

FREEDOM OF INFORMATION COMMISSION
OF THE STATE OF CONNECTICUT

In the Matter of a Complaint by

FINAL DECISION

Claire Bessette and The Day,

Complainants

against

Docket #FIC 2018-0089

General Manager, Norwich Public Utilities
Norwich Public Utilities,

Respondents

July 11, 2018

The above-captioned matter was heard as a contested case on April 23, 2018, at which time the complainants 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. The Commission takes administrative notice of the final decision in Claire Bessette and The Day v. General Manager, Norwich Public Utilities; and Norwich Public Utilities, Docket #FIC 2017-0528 (February 14, 2018) (Bessette I), in which the Commission ordered the following, in part:

Forthwith, the respondents shall provide to the complainants, free of charge, copies of all the records requested in this matter, redacted to conceal the identity of the complaining witness; however, with respect to the “notes” discovered by the respondents after the hearing in this matter, ... if the respondents claim such records are exempt from disclosure, and the complainants seek to challenge the respondents’ claim, the complainants may file a non-compliance appeal with the Commission for adjudication of that issue.

3. It is found that the respondents subsequently satisfied the Commission’s order, except as to the “notes” referenced in the order.

4. By email filed February 20, 2018, the complainants appealed to this Commission, alleging that the respondents violated the Freedom of Information (“FOI”) Act by failing to provide copies of the notes as required in Bessette I.

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

7. Section 1-212(a), G.S., provides in relevant part: "Any 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 requested records are public records, within the meaning of §§1-200(5), 1-210(a), and 1-212(a), G.S.

9. It is found that the notes were created by the respondent General Manager and concern his investigation of the sexual harassment claim that was the basis for a \$35,000 settlement agreement disclosed pursuant to Bessette I.

10. The respondents claim that §1-210(b)(10), G.S., which provides that disclosure is not required of "communications privileged by the attorney-client relationship," exempts the notes from mandatory disclosure.

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. The complainants challenged the respondents’ claim of exemption. At the hearing officer’s request, the respondents submitted the records for in camera inspection. Such records shall be referenced as IC-2018-0089-1 through IC-2018-0089-4.

15. It is found that the respondent General Manager created IC-2018-0089-1 through IC-2018-0089-4 after conversations with the attorney for the respondent Norwich Public Utilities. It is found that he created IC-2018-0089-1 through IC-2018-0089-3 at the direction of the attorney. It is found that he used the notes when he subsequently met with the attorney to receive advice concerning the underlying workplace incident at issue in this matter and in Besette I, and he created IC-2018-0089-4 to memorialize subsequent conversations with the attorney.

16. It is found that the General Manger has shared the notes with no one other than counsel, he has not disclosed the contents of the notes to anyone other than counsel, and he maintained them in a closed envelope marked “privileged.”

17. It is found that IC-2018-0089-1 through IC-2018-0089-3 contain, as described by the respondent General Manager at the hearing, “what [I] learned happened from my knowledge” about the underlying incident; as stated on the Index to In Camera Records, the records describe the “details of incident.” Upon careful inspection of the in camera records, it is found that IC-2018-0089-1 through IC-2018-0089-3 confirm the descriptions by the General Manager and the Index to In Camera Records.

18. The respondents cited two cases to support their claim of exemption: Olson v. Accessory Controls and Equipment Corp., 254 Conn. 145 (2000) and Josh Kovner and the Hartford Courant v. Commissioner, State of Connecticut Department of Correction, Docket #FIC 2017-0310 (December 13, 2017). Both cases concern whether communications to a third party were privileged. Resolution in favor of the privilege in both cases turned on the status of the third party as outside consultant employed specifically to assist the attorney in rendering legal advice. In both cases, the communications were found to have been made in confidence despite the presence of a third-party because the third-party was a technical expert retained as an agent of the attorney for the purpose of rendering legal advice. Olson 254 Conn. 168; Kovner, Docket #FIC 2017-0310, paragraph 24.

19. However, such circumstances are not found in this case. As a threshold matter, IC-2018-0089-1 through IC-2018-0089-3 do not reflect communication with an outside technical

expert retained specifically to assist the attorney in rendering legal advice. It is found, therefore, that the communication with the third-party was not made in confidence.

20. Moreover, even if the communication were made in confidence, “A communication ...solely regarding a matter of fact would not ordinarily be privileged, unless it were shown to be inextricably linked to the giving of legal advice...” (Citation omitted; internal quotation marks omitted.) Olson, 254 Conn. 157. It is found that IC-2018-0089-1 through IC-2018-0089-3 contain no legal advice, and the “details of the incident” (as described on the In Camera Index) memorialized in IC-2018-0089-1 through IC-2018-0089-3 are not “inextricably linked with the giving of legal advice.” (Citation omitted). Id.

21. It is found that the test set forth in §52-146r, G.S., is not satisfied with respect to IC-2018-0089-1 through IC-2018-0089-3. That is, the records were not communications between a public official or employee and an attorney or the attorney’s agent, nor were they records prepared by the attorney or the attorney’s agent. It is also found that the test set forth in Maxwell is not met, as IC-2018-0089-1 through IC-2018-0089-3 are neither written communications between an attorney and his or her client, nor are they written communications between an attorney and an agent of the attorney.

22. It is concluded, therefore, that §1-210(b)(10), G.S., does not protect IC-2018-0089-1 through IC-2018-0089-3 from disclosure.

