a "person" within the meaning of §1-200(4), G.S., did not control the outcome in *Town of Rocky Hill*.

19. Other provisions of the General Statutes demonstrate that when the legislature intends the statutory term "person" to include both private corporations and municipalities, it will include clear language that unequivocally covers both types of entities. For example, numerous statutory definitions of "person" or similar terms expressly include both "corporation" and either "municipality," "municipal corporation," or "political subdivision."[3] Other statutes that do not include such express language in the definition of "person" nevertheless include a broad catch-all term, such as "any other legal entity," which courts have concluded plainly includes municipalities. See *Cheryl Terry Enterprises, Ltd. v. City of Hartford*, 270 Conn. 619, 626-27 (2004), overruled on other grounds by *Tremont Public Advisors, LLC v. Connecticut Resources Recovery Authority*, 333 Conn. 672 (2019) (municipality was person under Antitrust Act, §35-25(b), G.S., which defines "person" to include "corporation … or ***any other legal or commercial entity***" (emphasis added)); *A-Right Plumbing v. Aquarion Operating Services*, 2005 WL 3663931, at *2 (Conn. Super. Dec. 16, 2005) (municipality was person under §42-110a, G.S., which defines "person" to include a "corporation … and ***any other legal entity***" (emphasis added)). The absence of any such language in §1-200(4), G.S., suggests that the legislature did not intend to include municipalities within the definition of "person" for purposes of the FOI Act.

20. In addition, construing the term "corporation" in §1-200(4), G.S., to include municipal corporations would mean that municipalities would have standing to file a complaint with the Commission, but that other public agencies (including state agencies) would not. Such a construction would contradict the principle that "the law favors rational and sensible statutory construction, and that the courts [and agencies should] interpret statutes to avoid bizarre or nonsensical results." *Whittaker v. Commissioner of Correction*, 90 Conn. App. 460, 490 (2005).

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[3] See, e.g., §22a-2(b), G.S. (defining "person" to include "any … corporation, … municipality, agency or political or administrative subdivision of the state, or other legal entity of any kind"); §22a-38(2), G.S. (defining "person" to include "any … corporation … or legal entity of any kind, including municipal corporations, governmental agencies or subdivisions thereof); §23-65f(9), G.S., (defining "person" to include "any … corporation, … or legal entity of any kind, including any political subdivision of the state"); §31-275(10), G.S. (defining "employer" to include "any person, corporation, … the state and any public corporation within the state"); §33-218, G.S. (defining "person" to include "any corporation [or] municipal corporation"); §46a-51(14), G.S. (defining "person" to include "corporations … and the state and all political subdivisions and agencies thereof"); §47a-1(f), G.S. (defining "person" to include "an individual, … the state or any political subdivision thereof").

21. Based on the foregoing, it is concluded that a municipality is not a "person" within the meaning of §1-200(4), G.S. It is therefore concluded that the City was not a proper complainant under §1-206(b)(1), G.S.[4]

Attorney Testa's Standing

22. However, it is found that Attorney Testa, as a "natural person," is a "person" within the meaning of §1-200(4), G.S.

23. It is further found that Attorney Testa submitted the request at issue to the respondents, and that the respondents denied such request. It is therefore found that Attorney Testa was "denied the right to inspect or copy records under [§1-210, G.S.] ... or denied any other right conferred by the [FOI] Act," within the meaning of §1-206(b)(1), G.S.

24. The respondents contended that notwithstanding the plain language of §§1-200(4) and 1-206(b)(1), G.S., Attorney Testa was not a proper complainant because he submitted the request on behalf of the City, and because the complaint alleged that the request was made by the City, not Attorney Testa. In support of such contention, the respondents relied on cases that stand for the general proposition that an attorney or other agent cannot sue in his or her own name for an injury incurred by the principal.

25. However, §1-210(a), G.S., unambiguously provides "***every person***" the right to "receive a copy of [public] records," and §1-206(b)(1), G.S., unambiguously allows "***[a]ny person*** denied the right to inspect or copy records under [§1-210(a), G.S.]" to file an appeal with the Commission. (Emphasis added.)

