FREEDOM OF INFORMATION COMMISSION
OF THE STATE OF CONNECTICUT

In the Matter of a Complaint by FINAL DECISION

Dan Reale,

Complainant

against Docket #FIC 2021-0096

Secretary of the State, State of Connecticut, Office of the Secretary of the State; and State of Connecticut, Office of the Secretary of the State,

Respondents September 25, 2024

The above-captioned matter was heard as a contested case on January 13, 2022 and February 22, 2022, 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, the hearings were conducted through the use of electronic equipment (remotely) pursuant to §149 of Public Act 21-2 (June Spec. Sess.), as amended by §1 of Public Act 22-3.

After consideration of the entire record, the following facts are found and conclusions of law are reached:

1. The respondents are public agencies within the meaning of §1-200(1), G.S.

2. It is found that, by letter dated February 11, 2021, the complainant requested that the respondents provide him with a copy of the following records:

a. all emails, letters and communications sent to or received by your office from (or to) any State Legislator(s) concerning Executive Order 7LL and/or proposals to implement electronic ballot petitioning;

b. all emails, letters and communications sent to or received by your office from (or to) the Office of the Governor or the Governor himself concerning Executive Order 7LL and/or proposals to implement electronic ballot petitioning;

c. all emails requesting any affidavits, input or feedback from Theodore Bromley concerning Executive Order 7LL; and

d. all requests for funding disbursements and/or applications under the CARES ACT and/or Help America Vote Act relating to COVID-19 dated between March 16, 2020 to the present.

3. By email dated and filed March 1, 2021[1], the complainant appealed to this Commission, alleging that the respondents violated the Freedom of Information ("FOI") Act by failing to provide him with a copy of the requested records.

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

> "[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, printed, photostated, photographed or recorded by any other method.[2]

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

> [e]xcept as otherwise provided by any federal law or state statute, all records maintained or kept on file by any public agency, whether or not such records are required by any law or by any rule or regulation, shall be public records and every person shall have the right to . . . (3) receive a copy of such records in accordance with section 1-212.

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

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

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[1] On March 25, 2020, the Governor issued Executive Order 7M, thereby suspending the provisions of Conn. Gen. Stat. §1-206(b)(1), which requires the Freedom of Information 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 and to any appeal filed on or after such date, through June 30, 2021. Consequently, the Commission retains jurisdiction over this matter.

[2] Section 147 of Public Act 21-2 (June Sp. Sess.) amended the definition of "public records or files" to also include data or information that is "videotaped."

8. At the hearing, the complainant conceded that he did receive responsive records from the respondents. The complainant contended, however, that the respondents failed to conduct a thorough search for records because he believed that he should have received more responsive records.

9. General Counsel for the Secretary of the State appeared and testified at both contested case hearings on behalf of the respondents.

10. It is found that, on May 11, 2020, the Governor issued Executive Order 7LL, which amended and suspended certain statutory requirements concerning the petitioning process for ballot access, including reducing the number of signatures required for such access by thirty percent and allowing petitioning candidates to gather the required signatures necessary for ballot access electronically and by way of U.S. mail, rather than through in-person interactions.

11. It is found that, prior to the issuance of Executive Order 7LL, then-counsel for the Governor reached out to employees at various public agencies and their attorneys concerning the executive order in order to access such individuals' expertise in the areas of election and voting law. It is found that all of the agencies that were consulted—including the Office of the Secretary of State, the State Elections Enforcement Commission, and the Office of the Attorney General—shared a common interest in ensuring that the executive order that ultimately issued was carefully crafted so the petitioning and election processes could be modified and proceed in a manner that was orderly, fair and safe for both the candidates and the voters during what was an unprecedented, world-wide pandemic.[3]

12. It is found that, upon receipt of the request set forth in paragraph 2, above, the respondents assigned it to a staff attorney in the respondent agency's office for processing. It is found, that, due to a miscommunication, the assigned staff attorney failed to contact the Bureau of Enterprise Systems and Technology ("BEST")[4] within the State Department of Administrative Services and request that it conduct a search for responsive electronic records.

13. It is found that, upon receipt of the Commission's Notice of Remote Hearing and Order to Show Cause, the respondent agency's General Counsel realized that the request had not been processed. It is found that the General Counsel promptly directed his Information Technology ("IT") Director to contact BEST and request that it conduct an electronic records search. It is found that the IT Director requested that BEST gather all electronic records between and among all individuals within the respondent agency's office that would have worked on Executive Order 7LL and all legislative leaders (and their staff) and all individuals at the Governor's Office. It is found that the search that the IT Director provided to BEST purposefully did not contain any search terms. In this regard, it is found that the respondents

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[3] As Executive Order 7LL noted, the COVID-19 pandemic created a great tension between "reducing the risk of transmission of COVID-19 among candidates seeking election, their supporters who are seeking to contact potential voters and the public at large," and "the process of qualifying for ballot access through in-person petitioning as required under Title 9 of the General Statutes...."