23. The respondents also claimed that IC-2018-0089-1 through IC-2018-0089-3 are exempt pursuant to §1-210(b)(2), G.S., which provides in relevant part that nothing in the FOI Act shall require disclosure of “...personnel or medical files and similar files the disclosure of which would constitute an invasion of personal privacy...”

24. The Supreme Court set forth the test for the exemption contained in §1-210(b)(2), G.S., in Perkins v. Freedom of Information Commission, 228 Conn. 158, 175 (1993). The claimant must first establish that the files in question are personnel, medical or similar files. Second, the claimant must show that disclosure of the records would constitute an invasion of personal privacy. In determining whether disclosure would constitute an invasion of personal privacy, the claimant must establish both of two elements: first, that the information sought does not pertain to legitimate matters of public concern, and second, that the disclosure of such information is highly offensive to a reasonable person.

25. The respondents submitted no evidence at the hearing in this matter in support of their claim of exemption pursuant to §1-210(b)(2), G.S. However, because the Commission takes administrative notice of Bessette I, which concerned the same underlying incident, the Commission takes administrative notice of the respondents’ argument in support of their claim of exemption in that matter.

26. It is found that IC-2018-0089-1 through IC-2018-0089-3 concern allegations of sexual harassment. It is found that such records are “personnel ... or similar files” within the meaning of §1-210(b)(2), G.S.

27. In Bessette I, the respondents relied on Rocque v. FOI Commission, 255 Conn. 651 (2000), which considered whether disclosure of records of an investigation of alleged sexual harassment by a public employee against a co-worker would constitute an invasion of personal privacy within the meaning of §1-210(b)(2), G.S. In Rocque, both the public employee and the complaining witness objected to disclosure of the records. The Court concluded “that the only portions of [the] two documents that are exempt are those portions identifying the complainant or containing sexually explicit information.” Id., 668. Sexually explicit information “pertaining to the complainant’s intimate relationships” was not a matter of legitimate public concern; id.; and disclosure of such information would be highly offensive to a reasonable person “because it pertains to the private life of the sexual harassment complainant and documents the complainant’s private relationships.” Id., 666.

28. The Court emphasized, however, that Perkins requires “an analysis of the facts of *each* case in which the personal privacy exemption is claimed.” (Emphasis added.) Rocque, 255 Conn. 669.

29. It is found that IC-2018-0089-1 through IC-2018-0089-3 contain information of a sexual nature, as well as the name of the complaining witness.

30. It is found that there is a legitimate public interest in the details of a workplace sexual harassment claim involving a high-level public official that gave rise to a \$35,000 settlement paid with public funds. In addition, upon careful inspection of IC-2018-0089-1 through IC-2018-0089-3, it is found that such records, unlike those in Rocque, do not pertain to the private life of the complaining witness, nor do they document the witness’s private relationships. It is found that a reasonable person would not find that disclosure of the sexual information contained in IC-2018-0089-1 through IC-2018-0089-3 would be highly offensive.

31. With respect to the identity of the complaining witness, the court in Rocque reasoned that the identity of the complainant was not a legitimate matter of public concern under the facts of that case because the disclosure of such information would do nothing to assist in the public’s understanding or evaluation of a public agency’s investigative process.

32. It is found, based on Rocque and the complaining witness’s objection to disclosure (see Bessette I), that the identity of the complaining witness in this matter is not a legitimate matter of public concern and a reasonable person would find disclosure of such information to be highly offensive. It is concluded, therefore, that such information is permissively exempt from disclosure and the respondents did not violate the FOI Act by withholding such information.

33. It is found that §1-210(b)(2), G.S., exempts from disclosure the complaining witness’s name and other personally identifying information in IC-2018-0089-1 through IC-2018-0089-3.

34. It is concluded that the respondents violated the FOI Act by withholding IC-2018-0089-1 through IC-2018-0089-3, except for the complaining witness’s identity.

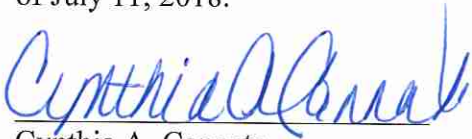
35. With respect to IC-2018-0089-4, the respondents presented testimonial evidence and it is found that such records memorialize oral communication between the respondent General Manager and his attorney. It is found that such records are confidential and concern legal advice sought by the General Manager. It is found that such records are protected by the attorney-client privilege and are permissively exempt pursuant to §1-210(b)(10), G.S.

36. It is concluded that the respondents did not violate the FOI Act by withholding IC-2018-0089-4 from mandatory disclosure.

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

1. Forthwith, the respondents shall provide to the complainants, free of charge, copies of the records referenced as IC-2018-0089-1 through IC-2018-0089-3, redacted to conceal the identity of the complaining witness.
2. Henceforth, the respondents shall strictly comply with §§1-210(a) and 1-212(a), G.S.

Approved by Order of the Freedom of Information Commission at its regular meeting of July 11, 2018.



Cynthia A. Cannata
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:

CLAIRE BESSETTE AND THE DAY, 47 Eugene O'Neill Drive, New London, CT 06320

GENERAL MANAGER, NORWICH PUBLIC UTILITIES; AND NORWICH PUBLIC UTILITIES, c/o Attorney Joseph B. Schwartz, Murtha Cullina LLP, CityPlace I, 185 Asylum Street, Hartford, CT 06103



Cynthia A. Cannata
Acting Clerk of the Commission