26. As found in paragraph 22, above, Attorney Testa is a "person," within the meaning of §1-200(4), G.S., and his request for copies of the records in question was denied by the respondents. Accordingly, under the plain meaning of §1-206(b)(1), G.S., Attorney Testa was permitted to file a complaint with the Commission to remedy the alleged injury to his own right to obtain public records under the FOI Act. See *Fort Trumbull Conservancy, LLC v. City of New London*, 282 Conn. 791, 803 (2007) ("in cases of statutory aggrievement, particular legislation grants standing to those who claim injury to an interest protected by that legislation").[5]

27. Moreover, the Supreme Court has recognized that "[i]t would be unreasonable to deny a member of the public access to the [FOI Act] simply because of arguable imperfections in the form in which a request for public records is couched." *Perkins v. FOI Commission*, 228 Conn. 158, 166 (1993). Public agencies should interpret records requests reasonably and pragmatically, and should not rely on "distinctions that are overly formal and legalistic" to avoid

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[4] To the extent the Commission's decision in *Town of Rocky Hill*, Docket #FIC 2013-303, held that a municipality is a "person" within the meaning of §1-200(4), G.S., such conclusion is overruled.

[5] The respondents also contended that certain cases involving the federal FOI Act, 5 U.S.C. § 552, support their contention that Attorney Testa was not a proper complainant merely because he submitted the request on behalf of the City. However, the cases cited by the respondents held only that when an attorney submits a records request on behalf of a client, the request must at least mention the name of the client in order for the client to have standing to sue in federal court to challenge the denial of the request. Nothing in the cases cited by the respondents suggests that an attorney lacks standing merely because the attorney does mention the name of the client in the request.

complying with public records requests. *Id.* at 166-67. To that end, the Court also recognized that it is appropriate to look at the actions of the agency in responding to a request to ascertain whether it truly understood the nature or scope of the request. See *id.* (rejecting claim that request for "information" concerning sick days used by public employee was not a request for "public records," in part because agency "treated the request as one for … sick leave records" and "[n]ever asked for any clarification regarding the specific information that [the complainant] sought").

28. It is found that the request, which was submitted on Berchem Moses letterhead and signed by Attorney Testa, stated that "the undersigned on behalf of the Respondent City of Bridgeport, Police Department requests copies of [the records described in paragraph 2, above]."

29. It is also found that the respondents did not request clarification from Attorney Testa as to the identity of the requester. Rather, it is found that in a letter addressed to Attorney Testa, the respondents implicitly acknowledged Attorney Testa as the requester and expressly stated their intention to comply with the request:

> The CHRO is in receipt of ***your*** [FOI] request for information contained in the above CHRO file.
>
> Please be advised that ***your*** request is currently being reviewed and will be processed once the information which ***you've*** requested [has] been compiled. Please be also advised that there could possibly be a cost associated with this request based on the records processed. I anticipate that you should hear back from me within the next 10-15 business days from the date of this notice. In the meantime, should you have any questions or need any additional assistance, please feel free to contact me. (Emphasis added.)

30. In addition, at the July 26, 2024 hearing, the respondents testified that in accordance with the requirement of §1-206(a), G.S.,[6] their general practice when denying a request is to notify the requester in writing. It is found, however, that the respondents never notified Attorney Testa or the City that they were denying the request on the basis that the requester was not a "person" within the meaning of the FOI Act. Accordingly, it is found that the conduct of the parties further supports that Attorney Testa was the person who made the request.

31. Finally, the Commission notes that attorneys often rely on the FOI Act to request records in connection with their representation of a client, and the Commission frequently dockets such cases in the name of the attorney. See, e.g., *Evan Parzych v. Chief, Police*

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[6] Section 1-206(a)(1), G.S., provides in relevant part: "Any denial of the right to inspect or copy records provided for under [§1-210, G.S.] shall be made to the person requesting such right by the public agency official who has custody or control of the public record, in writing, within four business days of such request …. Failure to comply with a request to so inspect or copy such public record within the applicable number of business days shall be deemed to be a denial."

