



FREEDOM OF INFORMATION



Connecticut Freedom of Information Commission • 18-20 Trinity Street, Suite 100 • Hartford, CT 06106
Toll free (CT only): (866)374-3617 Tel: (860)566-5682 Fax: (860)566-6474 • www.state.ct.us/foi/ • email: foi@po.state.ct.us

Adrienne DeLucca and the Berlin Education Association,
Complainant(s)
against

Notice of Meeting

Docket #FIC 2014-183

Superintendent of Schools, Berlin Public Schools; and Berlin Public Schools,
Respondent(s)

January 2, 2015

Transmittal of Proposed Final Decision

In accordance with Section 4-179 of the Connecticut General Statutes, the Freedom of Information Commission hereby transmits to you the proposed finding and decision prepared by the hearing officer in the above-captioned matter.

This will notify you that the Commission will consider this matter for disposition at its meeting which will be held in the Freedom of Information Commission Hearing Room, 18-20 Trinity Street, 1st floor, Hartford, Connecticut, at **2 p.m. on Wednesday, January 28, 2015**. At that time and place you will be allowed to offer oral argument concerning this proposed finding and order. Oral argument shall be limited to ten (10) minutes. For good cause shown, however, the Commission may increase the period of time for argument. A request for additional time must be made in writing and should be filed with the Commission **ON OR BEFORE January 14, 2015**. Such request **MUST BE (1) copied to all parties, or if the parties are represented, to such representatives, and (2) include a notation indicating such notice to all parties or their representatives.**

Although a brief or memorandum of law is not required, if you decide to submit such a document, an **original and fourteen (14) copies** must be filed **ON OR BEFORE January 14, 2015**. **PLEASE NOTE: Any correspondence, brief or memorandum directed to the Commissioners by any party or representative of any party MUST BE (1) copied to all parties, or if the parties are represented, to such representatives, (2) include a notation indicating such notice to all parties or their representatives and (3) be limited to argument. NO NEW EVIDENCE MAY BE SUBMITTED.**

If you have already filed a brief or memorandum with the hearing officer and wish to have that document distributed to each member of the Commission, it is requested that **fourteen (14) copies** be filed **ON OR BEFORE January 14, 2015**, and that **notice be given to all parties or if the parties are represented, to their representatives, that such previously filed document is being submitted to the Commissioners for review.**

By Order of the Freedom of Information Commission

W. Paradis
Acting Clerk of the Commission

Notice to: Adrienne DeLucca
D. Charles Stohler, Esq.

2015-01-02/FIC# 2014-183/Trans/wrbp/VRP//TAH

FREEDOM OF INFORMATION COMMISSION
OF THE STATE OF CONNECTICUT

In the Matter of a Complaint by

Report of Hearing Officer

Adrienne DeLuca and the
Berlin Education Association,

Complainants

against

Docket #FIC 2014-183

Superintendent of Schools, Berlin
Public Schools; and Berlin Public
Schools,

Respondents

December 30, 2014

The above-captioned matter was heard as a contested case on October 6, 2014, at which time the complainants and the respondents appeared, stipulated to certain facts and presented testimony, exhibits and argument on the complaint. The respondents submitted the records at issue in this case for an in camera inspection.

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. By letter of complaint filed April 2, 2014, the complainants appealed to the Commission, alleging that the respondents violated the Freedom of Information ("FOI") Act by denying their request for certain records pertaining to an investigation of the Chairman of the Berlin Board of Education.
3. It is found that the complainants made a March 17, 2014 request to the respondents for copies of, or the opportunity to inspect, the following records:

... any and all documents in connection with a certain investigation regarding Mr. Gary Brochu, Chairman of the Board of Education, including any and all bills for legal services in connection with this matter. We further request copies of or the right to inspect any and all documents provided to the Board of Education at their March 10, 2014 meeting concerning the Brochu investigation along with the minutes of the meeting....

4. It is found that the respondents replied on March 18, 2014 that they had not received any bills for legal services, but would provide a copy upon receipt; that the minutes of the March 10, 2014 Board of Education meeting were available on the Board of Education's website; and that the report responsive to the request, submitted by attorney C. Charles Stohler to the Berlin Board of Education at its March 10, 2014 meeting, was exempt from disclosure under §§1-210(b)(2)¹ and (10), G.S., and therefore would not be released.

5. It is found that the only document remaining at issue is the report by attorney Stohler, which concerns his investigation of allegations made by the Berlin Interscholastic Coaches Association that the chairman of the Board of Education used his position to intimidate coaches.

6. Section 1-200(5), G.S., provides:

“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, typed, tape-recorded, printed, photostated, photographed or recorded by any other method.

