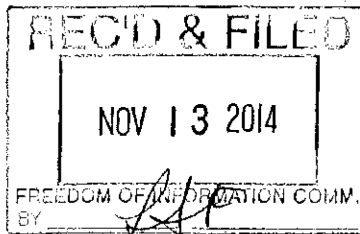

FIC AP # 2013-014
FIC# 2012-650

NO. CV 13 6022951S : SUPERIOR COURT

MICHAEL C. HARRINGTON Atty: PSP : JUDICIAL DISTRICT OF

v. cc: CHM HES VRP CAC : NEW BRITAIN

FREEDOM OF INFORMATION COMMISSION, ET AL. : NOVEMBER 12, 2014

MEMORANDUM OF DECISION

The plaintiff, Michael C. Harrington, appeals from an October 23, 2013 final decision of the defendant freedom of information commission (FOIC), sustaining the position of the respondent, the Connecticut resources recovery authority (CRRA), with regard to two sets of records. The plaintiff had previously requested documents from CRRA, resulting in a favorable ruling by the FOIC on August 8, 2012. Dissatisfied with the compliance by CRRA with the August 8th FOIC order, the plaintiff filed a complaint with the FOIC on November 16, 2012 in which he sought alleged public records of CRRA, emails relating to Attorneys Thomas Ritter and Peter Boucher. The plaintiff was not successful in obtaining these emails; on October 23, 2013, the FOIC ruled that the requested emails were exempt from disclosure under the attorney-client privilege. The plaintiff thereupon brought this administrative appeal.[1]

---

1 The plaintiff is aggrieved by the FOIC's ruling for purposes of General Statutes § 4-183 (a).

SUPERIOR COURT
2014 NOV 12 A 11:59
FILED

The record shows that the CRRA, in response to the plaintiff's complaint, filed with the FOIC a log of the Ritter and Boucher documents that it had established as relevant after a search of its files. The actual documents set forth in the log were submitted *in camera* and were subsequently submitted under seal to this court.[2] FOIC held a hearing on the complaint on May 28, 2013, June 25, 2013, August 9, 2013, and September 3, 2013. At the hearing, the in-house attorney for CRRA, Laurie Hunt, testified and also submitted written testimony, commenting on the relationship between CRRA and its attorneys. Especially addressing Attorney Ritter, she stated that he was asked advice both in his capacity under a service agreement with CRRA and as an attorney. Within the limits of the attorney-client privilege, she referenced specific instances of this relationship. (Return of Record, ROR, Exhibit 5, pp. 662-683; Transcript, pp. 1062, 1063, 1064, 1069, 1072, 1294). She also commented briefly on the records sought by the plaintiff. (ROR, Exhibit 5).

On September 24, 2013, a proposed decision was issued by the hearing officer concluding that the plaintiff's requests were subject to the attorney-client privilege. Subsequently, at a meeting of the FOIC on October 23, 2013, the plaintiff was given an opportunity to object to the proposed decision. The FOIC took a short recess to review the records *in camera*. After the recess, the chairman stated: "Has everyone had an

---

[2] The court has reviewed both the Ritter and Boucher sealed records.

opportunity to review the records? (Voices: Yes.) I'll just speak for myself, and other Commissioners may . . . wish to speak. Based on my review of the record, I don't agree with every single . . . I looked at the . . . documents that you used in your . . . example. . . . And while I don't agree that every single one of them is subject to the attorney-client privilege, I believe the bulk of them are. I think that [the hearing officer] did an excellent job and a thorough job going over every single item thoroughly to address the concerns that you raised. And I would not . . . substitute my judgment for her judgment in that respect. . . . [The hearing officer] gave it a good look and gave you a fair and honest decision on each of these items. So in light of that I'm going to support this decision." (ROR, pp. 1556-1557). Without dissent, the other commissioners agreed with the chairman and a motion to approve the proposed decision was adopted.

The final decision as approved states in part as follows:

* * *

> 3. By letter dated and filed November 16, 2012, the complainant appealed to this Commission, stating that the respondents "wrongfully withheld documents claiming they are privileged." The complainant requested that the Commission issue an order (1) requiring [the respondents] to comply with the requirements of the FOI Act; (2) requiring [the respondents] to provide the requested records for inspection and copying immediately free of cost, and (3) imposing a civil penalty. By letter dated December 5, 2012, the complainant reiterated his request for the imposition of civil penalties.