Department, City of Bridgeport, et al., Docket #FIC 2022-0366; *Johanna Fay v. Chief, Police Department, City of Bridgeport, et al.*, Docket #FIC 2022-0183; *Joseph Sastre v. Jonathan Fontneau, et al.*, Docket #FIC 2018-0471; *Dan Barrett and American Civil Liberties Union Foundation of Connecticut v. Commissioner, State of Connecticut, Department of Emergency Services and Public Protection, et al.*, Docket #FIC 2018-0133; *Robert Cushman v. Chief, Police Department, Town of Plainville, et al.*, Docket #FIC 2015-115; *Jon Schoenhorn v. Jack Daly, et al.*, Docket #FIC 2014-339.[7]

32. Based on the foregoing, it is concluded that Attorney Testa had standing to file a complaint pursuant to §1-206(b)(1), G.S., and therefore is a proper complainant in this case.[8]

Substitution of Attorney Testa as Complainant

33. With respect to the respondents' claim that the Commission lacked authority to substitute Attorney Testa as the complainant, §1-21j-30 of the Regulations of Connecticut State Agencies ("R.C.S.A."), provides in relevant part:

> (a) In issuing the notice of hearing described in section 1-21j-34 of the [R.C.S.A.], the [E]xecutive [D]irector or his or her designee shall designate as a party any person known to the [C]ommission whose legal rights, duties or privileges are required by statute to be determined by a [C]ommission proceeding and who is required by law to be a party in a [C]ommission proceeding, and any person whose participation as a party is then deemed to be necessary to the proper disposition of such proceeding. Subsequent to the issuance of the notice of hearing no other person before the [C]ommission shall have standing as a party, and no party having been designated as such shall be removed as a party, except upon the express order of the [C]ommission or the presiding officer.
>
> (b) Subsequent to the issuance of the notice of hearing, the [C]ommission or the presiding officer shall grant a person status as a party in a contested case if the [C]ommission or the presiding officer finds that: (1) such person has submitted a written petition to the [C]ommission and served copies on all parties, at least five (5) days before the

[7] Pursuant to §4-178, G.S., and §1-21j-37, R.C.S.A., the Commission may take administrative notice of the records in other Commission cases.

[8] In a related claim, the respondents also contended that they were not required to comply with the request because as they construed it, the City was the requester, not Attorney Testa. Based on that interpretation of the request, the respondents contended that there was no evidence that they denied any request from Attorney Testa. For the same reasons discussed in paragraphs 22 through 32, above, it is found that the respondents denied Attorney Testa's request, and that the respondents' claim that they were not required to comply with the request relies on "an overly formal and legalistic" interpretation of the request that is inconsistent with the actual conduct of the parties. *Perkins*, 228 Conn. at 166.

> date of hearing; and (2) the petition states facts that demonstrate that the petitioner's legal rights, duties or privileges shall be specifically affected by the [C]ommission's decision in the contested case. The five-day requirement in this subsection may be waived at any time before or after commencement of the hearing by the [C]ommission or the presiding officer on a showing of good cause....
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> (c) The [C]ommission or the presiding officer may remove as a party any person whose rights, duties or privileges are determined not to be at issue in the contested case....

34. As found in paragraph 26, above, Attorney Testa, as the person who made the request at issue, had the right under §1-206(b)(1), G.S., to appeal to the Commission from the respondents' denial of the request. It is also found that because the City was not a proper complainant, Attorney Testa is a "person whose participation as a party is ... necessary to the proper disposition of [this] proceeding." §1-21j-30(a), R.C.S.A.

35. The respondents contended that the Commission nevertheless lacked authority to substitute Attorney Testa as the complainant because the City's lack of standing deprived the Commission of jurisdiction to take any further action, including by substituting a proper complainant. In support of such claim, the respondents relied on the rule that when the issue of a court's subject matter jurisdiction is raised, the court must decide such issue first before taking any further action on the case. See, e.g., *F.D.I.C. v. Peabody, N.E., Inc.*, 239 Conn. 93, 99 (1996) ("Whenever the absence of jurisdiction is brought to the notice of the court or tribunal, cognizance of it must be taken and the matter passed upon before it can move one further step in the cause; as any movement is necessarily the exercise of jurisdiction.").

