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Joseph Sargent,
Complainant(s)
against

Office of the Corporation Counsel, City of Stamford; and City of Stamford,
Respondent(s)

Notice of Meeting

Docket #FIC 2011-619

September 14, 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, lst floor, Hartford, Connecticut, at **2 p.m. on Wednesday, October 10, 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 28, 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 28, 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 28, 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

W. Paradis
Acting Clerk of the Commission

Notice to: Joseph Sargent
Burt Rosenberg, Esq.
James M. Sconzo, Esq.

9/14/12/FIC# 2011-619/Trans/wrbp/VDH//CAL

FREEDOM OF INFORMATION COMMISSION
OF THE STATE OF CONNECTICUT

In The Matter of a Complaint by — Report of Hearing Officer

Joseph Sargent,

Complainant

against — Docket #FIC 2011-619

Office of the Corporation Counsel,
City of Stamford; and City of Stamford,

Respondents — September 14, 2012

The above-captioned matter was heard as a contested case on July 31, 2012, at which time the complainant and the respondents appeared, stipulated to certain facts 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 email dated October 25, 2011, the complainant made a request to the respondents for copies of the following records:

a. All public records that relate to or concern the City of Stamford's waiver of its defenses to liability under §7-101a[1] for any city employee or officer who is or was provided with joint representation by the municipality in the following cases: Tarzia v. City of Stamford, et al., and Fazoli v. City of Stamford, et al.;

[1] Conn. Gen. Stat. §7-101a is an indemnity statute, which provides, in part, that a municipality "shall protect and save harmless" a municipal officer or employee from financial loss and expense arising out of any claim, demand, suit or judgment by reason of alleged negligence, or for alleged infringement of any person's civil rights, on the part of such officer or employee while acting in the discharge of his duties. This section also provides that a municipality shall also "protect and save harmless" any municipal officer or employee from similar proceedings alleging malicious, wonton or willful act or ultra vires act, on the part of such officer or employee. However, in the event that a judgment enters against an officer or employee in connection with this latter category of behaviors, the municipality may seek reimbursement for any funds it has incurred in providing the defense.

b. All public records showing that the city employees or officers who are being provided with joint representation have made an informed consent, including any affidavits by defense counsel stating that the individual defendants have been given adequate notice of the conflict inherent in joint representation;

c. All public records evidencing that the defendant(s) in the Fasoli matter have been given notice that the City is seeking a declaratory judgment from a court to determine whether the Corporation Counsel has the discretion to provide defense costs to the defendant in that case during the litigation, as opposed to reimbursing them at the conclusion of the matter; and

d. The retainer agreement(s) for all parties on whose behalf the City has provided a defense in the Tarzia matter and the Fazoli matter, and copies of the legal bills that have been submitted on their behalf.

3. By letter dated November 4, 2011 and filed November 14, 2011, the complainant appealed to this Commission, alleging that the respondents violated the Freedom of Information ("FOI") Act by denying his request for records described in paragraph 2, above. In his complaint, the complainant requests that the Commission impose a civil penalty against the respondents and order them to attend a FOI training session.

4. 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.

5. 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, (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.

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 found that, to the extent that the respondents maintain the records described in paragraph 2, above, the records are "public records" and must be disclosed in accordance with §§1-210(a) and 1-212(a), G.S., unless they are exempt from disclosure.

8. It is found that, by email dated September 20, 2011, the complaint first requested that the respondents provide him with copies of the records described in paragraph 2, above (the "September 20th Request"). It is found that, by email dated October 3, 2011, the complainant followed up with the respondents regarding his request, asking that the respondents review his request and let him know when he could expect to have the records available for "inspection" (the "October 3rd Request"). It is found that, prior to the October 3rd Request to inspect records, the complainant had requested that the respondents provide him with copies of the subject records. It is found that the complainant followed up on the October 3rd Request with his October 25, 2011 request, the operative request in this case (the "October 25th Request").

9. It is found that, by email dated October 26, 2011, counsel for the respondents forwarded the October 25th Request to an attorney within the Office of the Corporation Counsel for the City of Stamford, directing that the attorney "respond" to the request. It is found that, while the complainant was copied on the October 26th email, he was not directly addressed.

10. It is found that, under cover of letter dated January 29, 2012, the respondents responded to the October 25th Request and provided the complainant with some responsive records. It is found that, at this time, the respondents explained that they did not maintain records responsive to the complainant's request described in paragraph 2.a, or 2.c, above.

11. It is further found that the respondents declined to provide the complainant with the records responsive to the complainant's request in paragraph 2.b, above, claiming that these records were exempt from disclosure pursuant to §1-210(b)(4), G.S. It is also found that the respondents provided the complainant with the Tarzia records that were responsive to the request in paragraph 2.d, above, but declined to provide the complainant with the Fazoli records that were responsive to the request in paragraph 2.d, above, claiming that these records were exempt from disclosure pursuant to §1-210(b)(4), G.S.

12. At the contested case hearing, the respondents also claimed an exemption to the disclosure of the records based on the attorney-client privilege.