[4] It is found that, at the time of the request, BEST had replaced the Department of Information Technology and was the agency responsible for conducting electronic records searches.

designed the search to be extremely broad in order to capture all potentially responsive emails. Accordingly, it is found that the respondents conducted a thorough search for responsive records in this matter.

14. It is found that the IT Director initially submitted the search request to BEST in May 2021. It is found that, upon receipt of the responsive records from BEST, the respondents were unable to open the file. It is found that, in August 2021, the IT Director resubmitted the search request to BEST and received the responsive records shortly thereafter.

15. It is found that, because the search was so broad, the General Counsel was required to sort out non-responsive records and thereafter review the responsive records for exemptions. It is found that the General Counsel spent approximately 60 hours completing this process.

16. It is found that, on August 26, 2021, the respondents provided the complainant with all non-exempt, records responsive to the request set forth in paragraphs 2.a, 2.b, and 2.c, above. It is further found that, between emails and attachments thereto, the respondents provided the complainant with approximately 80 pages of records, free of charge. It is also found that the respondents did not maintain any records responsive to the request set forth in paragraph 2.d, above.

17. At the hearings on this matter, the respondents contended that the records that were withheld from the complainant are exempt from disclosure as preliminary drafts, privileged attorney-client communications and records pertaining to negotiations concerning pending litigation.

18. The respondents submitted the records claimed exempt from disclosure to the Commission for in camera inspection. Such records shall be identified as IC-2021-0096-1 through IC-2021-0096-103.

19. It is found that, after submitting the records to the Commission for in camera inspection, the respondents' counsel reviewed the submission again and determined that IC-2021-0096-77 was not exempt from disclosure. It is further found that the respondents provided the complainant with IC-2021-0096-77.

20. Initially, it is found that the following in camera records are blank or non-responsive and, as such, will not be further addressed herein: IC-2021-0096-24; IC-2021-0096-26; IC-2021-0096-28; IC-2021-0096-67; and IC-2021-0096-90.

21. The respondents contended that, with the exception of IC-2021-0096-78 through IC-2021-0096-80, all of the in camera records are exempt from disclosure pursuant to §1-210(b)(1), G.S. (preliminary drafts).

22. Section 1-210(b)(1), G.S., provides, in relevant part, that the FOI Act shall not require the disclosure of:

> Preliminary drafts or notes provided the public agency has determined that the public interest in withholding such documents clearly outweighs the public interest in disclosure....

23. Section 1-210(e)(1), G.S., additionally provides, in relevant part, that:

> (e) Notwithstanding the provisions of subdivision (1)....of subsection (b) of this section, disclosure shall be required of:
>
> (1) Interagency or intra-agency memoranda or letters, advisory opinions, recommendations or any report comprising part of the process by which governmental decisions and policies are formulated, except disclosure shall not be required of a preliminary draft of a memorandum, prepared by a member of the staff of a public agency, which is subject to revision prior to submission to or discussion among the members of such agency....

24. Upon careful in camera inspection, it is found that the following records are preliminary drafts of Executive Order 7LL and a draft memorandum concerning absentee voting: IC-2021-0096-2 through IC-2021-0096-5; IC-2021-0096-7 through IC-2021-0096-10; IC-2021-0096-12 through IC-2021-0096-15; IC-2021-0096-33; IC-2021-0096-37; IC-2021-0096-40 through IC-2021-0096-43; IC-2021-0096-46 through IC-2021-0096-48; IC-2021-0096-50 through IC-2021-0096-54; IC-2021-0096-93 through IC-2021-0096-97; and IC-2021-0096-99 through IC-2021-0096-103.

25. It is further found that IC-2021-0096-17 though IC-2021-0096-23; IC-2021-0096-25; IC-2021-0096-27; IC-2021-0096-29 and IC-2021-0096-30 comprise a draft election day handbook.

