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FREEDOM OF INFORMATION

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Adrienne DeLucca and the
Berlin Education Association
Complainant(s)

against

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

Notice of Rescheduled Commission Meeting

Docket #FIC 2014-183

June 23, 2016

This will notify you that the Freedom of Information Commission has rescheduled the above-captioned matter, which had been noticed to be heard on Wednesday, June 22, 2016 at 2 p.m.

The Commission will consider the case at its meeting to be held at the Freedom of Information Commission Hearing Room, 18-20 Trinity Street, 1st floor, Hartford, Connecticut, at **2:00 p.m.** on **Wednesday, July 27, 2016.**

Any brief, memorandum of law or request for additional time, as referenced in the June 1, 2016 Transmittal of Proposed Final Decision, should be received by the Commission on or before July 15, 2016.

By Order of the
Freedom of Information Commission

W. Paradis,
Acting Clerk of the Commission

Notice to:

Adrienne DeLucca
D. Charles Stohler, Esq.

FREEDOM OF INFORMATION COMMISSION
OF THE STATE OF CONNECTICUT
18-20 Trinity Street Hartford, CT 06106
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Adrienne DeLucca and the
Berlin Education Association,
Complainant(s)

against

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

Notice of Meeting

Docket #FIC 2014-183

June 1, 2016

Transmittal of Proposed Final Decision Dated May 31, 2016

In accordance with Sections 4-179 and 4-183(h) of the Connecticut General Statutes, the Freedom of Information Commission hereby transmits to you the proposed finding and decision dated May 31, 2016 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, June 22, 2016.** 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 June 10, 2016.* 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 June 10, 2016.* **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 **fifteen (15) copies** be filed *on or before June 10, 2016,* 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.

FIC/2014-183/RTrans/wrbp/VRP//TAH/2016-06-01

FREEDOM OF INFORMATION COMMISSION
OF THE STATE OF CONNECTICUT

In the Matter of a Complaint by	Report of Hearing Officer Following Remand
Adrienne DeLucca and the Berlin Education Association,	
Complainants	
against	Docket #FIC 2014-183
Superintendent of Schools, Berlin Public Schools; and Berlin Public Schools,	
Respondents	May 31, 2016

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. A Report of Hearing Officer was issued on December 30, 2014, concluding that there had been only a partial waiver of the attorney-client privilege with respect to the in camera records. At its regular meeting of February 4, 2015, the Commission voted 2-2 on adoption of the Report. By virtue of the tie vote, the Hearing Officer's Report was not adopted. The Commissioners then voted to remand the matter back to staff for consideration of a revised report.

A Proposed Final Decision drafted by staff was issued, without any additional hearing, on March 5, 2015. That decision concluded that there had been a complete waiver of the attorney-client privilege with respect to the in camera records, relying on *United States v. Jacobs*, 117 F.3d 82 (2d Cir. 1997). That Proposed Final Decision was approved by the Commission and issued as the Commission's Final Decision on March 25, 2015. The Final Decision was then appealed to the Superior Court by the respondents. The Court (Schuman, J.) by Memorandum of Decision dated February 2, 2016, sustained the appeal and remanded the case for further proceedings consistent with its opinion. The Court's opinion held that the extent of waiver in an extra-judicial context was limited to that portion of the in camera records that confirmed what was actually disclosed, citing *In re Von Bulow*, 939 F.2d 94 (2d Cir. 1987).

After consideration of the entire record, the following facts are found and conclusions of law are reached. Paragraphs 1 through 18, which are unaffected by the Court's decision, and previously approved in the Commission's March 5, 2015 Final Decision, are restated as they

were issued in that Final Decision. The remainder of the paragraphs of findings and conclusions and orders that follow are new:

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 D. 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:

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

> 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.

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 representation 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. The complainants contended 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.

16. 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.

17. It is therefore concluded that any privilege that attached to Attorney Stohler's investigation report pursuant to §1-210(b)(10), G.S., was not waived due to the chairman's presence at the executive session during which the report was submitted and discussed.

18. The complainants further contend that the respondents waived any privilege that attached to the report when they adopted and published Attorney Stohler's "Recommendations" in the minutes of the respondents' meeting.