36. However, even assuming that such rule applies in administrative proceedings,[9] courts have recognized an exception that allows "the substitution of a real party in interest as the plaintiff [which] cures the lack of standing of the original plaintiff ...." *Fairfield Merritview Ltd.*, 320 Conn. 535, 553 (2016). Allowing substitution under such circumstances avoids "the harsh and inefficient result that attached to the mispleading of parties at common law," *F.D.I.C. v. Retirement Management Group, Inc.*, 31 Conn. App. 80, 84 (1993), and is consistent with the principle "that cases should, whenever possible, be heard on their merits rather than dismissed for procedural irregularities." *Fairfield Merritview Ltd.*, 320 Conn. at 554 n.22. While most decisions addressing this issue involved substitution pursuant to §52-109, G.S., which liberally allows courts to substitute a proper plaintiff when an action was commenced in the name of the

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[9] But see *City of Arlington, Tex. v. F.C.C.*, 569 U.S. 290, 297-98 (2013) (questioning the "reflexive extension to agencies of the very real division between the jurisdictional and nonjurisdictional that is applicable to courts.... Because the question—whether framed as an incorrect application of agency authority or an assertion of authority not conferred—is always whether the agency has gone beyond what [the legislature] has permitted it to do, there is no principled basis for carving out some arbitrary subset of such claims as 'jurisdictional.'"), overruled on other grounds by *Loper Bright Enterprises v. Raimondo*, 144 S. Ct. 2244 (2024).

wrong plaintiff by mistake,[10] the Superior Court has recognized that "nothing in the decisions suggests that the principles articulated therein were limited to matters where an action is mistakenly brought in the name of the wrong plaintiff." *500 North Ave., LLC v. Town of Stratford Zoning Commission*, 2019 WL 7865057, at *3 (Conn. Super. Oct. 29, 2019).

37. It is found that substituting Attorney Testa as complainant was appropriate under the present circumstances. First, as found in paragraph 26, above, Attorney Testa was a proper complainant because he submitted the request at issue, and his participation was "necessary to the proper disposition of [this] proceeding." §1-21j-30(a), R.C.S.A. See also *Fairfield Merritview Ltd.*, 320 Conn. at 555 ("Because the LLC was the sole owner of the property at issue at the relevant time, its addition as a party plaintiff undeniably was necessary for a determination of the matter in dispute ....").

38. It is also found that the respondents were not prejudiced by the substitution of Attorney Testa as complainant because they were aware of the request, were on notice of the claims at issue based on the allegations in the complaint, and were given ample opportunity after the substitution to present evidence and argument in support of their claims and defenses. See *Rana v. Terdjanian*, 136 Conn. App. 99, 112 (2012) ("[A]llowing a substitution in this case would not prejudice the defendant because the causes of action alleged in the complaint would not change and the defendant's ability to defend against the allegations would not be affected.").

39. Finally, it would be especially unfair in the present case to dismiss the complaint and require the complainant to start anew because, as noted in paragraph 18, above, at the time the complaint was filed, the only case in which the Commission had addressed the issue found that a municipality had standing to file a complaint with the Commission.

40. Based on the foregoing, it is concluded that Attorney Testa was properly substituted as complainant.

Claims of Exemption

Relevant Facts and Procedural History

41. On April 19, 2024, the hearing officer ordered the respondents to submit for in camera inspection "unredacted copies of all records responsive to the complainant's request ... that the respondents claim are exempt from disclosure" ("First In Camera Order").

42. On May 14, 2024, the respondents filed in the Superior Court an interlocutory appeal of the order denying their request to dismiss the case, along with an application to stay this case pending the interlocutory appeal.[11] In support of their application to stay, the respondents claimed, among other things, that they would be irreparably injured if required to comply with

[10] Section 52-109, G.S., provides that "[w]hen any action has been commenced in the name of the wrong person as plaintiff, the court may, if satisfied that it was so commenced through mistake, and that it is necessary for the determination of the real matter in dispute so to do, allow any other person to be substituted or added as plaintiff."

