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FREEDOM OF INFORMATION



Connecticut Freedom of Information Commission • 18-20 Trinity Street, Suite 100 • Hartford, CT 06106
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Roger Emerick,
Complainant(s)
against

Notice of Meeting

Docket #FIC 2012-001

Commissioner, State of Connecticut,
Department of Public Health; and State of
Connecticut, Department of Public Health,
Respondent(s)

October 25, 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 Wednesday, November 14, 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 November 2, 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 November 2, 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 November 2, 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: Roger Emerick
Kerry Anne Colson, Esq.

10/25/12/FIC# 2012-001/Trans/wrbp/VRP//LFS

FREEDOM OF INFORMATION COMMISSION
OF THE STATE OF CONNECTICUT

In the Matter of a Complaint by

Report Of Hearing Officer

Roger Emerick,

Complainant

against

Docket #FIC 2012-001

Commissioner, State of Connecticut,
Department of Public Health; and
State of Connecticut, Department of
Public Health,

Respondents

October 25, 2012

The above-captioned matter was heard as a contested case on June 12, 2012, at which time the complainant 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 January 3, 2012, the complainant appealed to the Commission, alleging that the respondents violated the Freedom of Information ("FOI") Act by denying his request for public records.
3. It is found that the complainant made a November 11, 2011 request for documents related to proposed changes to the Connecticut Public Swimming Pool Design Guide.
4. It is found that the respondents acknowledged the request on November 17, 2011, and additionally responded on December 5, 2011 by providing certain records, and withholding others based upon a claim of attorney-client privilege.
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:

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.

7. It is concluded that the requested records are public records within the meaning of §§1-200(5) and 1-210(a), G.S.

8. The respondents contend that the withheld records are exempt from disclosure either pursuant to §1-210(b)(4), G.S., or §1-210(b)(10), G.S.:

9. Section 1-210(b)(4), G.S., provides that disclosure is not required 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

10. Section 1-210(b)(10), G.S., provides that disclosure is not required of "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. After a careful review of the in camera records, it is found that the portions of the requested records identified by the respondents as privileged are in fact written communications transmitted in confidence between the respondents’ employees acting in the performance of their duties and within the scope of their employment and the Office of the Attorney General relating to legal advice sought by those employees from that office. Generally speaking, the respondents sought the advice of the Office of the Attorney General concerning proposed changes to the Connecticut Public Swimming Pool Design Guide, and exchanged drafts and comments with that office.

15. It is therefore concluded that the records described in paragraph 14, above, are exempt from disclosure pursuant to §1-210(b)(10), G.S.

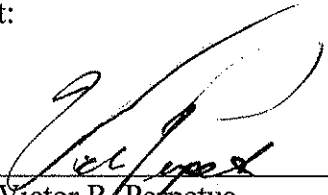
16. After a careful review of the in camera records, it is also found that the redacted portions of the requested records identified by the respondents as exempt pursuant to §1-210(b)(4), G.S., are in fact records pertaining to strategy and negotiations with respect to pending claims or pending litigation between the complainant and the respondents.

17. It is therefore concluded that the records described in paragraph 16, above, are exempt from disclosure pursuant to §1-210(b)(4), G.S.

18. It is concluded that the respondents did not violate the FOI Act as alleged.

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