19. In a judicial context, the "fairness doctrine" requires that "testimony as to part of a privileged communication, in fairness, requires production of the remainder.' *In re Von Bulow*, 828 F.2d 94, 102 (2d Cir. 1987). The doctrine "aims to prevent prejudice to a party and distortion of the judicial process that may be caused by the privilege-holder's selective disclosure during litigation of otherwise privileged information." *Id.* at 101. In other words, it would be "unfair to permit a party to make use of privileged information as a sword with the public and then as a shield in the courtroom." *Id.*

20. However, the Commission is additionally guided by the Superior Court's February 2, 2016 memorandum of decision, which concluded that where disclosure of communications protected by attorney-client privilege occurs in an *extrajudicial* setting – i.e., outside of the context of an adversarial proceeding – waiver applies only to "the particular matters actually disclosed[.]" *In re von Bulow*, at 102. More particularly, the Superior Court has directed:

> Of course, in any given case, application of the "actually disclosed" standard will not eliminate all argument as to what was waived. This case is particularly difficult because it involves disclosure of part, but not all, of one document. There are, however, some standards that can apply. First, the *Von Bulow* "actually disclosed" standard focuses on the substance rather than the exact wording of the disclosure. See *In re Kidder Peabody*, 168 F.R.D. 459, 470 (S.D.N.Y. 1996) (under *Von Bulow*, "[d]isclosure of the substance of a privileged communication [in

> an extrajudicial context] is as effective a waiver as a direct quotation since it reveals the 'substance' of the statement.") In this case, the commission found that the meeting minutes contain "recommendations" consisting of "[six] very detailed paragraphs, taken nearly verbatim from the report itself." (ROR, p. 519.) The court agrees that, at a minimum, these recommendations "actually disclosed" the same recommendations in the Stohler report, which are found in Section III (pages 4-5) of Stohler's Legal Analysis and Recommendations, even if the recommendations in the minutes are not worded precisely the same was as in the report. [Footnote omitted.]
>
> On the other hand, as *Von Bulow* recognized, in the extrajudicial context the "actually disclosed" standard is not equivalent to a broad waiver of communications on the same "subject matter." As the court stated: "[l]ike the 'implied waiver,' the subject matter waiver also rests on the fairness considerations at work in the context of litigation." *In re Von Bulow*, supra, 828 F.2d 103. In the present case, in contrast, the purpose of the inquiry into deciding what was "actually disclosed" should be merely to identify what portion of the attorney-client communication "confirms what was actually disclosed." *Long-Term Capital Holdings v. United States*, supra, 2003 WL 1548770, at *9
>
> The court acknowledges that this process will be fact-specific. This court, on an administrative appeal, is confined to the record and cannot find facts. General Statutes §4-183(i). Therefore, pursuant to General Statutes §4-183(j) the court must remand the case to the commission to apply the correct standard. [Footnote omitted.] The commission in the first instance should compare the disclosure with the actual sealed report, and, under the standards discussed here and employing the procedures it deems appropriate, determine what portion of the report the minutes "actually disclosed."

21. Applying the principles articulated by the Superior Court in its February 2, 2016 Memorandum of Decision, and based upon careful review of the in camera records, comparing each line of those records to what was disclosed in the meeting minutes, it is found that the following portions of the in camera records confirm what was actually disclosed in the minutes.

22. First, consistent with the Superior Court Memorandum of Decision, it is found, with respect to the recommendations actually published in the minutes, "at a minimum, these recommendations "actually disclosed" the same recommendations in the Stohler report, which are found in Section III (pages 4-5) of Stohler's legal Analysis and Recommendations, even if

the recommendations in the minutes are not worded precisely the same way as in the report." Memorandum of Decision at page 11.

23. Second, with respect to the first eight pages, labeled "Investigat[i]on Report" in the Stohler report (the in camera records), it is found that the following identified passages from the in camera records confirm what was actually disclosed in the minutes:[2]

a. p. 1, Section I: the first sentence, the quoted indented language that immediately follows, all of the next paragraph except for the second sentence, and all of the last paragraph in Section I except for the third sentence; which confirm what was actually disclosed in the minutes at page 5 paragraph C: "Receipt of Attorney Report Regarding Claim Concerning Board Member's Alleged Conduct," and D: "Discussion Regarding Claim Concerning Board Member's Alleged Conduct.:

> Ms. Matulis reported at the February 10, 2014 Board meeting the Board authorized the Superintendent of Schools, in coordination with the Secretary of the Board, to engage legal counsel to advise the Board with respect to a claim concerning a Board member's alleged conduct. Ms. Matulis reported, since then, the Board has contracted with Attorney D. Charles Stohler of Carmody Torrance Sendak & Hennessey, LLP and she, along with Superintendent Erwin, met with Attorney Stohler to review the scope of services. Attorney Stohler conducted an investigation, and as a result of his fact findings, an attorney-client report is to be delivered to the Board of Education tonight.[3]

b. p. 3, ¶ 1, which confirms what was actually disclosed in the minutes at page 6 paragraph B: "BICA [Berlin Interscholastic Coaches Association] alleges a pattern of activity by Mr. Brochu over a number of years."

c. p. 3, ¶ 4, which confirms what was actually disclosed in the minutes at page 6 paragraph B: "Mr. Brochu is a passionate and intense individual."