[11] The Commission takes administrative notice of the complaint and filings in *Commission on Human Rights and Opportunities v. City of Bridgeport, et al.*, HHB-CV24-608355-S, Superior Court, Judicial District of New Britain.

the First In Camera Order because doing so would violate §46a-83(j), G.S. The Court denied the application, concluding that "because the subject records shall only be provided to the [Commission] for in camera inspection, the [respondents] will not suffer irreparable injury."

43. On June 17, 2024, the respondents submitted 19 pages of records for in camera inspection ("First In Camera Submission"). Such records will be referred to hereafter as IC-2023-0468-001 through 019. On the in camera index and in an accompanying affidavit, the respondents claimed that such records were exempt from disclosure pursuant to §§1-210(b)(4) and (b)(10), G.S.

44. In a cover letter accompanying the First In Camera Submission, the respondents notified the Commission that in addition to the records submitted for in camera inspection, they maintained additional records related to the CHRO Complaint that they claimed were exempt from disclosure pursuant to §46a-83(j), G.S. The respondents further notified the Commission that they objected to submitting such records for in camera inspection because they claimed that doing so was prohibited by §46a-83(j), G.S.

45. However, the respondents further stated in the cover letter that because the complainant represented the City in connection with the CHRO Complaint, they were able to disclose to him records concerning such complaint without violating §46a-83(j), G.S. In an accompanying affidavit, the respondents attested that they had "disclosed records of [the respondents'] post-initiation processing of [the CHRO Complaint] to [the complainant] who, as counsel for [the City] in that case, is considered an authorized representative."[12] Neither the cover letter nor the affidavit notified the Commission that the respondents maintained other responsive records that they continued to withhold from the complainant based on §46a-83(j), G.S.

46. On June 18, 2024, the hearing officer ordered the respondents to submit an additional affidavit addressing, among other matters, whether they had "provided the complainant with copies of all records that they claim are exempt from disclosure pursuant to [§46a-83(j), G.S.]"

47. On June 24, 2024, the respondents submitted an affidavit in accordance with the June 18, 2024 order of the hearing officer described in paragraph 46, above. Such affidavit attested that although the respondents had provided the complainant with some records concerning the CHRO Complaint, they withheld other responsive records based on §46a-83(j), G.S., namely (1) records concerning the respondents' "processing of complaints other than [the CHRO Complaint]," and (2) records concerning the respondents' "processing of the [CHRO Complaint] that are not evidence pertaining to the complaint."

48. On July 3, 2024, the hearing officer overruled the respondents' objection to the First In Camera Order, and ordered the respondents to submit for in camera inspection all records that

[12] In a subsequent affidavit, the respondents stated that they had provided such records to Berchem Moses in response to a separate FOI request that sought identical records. The Commission takes administrative notice that such request is the subject of a separate complaint, Docket #FIC 2024-0383, *Henderson v. Executive Director, State of Connecticut, Commission on Human Rights and Opportunities, et al.* That complaint is still pending before the Commission.

they had withheld from the complainant based on §46a-83(j), G.S. ("Second In Camera Order"). The Second In Camera Order did not require the respondents to submit for in camera inspection any records that they had already provided to the complainant, but ordered the respondents only to submit the records described in paragraph 47, above, that they withheld from the complainant. The Second In Camera order further required the respondents to be prepared to present a witness at the July 26, 2024 reopened hearing to testify concerning the applicability of §46a-83(j), G.S., to the withheld records.

49. Ultimately, the respondents refused to comply with the Second In Camera Order.[13] However, on July 24, 2024, the respondents submitted for in camera inspection 141 pages of records relating to the processing of the CHRO Complaint ("Second In Camera Submission") that had already been provided to the complainant. In a cover letter accompanying such submission, the respondents notified the Commission that although the submission contained records that they claimed were exempt from disclosure pursuant to §46a-83(j), G.S., they were able to submit such records for in camera inspection because they received written authorization from the City as a party to the CHRO matter.

50. At the July 26, 2024 reopened hearing, the complainant stated on the record that he was only contesting the records that the respondents withheld from him. The complainant further stated that because the respondents provided him with the records included in the Second In Camera Submission, such records were no longer at issue. Accordingly, the Second In Camera Submission will not be addressed further in this decision.