26. It is found that the respondents determined that the public interest in withholding the records referenced in paragraphs 24 and 25, above, clearly outweighed the public interest in disclosure. In this regard, it is found that the respondents determined that the release of various draft records on issues as important as ballot access and election day plans and directions would be confusing to voters and cause the public additional angst during what already was an extremely difficult time. It is further found that the respondents' reasons for withholding such records were not frivolous or patently unfounded. Moreover, it is found that in camera records referenced in paragraphs 24 and 25, above, were interagency or intra-agency draft memoranda comprising part of the process by governmental decisions and policies are formulated. However, it is further found that such memoranda were prepared by a member of the staff of a public agency and were subject to revision prior to submission to or discussion with or among a member or members of a public agency, within the meaning of §1-210(e)(1), G.S

27. Accordingly, it is concluded that the respondents did not violate the disclosure provisions of §§1-210(a) and 1-212(a), G.S., when they declined to disclose the records referenced in paragraphs 24 and 25, above, to the complainant.[5]

28. Next, the respondents contended that the following records are exempt from disclosure pursuant to the provisions of §1-210(b)(10), G.S., which section permits an agency to withhold from disclosure records of "communications privileged by the attorney-client relationship": IC-2021-0096-1; IC-2021-0096-6; IC-2021-0096-11; IC-2021-0096-16; IC-2021-0096-31; IC-2021-0096-32; IC-2021-0096-34 through IC-2021-0096-36; IC-2021-0096-38; IC-2021-0096-39; IC-2021-0096-44; IC-2021-0096-45; IC-2021-0096-49; IC-2021-0096-55 through IC-2021-0096-66; IC-2021-0096-68 through IC-2021-0096-76; IC-2021-0096-78 through IC-2021-0096-89; IC-2021-0096-91; IC-2021-0096-92; and IC-2021-0096-98.

29. 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 disclosure."

30. Section 52-146r(a)(2), G.S., defines "confidential communications" to mean:

> 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.

31. In Maxwell v. Freedom of Info. Comm'n, 260 Conn. 143, 149 (2002), the Connecticut Supreme Court held that §52-146r, G.S., "merely condif[ies] the common law attorney-client privilege as this court previously defined it." The Court further 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." Id.

32. 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. Freedom of Info. Comm'n, 245 Conn. 149, 159 (1998). "The burden of

[5] The Commission notes that final versions of the draft documents have been released to the complainant.

establishing the applicability of the privilege rests with the party invoking it." Harrington v. Freedom of Info. Comm'n, 323 Conn. 1, 12, (2016) ("Harrington"). 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. Freedom of Info. Comm'n, 300 Conn. 511, 516-17 (2011).

33. Moreover, 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....The privilege fosters full and frank communications between attorneys and their clients and thereby promote[s] the broader public interests in the observation of law and [the] administration of justice." PSE Consulting, Inc. v. Frank Mercede & Sons, Inc., 267 Conn. 279, 329–30 (2004).

34. Generally, "once a privileged communication has been purposely disclosed to a third party, the attorney-client privilege is waived, unless the disclosed material falls under the common interest rule." Raymond Rd. Assocs., LLC v. Taubman Centers, Inc., No. X02UWYCV075007877S, 2009 WL 4069251, at *8 (Conn. Super. Ct. Oct. 30, 2009 ("Raymond Rd. Assoc."), citing United States v. United Techs Corp., 979 F.Supp. 108, 111 (D.Conn. 1997). The common interest rule, also referred to as the common interest doctrine, applies "where the parties are represented by separate attorneys but share a common legal interest." State Farm Mut. Auto. Ins. Co. v. Hawkins, No. 08-10367, 2010 WL 2287454, at *8 (E.D. Mich. June 4, 2010). Under the doctrine, privileged communications can be exchanged without waiving the privilege, provided that the parties "share a 'common interest about a legal matter,' but 'it is ... unnecessary that there be actual litigation in progress....'" (Citations omitted.) Bianco v. Denning, No. FSTCV206045111S, 2021 WL 4906070, at *3 (Conn. Super. Ct. Sept. 20, 2021), reconsideration granted in part, No. FSTCV206045111S, 2021 WL 5277877 (Conn. Super. Ct. Oct. 27, 2021); accord, Fensore v. Lyons, No. FBTCV166057520S, 2017 WL 1311107, at *2 (Conn. Super. Ct. Mar. 17, 2017); Hubbell v. Ratcliffe, No. HHDX04CV08403824S, 2010 WL 4885631, at *8 (Conn. Super. Ct. Nov. 8, 2010) (The common interest rule "protect[s] the free flow of information from the client to attorney...whenever multiple clients share a common interest about a legal matter."), citing Raymond Rd. Assoc., 2009 WL at *8.

35. A party relying on the common interest doctrine to shield communications from disclosure has the burden of establishing all of the elements of the attorney-client privilege, see ¶ 32, above, as well as the burden of establishing that a common legal interest exists between the entities who are raising the protection. See Ford Motor Co. v. Michigan Consol. Gas Co., No. 08-CV-13503, 2015 WL 6470830, at *5 (E.D. Mich. Oct. 27, 2015) ("for the common-interest doctrine to apply, the underlying shared communication must be privileged.").