13. At the contested case hearing, the complainant moved that records claimed exempt from disclosure be submitted to the Commission for an in camera inspection. The complainant's motion was granted. The respondents submitted the in camera records to the Commission, and, based on the bates-stamp identifiers used by the respondents, such records shall be identified as follows:

1. IC-2011-619-SGT-1 through IC-2011-619-SGT-3;
2. IC-2011-619-GLC-1 through IC-2011-619-GLC-9;
3. IC-2011-619-B&N-1 through IC-2011-619-B&N-32; and
4. IC-2011-619-JB-1 through IC-2011-619-JB-45.

14. Section 1-210(b)(4), G.S., provides that nothing in the FOI Act shall be construed to require the disclosure of:

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

15. Section 1-210(b)(10), G.S., permits an agency to withhold from disclosure records of "communications privileged by the attorney-client relationship."

16. 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.

17. 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. . . .

18. 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.

19. In the context of an attorney's billing records, the Commission notes that it is generally accepted that an attorney billing statement and time records are protected by the attorney-client privilege only to the extent that they reveal litigation strategy and/or the nature of the services performed. See Bruno v. Bruno, FA0540049006S, 2009 Conn. Super. LEXIS 1913, at *3 (Conn. Super. Ct. July 10, 2009). However, ". . . bills, . . . and time records which also reveal the motive of the client in seeking representation, litigation strategy, or the specific nature of the services provided, such as researching particular areas of law, fall within the privilege." Id. at *5; see also New Haven v. FOIC, et al., 4 Conn. App. 216, 220, 493 A.2d 283, 285 (1985) (trial court found, after conducting an in camera review of the billing records, that there was nothing in such records to suggest they came within the purview of the attorney-client privilege).

20. As an initial matter, while the respondents indicated that it was possible that they maintained Tarzia records responsive to the complainant's request in paragraph 2.b., above, it is found that the respondents do not maintain such records.

21. It is found that the in camera records are comprised of counsels' billing records pertaining to the Fazoli matter, which is a case currently pending in the United States District Court, for the District of Connecticut, as well as an engagement letter from counsel to his clients in this same matter.

22. With regard to the engagement letter, IC-2011-691-JB-42 through IC-2011-691-JB-45, it is found that this is a written communication transmitted in confidence between counsel and public officials or other employees acting within the scope of their employment with the respondent agency. It is further found that the records relate to legal advice sought by the public agency from their attorneys, received by the public officials acting on behalf of the agency from their attorneys. Finally, it is found that the respondents did not waive the privilege.

23. It is concluded that the engagement letter is an attorney-client privileged communication within the meaning of §1-210(b)(10), G.S. It is further concluded that the engagement letter is exempt from mandatory disclosure and that the respondents did not violate §1-210(a), G.S., when they denied the complainant's request for a copy of this letter.

24. After a careful review of the remaining in camera records, it is found that these are billing records regarding the Fasoli matter. It is further found that within the billing records are detailed, dated entries describing the nature of the work being performed, including the focus of legal research, in the context of an ongoing legal matter. It is found that the entries within the billing records substantively describe a particular attorney's legal activity, and thus "the specific nature of the services [being] provided [to a client]." Bruno, 2009 Conn. Super. LEXIS 1913, at *3. It is concluded that the information contained in the descriptive section of the billing records falls within the protection of the attorney-client privilege and is exempt from disclosure. It is therefore concluded that this

information may be redacted from the in camera records.

25. It is found further, however, that the contention that the entirety of the billing records should be protected in their entirety under the attorney-client privilege, or that these records should be deemed to reveal litigation strategy, is not supported by the law. It is therefore concluded that, other than the information specifically identified in paragraph 24, above, the billing records, including those sections in the records that reveal how many hours were worked by each attorney and the cost of such work, are not exempt from disclosure pursuant to either the attorney-client privilege or §1-210(b)(4), G.S., and must be disclosed.

26. It is further concluded that the respondents violated the disclosure provisions of §§1-210(a) and 1-212(a), G.S., by refusing to disclose the billing records to the complainant in redacted form.

27. With regard to the issue of civil penalties, FOI training, and the promptness requirement, it is found that, based on the facts and circumstances of this case, no civil penalties or FOI training is necessary. It is found that there were circumstances occurring within the Office of the Corporation Counsel that had to do with employees needing time out of the office, which circumstances could not have been anticipated. With regard to promptness, it is found that, even if, as the respondents contend, they did not receive the first two requests for records, it should not have taken them over three months to locate the records at issue and provide them to the complainant. See ¶¶ 8, 10, above. In addition, it is found that if the respondents were actively engaged in locating the records, they should have communicated this to the complainant. Consequently, it is concluded that the respondents violated the promptness requirement of the FOI Act.

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 at issue, free of charge. In complying with this order, the respondents may redact from the in camera records the information specifically identified in paragraphs 23 and 24 of the findings, above.

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

Valicia Dee Harmon

Valicia Dee Harmon
as Hearing Officer

FIC2011-619/HOR/vdh/09/14/2012