d. p. 4, ¶ 9, which confirms what was actually disclosed in the minutes page 6 paragraph C: "[T]here are occasions when his conduct has been adversarial, rude, overbearing and he has not listened to the other party."

e. p. 4, ¶¶ 9 and 10, which confirm what was actually disclosed in the minutes paragraph B: "The allegations against Mr. Brochu appear minor when viewed separately; when examined in their totality, they can reasonably be construed as his attempts to influence or intimidate at least one coach."

f. p. 4, ¶ 10; p. 6, ¶ 20, third and fourth sentences only; and p. 7, ¶ 27; which confirm what was actually disclosed in the minutes at page 7 paragraph F:

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[2] Some identified passages from the in camera records are listed more than once, because they confirm what was actually disclosed in more than one section of the minutes. For example, see paragraphs 23.d, 23.e, and 23.f, below.

[3] All language in quotations in this decision is directly from the minutes of the Berlin Board of Education March 10, 2014 meeting.

"There is a perception that Mr. Brochu had a direct hand in many more actions than he did," and disclosed at page 7 paragraph F sentence two: "Some, but not all, of the allegations [put forth by BICA] are grounded in fact."

g. p. 5, ¶ 12; p. 6, ¶¶ 22 and 23; which confirm what was actually disclosed in the minutes at page 6 paragraph A: "There is no credible evidence of any tangible retribution or retaliation taken by the President of the Board, Mr. Brochu, against any coach," and at page 7 paragraph F: "Some, but not all, of the allegations [put forth by BICA] are grounded in fact."

h. p. 5, ¶ 13, which confirms what was actually disclosed in the minutes at page 7 paragraph F sentence two: "Some, but not all, of the allegations [put forth by BICA] are grounded in fact."

i. p. 5, ¶¶ 15 and 16; p. 6, ¶ 19; and p. 7, ¶ 30 sentences 3, 4 and 5; which confirm what was actually disclosed in the minutes at page 6 paragraph C: He [Brochu] has made comments that call attention to his position, and even when he does not say he is a Board member, he is often perceived as acting in his official role due to his long tenure at the Board and stature in the community."

j. p. 6, ¶¶ 25 and 29, which confirm what was actually disclosed in the minutes paragraph E: "There are varying interpretations of what that [Conflict Resolution] protocol [set forth in the Athletic Handbook] means, and more importantly, how it actually operates and is enforced."

k. p. 7, ¶ 30, sentences 1 and 2, which confirm what was actually disclosed in the minutes at page 7 paragraph F: "Many of the allegations put forth by BICA are the result of 'stories' which have grown over time."

l. p. 7, ¶ 30, sentences 3 and 4, which confirms what was actually disclosed in the minutes at page 6 paragraph B: "The allegations against Mr. Brochu appear minor when viewed separately; when examined in their totality, they can reasonably be construed as his attempts to influence or intimidate at least one coach."

24. Third, with respect to the five pages labeled "Legal Analysis and Recommendations" by the Court in the Stohler report (the in camera records), it is found that the following identified passages from the in camera records confirm what was actually disclosed in the minutes::

a. p. 3, ¶D, first two sentences, and first indented paragraph that follows the first two sentences, the sentence that follows the first indented paragraph, and the indented paragraphs numbered 3, 4 and 12, which confirm what was actually disclosed in the minutes paragraph D: "The Board member Handbook includes many references to the importance of Board Members modeling appropriate leadership behaviors."

25. It is therefore concluded that the passages within the in camera records identified in paragraphs 22, 23 and 24, above, are not exempt from disclosure under §1-210(b)(10), G.S.,

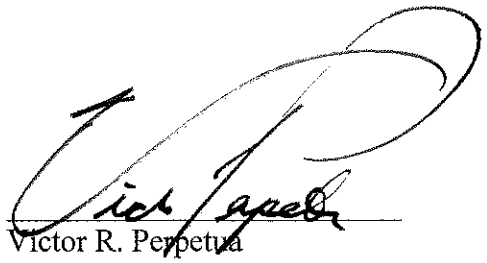
because the attorney-client privilege with respect to those passages was waived by the disclosures made in the minutes.

26. It is therefore concluded that the respondents violated the FOI Act by failing to disclose the portions of the in camera records described in paragraphs 22, 23 and 24, above, as to which the attorney-client privilege was waived by the disclosures made in the minutes.

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 a redacted copy of the report by Attorney Stohler to the complainants, free of charge.

2. In complying with paragraph 1 of this order, the respondents may redact only the portions of the Stohler report *not* described in paragraphs 22, 23 or 24, above.



Victor R. Perpetua
as Hearing Officer

FIC/2014-183/HORafterremand/VRP/05312016