Section 46a-83(j), G.S.

51. Section 46a-83(j), G.S., provides:

> No commissioner or employee of the [CHRO] may disclose, except to the parties or their representatives, what has occurred in the course of the [CHRO]'s processing of a complaint, provided the [CHRO] may publish the facts in the case and any complaint that has been dismissed and the terms of conciliation when a complaint has been adjusted. Each party and his or her representative shall have the right to inspect and copy documents, statements of witnesses and other evidence pertaining to the complaint, except as otherwise provided by federal law or the general statutes.

52. The respondents claimed that the following records that remain at issue in this matter were exempt from disclosure because they relate to the "processing of a complaint," within the meaning of §46a-83(j), G.S.:

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[13] On July 11, 2024, the respondents filed a motion for reconsideration of the Second In Camera Order based on the same objection they raised in the letter described in paragraph 45, above. On the same day, the hearing officer denied such motion and ordered the respondents to submit records for in camera inspection in accordance with the Second In Camera Order.

(a) records related to the respondents' "processing of complaints other than [the CHRO Complaint]," and

(b) records related to the respondents' "processing of the [CHRO Complaint] that are not evidence pertaining to [such] complaint."[14]

53. As noted in paragraph 49, above, the respondents refused to submit the records described in paragraphs 52(a) and (b), above, for in camera inspection. In filings dated July 11, 2024 and July 22, 2024, the respondents stated that notwithstanding such refusal, they were prepared to present testimony concerning the applicability of §46a-83(j), G.S., to the records at issue. In addition, by order dated July 23, 2024, the hearing officer notified the respondents that their refusal to comply with the Second In Camera Order did not obviate their burden to prove the applicability of all claimed exemptions, and reiterated that the portion of the Second In Camera Order "requiring the respondents to present a witness at the July 26, 2024 reopened hearing to testify regarding the applicability of [§46a-83(j), G.S.,] to the withheld records remains in effect."

54. At the July 26, 2024 hearing, however, the respondents' witness could not testify regarding the applicability of §46a-83(j), G.S., to the withheld records. Specifically, the respondents' witness testified that he had not reviewed and was not familiar with the withheld records described in paragraphs 52(a) and (b), above.

55. With respect to the records described in paragraph 52(b), above, the respondents testified that they interpret the "processing of the complaint," as used in §46a-83(j), G.S., to begin when the complaint is either initiated by the CHRO or received from a third party. However, the respondents' witness testified that he did not know whether the respondents withheld any records based on §46a-83(j), G.S., that were created or received prior to the initiation of the CHRO Complaint.

56. With respect to the records described in paragraph 52(a), above, in response to questioning by the hearing officer about records related to the "complaints other than [the CHRO Complaint]" that the respondents withheld from the complainant, the respondents' counsel instructed the witness not to answer such questions.

57. In addition, when the hearing officer attempted to inquire whether the respondents withheld any records responsive to each of the sub-items in the request, the respondents' counsel again instructed the witness not to answer such questions.

58. It is well established that "the burden of proving the applicability of an exemption rests upon the agency claiming it." *Commissioner of Emergency Services and Public Protection v. FOI Commission*, 330 Conn. 372, 395 (2018). The Supreme Court has instructed that the Commission "should not accept an agency's generalized and unsupported allegations relating to documents claimed to be exempt from disclosure." *Wilson v. FOI Commission*, 181 Conn. 324,

[14] With respect to the records described in paragraph 52(b), above, the respondents testified that because §46a-83(j), G.S., gives parties to a proceeding before the CHRO the right to obtain only "evidence pertaining to the complaint," they did not provide the complainant with any records pertaining to the CHRO Complaint that they do not consider "evidence."

340 (1980). "Unless the character of the documents in question is conceded by the parties, an in camera inspection of the particular documents by the [C]ommission may be essential to the proper resolution of a dispute under the [FOI Act]," unless "such an inspection would be burdensome on the [C]omission ... or ineffective because of the absence of the adversarial process." (Citations omitted.) *Id.* at 340-41. In the present matter, the character of the documents in question was not conceded by the parties, and the hearing officer determined that an in camera inspection would not be unnecessarily burdensome or ineffective, but, rather, was necessary to determining the applicability of §46a-83(j), G.S.

