

Since 1975



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

Thomas White,
Complainant(s)
against

Notice of Meeting

Docket #FIC 2012-157

City Attorney, Office of the City Attorney,
City of Bridgeport; and City of Bridgeport,
Respondent(s)

September 7, 2012

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 Thursday, September 27, 2012**. 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 September 14, 2012**. 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, the Commission requests that an **original and fourteen (14) copies** be filed **ON OR BEFORE September 14, 2012**. **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 September 14, 2012**, 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: Thomas White
Gregory M. Conte, Esq.

9/7/2012/FIC# 2012-157/Trans/wrbp/KKR//PSP

FREEDOM OF INFORMATION COMMISSION
OF THE STATE OF CONNECTICUT

In the Matter of a Complaint by

Report of Hearing Officer

Thomas White,

Complainant

against

Docket #FIC 2012-157

City Attorney, Office of City
Attorney, City of Bridgeport; and
Office of the City Attorney, City of
Bridgeport,

Respondents

September 7, 2012

The above-captioned matter was heard as a contested case on August 30, 2012, at which time the complainant and the respondents appeared and presented 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, by letter dated March 2, 2012, the complainant made a request to the respondents for all records related to a "letter dated September 14, 2010 from Attorney Michel Bayonne to Attorney Thomas Bucci" (the "September 14 letter").
3. It is found that, by letter dated March 6, 2012, the respondents informed the complainant that his request had been received and was being reviewed, and that they would contact him once the records had been compiled.
4. By email dated and filed March 16, 2012, the complainant appealed to this Commission, alleging that the respondents violated the Freedom of Information (FOI) Act by failing to comply with the request for records described in paragraph 2, above.
5. 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.

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

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 . . . (3) receive a copy of such records in accordance with section 1-212.

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

8. It is found that the records, described in paragraph 2, above, are public records, within the meaning of §§1-200(5) and 1-210(a), G.S.

9. It is found that the complainant, who was employed as the legislative services director for the City of Bridgeport, received the September 14, 2010 letter, informing him that the City Council intended to terminate his employment for cause, but offered to permit him to resign.

10. It is found that the respondents hired the law firm of Durant, Nichols, Houston, Hodgson & Cortese-Costa (“Durant Nichols”), to provide them with legal advice in connection with the intended dismissal of the complainant. It is found that Attorney Michel Bayonne of Durant Nichols, prepared a written legal opinion addressed to Mark Anastasi, City Attorney, dated May 5, 2010 (the “opinion”); and a Report of Investigation Prepared for the City of Bridgeport, City Council Leadership, dated May 26, 2010 (the “report”).

11. The respondents claim that both the opinion and the report, described in paragraph 10, above, are exempt from disclosure, pursuant to §1-210(b)(10), G.S., which permits an agency to withhold from disclosure records of “communications privileged by the attorney-client relationship.”

12. At the conclusion of the hearing, the respondents submitted the opinion and the report to the Commission for in camera inspection. The in camera records consist of a four-page legal opinion, plus a fax cover sheet, and a four-page report, plus a cover page and table of contents page, for a total of 11 pages.

13. 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.

14. 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. . . .

15. 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. See also Shew v. Freedom of Information Commission, 245 Conn. 149 (1998).

16. In addition, in Shew, the sole issue on appeal was whether certain documents created by an attorney who had been retained by the town of Rocky Hill to conduct an investigation of the town’s police chief were subject to disclosure under the FOI act. See id. at 151. The Court held that the report at issue was exempt from mandatory public disclosure based upon the portion of §1-210(b)(10), G.S., which recites the attorney-client privilege. Id. at 160.

17. After careful inspection of the opinion, it is found that: (a) Attorney Bayonne was acting in a professional capacity for the respondents; (b) the communications were made by Attorney Bayonne to the city attorney in his capacity as such; (c) the communications relate to the legal advice sought by the respondents from Attorney Bayonne; and (d) the communications were made in confidence.

18. Accordingly, it is concluded that the opinion is an attorney-client privileged communication within the meaning of §1-210(b)(10), G.S.

19. After careful inspection of the report, it is found that, such report was created by Attorney Bayonne in furtherance of the legal advice the respondents requested from him. Specifically, as in Shew, it is found that: (a) Attorney Bayonne was acting in his capacity as an attorney for the respondents; (b) that the communications contained in the report were made by Attorney Bayonne to the city council members; (c) the communications in the report relate to the legal advice sought by the respondents from Attorney Bayonne; and (d) the communications were made in confidence.

20. Accordingly, it is concluded that the report is an attorney-client privileged communication within the meaning of §1-210(b)(10), G.S.

21. Based upon the foregoing, it is concluded that the in camera records, described in paragraphs 10 and 12, above, are exempt from disclosure.

22. It is found that the respondents provided the complainant with copies of several emails between and among the complainant, and various members of the city council and the city's personnel director, all of which are dated December 2009 and January 2010. In addition, it is found that the respondents provided the complainant with a copy of a memorandum, dated January 19, 2010, to the acting personnel director, which purports to be from city council leadership.¹

23. At the hearing in this matter, the complainant stated that the records described in paragraph 22, above, are not responsive to his request, described in paragraph 2, above. Although the complainant acknowledged that the respondents never conducted any reviews of his performance during his employment with the city, and that thus there are no records regarding the same, he insisted that additional responsive records exist that have not been provided to him.

24. As evidence of this claim, the complainant requested permission, after the hearing, to file an exhibit, consisting of a chain of emails among himself, the city council president and the acting personnel director, all dated January 26, 2010 and January 27, 2010. The hearing officer granted such request, and such exhibit was marked as complainant's exhibit B. It is found that such emails evidence that the complainant authored the memorandum, described in paragraph 22, above, and sent it to the personnel director, without authorization.

25. In addition, however, complainant's exhibit B evidences that the respondents did, in fact, have at least one additional responsive record that they failed to provide to the complainant. Although counsel for the respondents represented at the hearing that a search for responsive records had been conducted, and that all responsive records have been provided to the complainant, no witness appeared at the hearing to testify as to the nature and scope of any such search. Further, respondents' exhibit 4 recites the following exchange between respondents' counsel and the city council president: "Tom, do you recall or have possession of the emails that Tom White is referencing?...Greg, I have no memory of sending an email to the personnel director at all. That was a long time ago." Based upon the foregoing, the Commission is unconvinced that the city council president, nor any other person, conducted any search for responsive emails.

26. It is concluded that the respondents violated the disclosure provisions of §§1-210(a) and 1-212(a), G.S., when they failed to provide the complainant with a copy of complainant's exhibit B, and failed to conduct a thorough search for responsive emails.

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

¹ See paragraph 24.

1. The respondents shall conduct a thorough search for all records responsive to the request, described in paragraph 2, above. Three weeks from the date of issuance of this final decision, the respondents shall provide an affidavit from each member of the city council, the personnel director, and the city attorney, stating the nature and scope of the search, which shall include a search for deleted emails, to the complainant, along with any located responsive records.

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



Kathleen K. Ross
as Hearing Officer