7. 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, (2) copy such records in accordance with subsection (g) of section 1-212, or (3) receive a copy of such records in accordance with section 1-212.

8. 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.”

9. It is concluded that the requested report is a public record within the meaning of §§1-200(5), 1-210(a) and 1-212(a), G.S.

¹ The respondents subsequently abandoned their claim of exemption under §1-210(b)(2), G.S.

10. The respondents contend that the requested record is exempt from disclosure under §1-210(b)(10), G.S., as “communications privileged by the attorney-client relationship.”

11. The applicability of the exemption contained in §1-210(b)(10), G.S., is governed by established Connecticut law defining the privilege. Maxwell v. FOI Commission, 260 Conn. 143 (2002). In Maxwell, 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.

12. 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. . . .

13. 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.

14. It is found that the Berlin Board of Education retained attorney Stohler to serve as independent legal counsel in the Brochu matter, and that the scope of his representations included uncovering the facts in order to provide legal advice. Attorney Stohler interviewed witnesses and reviewed relevant statutes and documents such as the Town Charter, Board Bylaws and the Board Member Handbook. His work culminated in a report to the Board that detailed his factual findings, interpretations, legal analysis, and recommendations.

15. It is found that the requested investigation report relates to obtaining confidential legal analysis and recommendations concerning the allegations against the chairman of the Board of Education.

16. The complainants contend that the investigation report was not transmitted in confidence because the chairman of the Board of Education, who was also the subject of the report, was present at the executive session during which the report was submitted and discussed by the Board, and that the chairman cannot both be the subject of the report and a member of the client agency for whom the report was prepared.

17. Is also found, however, that any conflicts created by the chairman's status as the subject of the report do not vitiate his status as a member of the client Board of Education that commissioned the report. It is therefore found that the investigation report was transmitted in confidence to the client Board of Education, and relates to legal advice sought from attorney Stohler by the Board acting in the performance of its duties.

18. It is therefore concluded that attorney Stohler's investigation report is privileged, and exempt from disclosure pursuant to §1-210(b)(10), G.S.

19. The complainants further maintain that the privilege was waived by the Board's subsequent adoption and disclosure of many of the conclusions and recommendations contained in the report.

20. It is found that the portions of the report that were subsequently disclosed in the minutes of the Board of Education, as to which the privilege was waived, did not themselves disclose the remainder of the investigative report, although the complainants nonetheless contend that the waiver should also apply to these remaining matters.

21. The Commission is guided by its previous decision in Docket #FIC 2002-057, Joseph McLaughlin v. First Selectman, Town of Greenwich; affirmed, McLaughlin v. FOIC, 03-CBAR-1503, Docket No. CV 02-0518367-S, Superior Court, Judicial District of New Britain, Memorandum of Decision dated June 4, 2003 (Aronson, J.T.R.); affirmed, McLaughlin v. Freedom of Information Commission, 83 Conn. App. 190 (2004). In that case, the First Selectman published an article in the local newspaper in which he quoted from a non-privileged January 31, 2002 letter to him from attorney Ralph Elliot, the town's outside counsel. The complainant McLaughlin requested from the First Selectman all other legal advice received by the Board of Selectmen regarding the same issue. The first Selectman provided McLaughlin with a copy of Elliot's non-privileged January 31, 2002 letter, but not any other related legal opinions rendered by its attorney on the same issue. The Commission found that the First Selectman had not, by disclosing the non-privileged letter, waived the attorney-client privilege with respect to the other opinions sought by McLaughlin and that the other opinions remained exempt from disclosure pursuant to §1-210(b)(10), G.S.

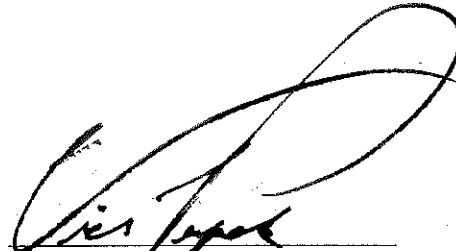
22. While the facts of the instant case are not identical to those in McLaughlin, above, it is found that the extent of waiver of the privilege, and the reasons for which the privilege was partially waived, are similar. In both cases, an officer of the town waived the privilege with respect to some of the conclusions and reasoning behind confidential advice given to the town, in order to explain or justify the actions proposed to be taken by the town, but, in each case, without disclosing all of the confidential communications relating to the legal advice rendered.

23. It is concluded that the partial waiver of the privilege did not, under the facts and circumstances of this case, extend to the portions of the investigative report that were not disclosed.

24. It is therefore concluded that the respondents did not violate §1-210(a), G.S., when they declined to provide the complainant with the portions of the investigative report that had not been waived.

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

1. The complaint is dismissed.



Victor R. Perpetua
As Hearing Officer