* * *

7. Specifically, at issue in the present appeal are the exemptions claimed for certain records withheld in response to the November 21, 2011 request in Harrington I (see paragraph 2, above); specifically, for "all communications between Tom Ritter and the CRRA staff and Board" from January 1, 2007 to present; "all communications between Peter Boucher and the CRRA staff and Board" from January 1, 2009 to present. . . .

8. The respondents submitted the records, described in paragraph 7, above, for in camera inspection by the Commission. It is found that the in camera records consist of emails to or from Mr. Ritter and CRRA staff and Board members, and emails on which Mr. Ritter was copied; emails to or from Mr. Boucher and CRRA staff and Board members and emails on which Mr. Boucher was copied. . . .

* * *

13. It is found that the records, described in paragraph 7 and 8, above, are public records within the meaning of §§ 1-210(a) and 2-212(a), G.S.

14. With regard to the respondents' claim that the requested records, or portions thereof, are protected by the attorney-client privilege, the applicability of the exemption contained in §1-21-(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.

* * *

16. As our Supreme Court has stated, a four part test must be applied to determine whether communications are privileged; "(1) the attorney must be acting in a professional capacity for the agency; (2) the communications must be made to the attorney by current employees or officials of the agency; (3) the communications must relate to the legal advice sought by the agency from the attorney, and (4) the communications must be made in confidence." Lash v. Freedom of Information Commission, 300 Conn. 511, 516 (2011), citing Shew v. Freedom of Information Commission, 245 Conn. 149, 159 (1998).

17. At the hearing in this matter, the complainant argued, with regard to the Ritter emails, that because Mr. Ritter provided services to CRRA pursuant to the municipal government liaison services agreement (MGLSA), and not under a legal services contract, he was not providing legal advice in a "professional capacity," for the agency. Moreover, the complainant argued that the Ritter emails do not appear to relate to legal advice sought by CRRA, but rather, appear to be communications pertaining to general business advice or legislative matters.

18. Courts have recognized that the attorney-corporate client privilege raises additional questions because lawyers in this context may have mixed "business-legal" responsibility which may result in the blurring of business and legal advice. See Rossi v. Blue Cross and Blue Shield of Greater New York, 73 N.Y. 2d 588, 592 (1989); Cuno, Inc. v Paul Corp., 121 F.R.D. 198, 203-204 (1988); Olson v. Accessory Controls and Equipment Corp., 254 Conn. 145, 163 (2000). Our Connecticut Supreme Court has ruled that the test for determining whether communications that may contain both business and legal advice are protected by the attorney-client privilege is whether such communications

are "inextricably linked" to the giving of legal advice. Olson at 164.

19. It is found that Mr. Ritter is an attorney in the government relations practice group at the law firm of Brown Rudnick. It is found that CRRA entered into the MGLSA with Mr. Ritter whereby Mr. Ritter provided "municipal government advisor services" to CRRA, to including, but not limited to:

> (a) providing CRRA with insight and outreach relative to CRRA and its interactions with municipalities that are currently and/or that may become hosts to CRRA facilities and pertinent or related groups and organizations that are and/or may become affected by CRRA facilities. Such services will be designed to assist CRRA in achieving certain critical goals as well as developing and enhancing relationships with CRRA's host communities.
>
> (b) acting as a community liaison for CRRA to provide counsel and outreach to current and/or potential host communities in connection with local issues in the community(s) and the State of Connecticut in general.
>
> (c) recommending to CRRA ways to improve outreach to the current and/or potential host communities and provide other opportunities for outreach.
>
> (d) providing counsel to CRRA to assist CRRA with its critical goals in the current and/or potential host communities as well as develop and enhance CRRA's relationships with its current and/or potential host

communities.