36. Upon careful in camera inspection, it is found that the following records, or portions thereof, are communications between public officials or employees of a public agency acting in the performance of their duties or within the scope of their employment and government attorneys, and that such records relate to legal advice required by the Governor from his then-attorney: IC-2021-0096-1; IC-2021-0096-11; IC-2021-0096-16; IC-2021-0096-31; IC-2021-0096-32; IC-2021-0096-34 through IC-2021-0096-36; IC-2021-0096-38; IC-2021-0096-39; IC-2021-0096-44; IC-2021-0096-45; IC-2021-0096-49; IC-2021-0096-55 through IC-2021-0096-

66; IC-2021-0096-68 through IC-2021-0096-76; IC-2021-0096-78; IC-2021-0096-79 (the first 18 lines); and IC-2021-0096-81 through IC-2021-0096-89.

37. It is further found that the public agency attorneys and their clients who shared the communications referenced in paragraph 36, above, did so during the course of an ongoing "common interest regarding a legal matter" and that such communications were intended to further such common interest. See ¶¶ 10-11, above. It is further found that such records were transmitted in confidence, within the meaning of §52-146r(a)(2), G.S., and that the attorney-client privilege was not waived with respect to such records.[6]

38. Accordingly, it is concluded that the records, or portions thereof, identified in paragraph 36, above, constitute communications privileged by the attorney-client relationship, within the meaning of §1-210(b)(10), G.S. It is further concluded that the respondents did not violate the disclosure provisions of §§1-210(a) and 1-212(a), G.S., when they declined to disclose a copy of such records, or portion thereof, to the complainant.

39. Finally, the respondents contend that IC-2021-0096-79 (line 19 to the bottom of the page) and IC-2021-0096-80 are exempt from disclosure because they contain negotiations pertaining to pending litigation.[7]

40. Section 1-210(b)(4), G.S., provides, in relevant part, that the FOI Act shall not require the disclosure of:

> Records pertaining to...negotiations with respect to...pending litigation to which the public agency is a party until such ligation...has been finally adjudicated or otherwise settled.

41. Upon careful in camera inspection, it is found that IC-2021-0096-79 (line 19 to the bottom of the page) and IC-2021-0096-80 are records of negotiations. Based upon General Counsel's testimony, it is further found that such records concern litigation that was pending at the time the request was made, and that the respondent agency was a party to such litigation.

42. Accordingly, it is concluded that IC-2021-0096-79 (line 19 to the bottom of the page) and IC-2021-0096-80 are permissively exempt from disclosure pursuant to the provisions of §1-210(b)(4), G.S. It is further concluded that the respondents did not violate the disclosure

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[6] It is found that, in connection with finalizing Executive Order 7LL, then-counsel for the Governor communicated with one non-government attorney in order to obtain his legal advice and input on the formation of the executive order. It is found that these communications satisfy all of the requirements of the common law attorney-client privilege and the common interest doctrine. See Maxwell v. Freedom of Info. Comm'n, 260 Conn. 143, 149 (2002). It is further found that the attorney-client privilege with respect to these communications was not waived.

[7] The Commission notes that the index accompanying the in camera records does not list §1-210(b)(4), G.S, as an exemption to disclosure. However, the respondents claimed the exemption for IC-2021-0096-79 and IC-2021-0096-80 on the record during the first contested case hearing.

provisions of §§1-210(a) and 1-212(a), G.S., when they declined to disclose a copy of such records, or portion thereof, to the complainant.

43. It is found, however, that IC-2021-0096-6; IC-2021-0096-91; IC-2021-0096-92; and IC-2021-0096-98 are not exempt from disclosure pursuant to the provisions of §§1-210(b)(1), 1-210(4), or 1-210(b)(10), G.S.

44. It is therefore concluded that the respondents violated the disclosure requirements of §§1-210(a) and 1-212(a), G.S., when they declined to provide the complainant with a copy of the records referenced in paragraph 43, above.

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

1. The respondents shall forthwith provide the complainant with a copy of the records referenced in paragraph 43 of the findings, above, free of charge.

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

Approved by Order of the Freedom of Information Commission at its regular meeting of September 25, 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:

DAN REALE, 20 Dougherty Avenue, Plainfield, CT 06374

SECRETARY OF THE STATE, STATE OF CONNECTICUT, OFFICE OF THE SECRETARY OF THE STATE; AND STATE OF CONNECTICUT, OFFICE OF THE SECRETARY OF THE STATE, c/o Assistant Attorney General Philip Miller, Office of the Attorney General, 165 Capitol Avenue, Hartford, CT 06106

Jennifer M. Mayo
Acting Clerk of the Commission

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