59. The respondents' refusal to comply with the Second In Camera Order did not relieve them of their burden of proving the applicability of §46a-83(j), G.S., to the withheld records. As the Supreme Court made clear in *Wilson*, when an agency attempts to satisfy its burden of proving a claimed exemption through testimony or affidavits, "[a]ny such testimony or affidavits must not be couched in conclusory language or generalized allegations, however, but should be sufficiently detailed, without compromising the asserted right to confidentiality, to present the commission with an informed factual basis for its decision in review under the act." *Wilson*, 181 Conn. at 341.

60. Based on the respondents' refusal to submit the records described in paragraphs 52(a) and (b), above, for in camera inspection, as well as their refusal to provide sufficiently detailed testimony concerning the basis for the claimed exemption, it is found that the respondents failed to prove that the records described in paragraphs 52(a) and (b), above, were exempt from disclosure pursuant to §46a-83(j), G.S. It is therefore concluded that the respondents violated the FOI Act by failing to provide the complainant with copies of such records.

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

61. The respondents claimed that IC-2023-0468-001 through 019 were exempt from disclosure pursuant to §1-210(b)(10), G.S., because such records consisted of communications protected by the attorney-client privilege.

62. 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 ...."

63. 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."

64. Section 52-146r(a), G.S., provides in relevant part that:

> (2) "Confidential communications" means 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.

(3) "Government attorney" means a person admitted to the bar of this state and employed by a public agency or retained by a public agency or public official to provide legal advice to the public agency or a public official or employee of such public agency.

65. 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).

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

67. It is found that at all relevant times, Michelle Dumas Keuler, Anna-Marie Puryear, and George Welch were employed by the respondents as attorneys. It is further found that such individuals were "government attorneys," within the meaning of §52-146(a)(3), G.S.

68. It is found that IC-2023-0468-001, IC-2023-0468-002, and IC-2023-0468-007 through 019 consist of written communications between one or more of the attorneys identified in paragraph 67, above, and one or more public officials or employees of the respondents. It is further found that such attorneys were acting in their professional capacity as attorneys with respect to such communications, that such communications related to legal advice sought by the respondents, and that such communications were made in confidence.

69. It is further found that IC-2023-0468-003 through 006 consists of a record prepared by one or more of the attorneys identified in paragraph 67, above, in furtherance of the legal advice sought by the respondents.

70. Based on the foregoing, it is found that IC-2023-0468-001 through 019 are "confidential communications," within the meaning of §52-146r(a)(2), G.S.

71. Accordingly, it is found that IC-2023-0468-001 through 019 are exempt from disclosure pursuant to §1-210(b)(10), G.S. It is therefore concluded that the respondents did not violate the FOI Act by failing to provide the complainant with copies of such records.[15]

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

1. Within 60 days of the notice of final decision in this matter, the respondents shall provide the complainant, free of charge, with copies of the records described in paragraphs 52(a) and (b), above.

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 August 28, 2024.

Molly Steffes

Molly Steffes
Acting Clerk of the Commission

[15] Because the Commission concludes that IC-2023-0468-001 through 019 are exempt from disclosure pursuant to §1-210(b)(10), G.S., the Commission need not address the respondents' claim that such records also are exempt from disclosure pursuant to §1-210(b)(4), G.S.

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:

PAUL TESTA, c/o Attorney Bryan L. LeClerc, Berchem Moses PC, 75 Broad Street, Milford, CT 06460

EXECUTIVE DIRECTOR, STATE OF CONNECTICUT, COMMISSION ON HUMAN RIGHTS AND OPPORTUNITIES; AND STATE OF CONNECTICUT, COMMISSION ON HUMAN RIGHTS AND OPPORTUNITIES c/o Attorney Michael Roberts, Commission on Human Rights and Opportunities, 450 Columbus Boulevard, Suite 2, Hartford, CT 06103

Molly Steffes
Acting Clerk of the Commission

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