20. Respondent Laurie Hunt testified, and it is found, that Mr. Ritter provided municipal liaison services to CRRA, and that he also provided legal advice to CRRA, during the relevant time period. It is also found that CRRA was involved in at least two legal controversies, and was the subject of proposed legislation that potentially would have affected CRRA's business, and that such matters are the subject of the Ritter and Boucher emails. It is found that CRRA employees and Board members regularly communicated, during the time period at issue, via email, with CRRA's legal counsel, including Mr. Ritter and Mr. Boucher, for the purposes of (1) seeking legal advice; and (2) keeping counsel apprised of ongoing business developments, with the expectation that the attorney would respond in the event the matter raised a legal issue.

21. Based upon the foregoing, and a careful in camera review of each of the Ritter emails, it is found that Mr. Ritter was acting in a professional capacity, as an attorney, for CRRA, and that the fact Mr. Ritter was hired and paid, pursuant to the terms of the MGLSA, does not preclude a finding that communications between Mr. Ritter and CRRA staff and Board members are attorney-client privileged. It is further found, therefore, that the first part of the test has been met, with regard to each of the Ritter emails.

22. With regard to the second part of the test, after careful in camera review of each of the Ritter emails, it is found that the communications are between Mr. Ritter and current staff or Board members of CRRA, or, to the extent the email messages were not directed to or from Mr. Ritter, they were copied to him for the purpose of allowing him to respond to ongoing developments with legal advice. Accordingly, it is found that the second part of the test has been met, with regard to each of the Ritter emails.

23. With regard to the third part of the test, it is found, after careful in camera review of each of the Ritter emails, that each of the communications relate to legal advice sought by the agency either from Mr. Ritter, or another attorney acting on behalf of CRRA, or both. Although it is found that certain communications contain a mix of legal and business advice, it is found that such communications are "inextricably linked" to the giving of legal advice. Accordingly, it is found that the third part of the test has been met, with regard to each of the Ritter emails.

24. With regard to the fourth part of the test, upon careful in camera review of each of the Ritter emails, and the testimony of respondent Laurie Hunt, that it is found that such communications were made in confidence. Accordingly, it is found that the fourth part of the test has been met, with regard to each of the Ritter emails.

25. Accordingly, it is concluded that all of the Ritter emails are attorney-client privileged, as claimed on the index.

26. The respondents also claim that the attachments to several of the Ritter emails, found to be privileged, are themselves privileged. After careful in camera review of each of the attachments, it is found that each is the subject of the legal advice sought in the email to which it is attached. Accordingly, it is concluded that all of the attachments are attorney-client privileged, as claimed on the index.

27. With regard to the Boucher emails still remaining at issue, it is found that Mr. Boucher is attorney with the law firm of Halloran & Sage and that Halloran & Sage acts as CRRA's general counsel.

28. After careful in camera review of each of the Boucher emails, it is found that Mr. Boucher was acting in a professional capacity, as an attorney, for CRRA. It is further found, therefore, that the first part of the test has

been met, with regard to each of the Boucher emails.

29. With regard to the second part of the test, after careful in camera review of each of the Boucher emails, it is found that the communications are between Mr. Boucher and current staff or Board members of CRRA, or, to the extent the email messages were not directed to or from Mr. Boucher, they were copied to him for the purpose of allowing him to respond to ongoing developments with legal advice. Accordingly, it is found that the second part of the test has been met, with regard to each of the Boucher emails.

30. With regard to the third part of the test, it is found, after careful in camera review of each of the Boucher emails, that each of the communications related to legal advice sought by the agency either from Mr. Boucher, or another attorney acting on behalf of CRRA, or both. Although it is found that certain communications contain a mix of legal and business advice, it is also found that such communications are "inextricably linked" to the giving of legal advice. Accordingly, it is found that the third part of the test has been met, with regard to each of the Boucher emails.

31. With regard to the fourth part of the test, based upon careful in camera review of each of the Boucher emails, and the testimony of respondent Laurie Hunt, it is found that such communications were made in confidence. Accordingly, it is found that the fourth part of the test has been met, with regard to each of the Boucher emails.

32. Accordingly, it is concluded that all of the Boucher emails still at issue are attorney-client privileged, as claimed on the index.

33. The respondents also claim that the attachments to several of the Boucher emails are themselves privileged. After

careful in camera review of each of the attachments, it is found that each is the subject of the legal advice sought in the email to which it is attached. Accordingly, it is concluded that all of the attachments are attorney-client privileged, as claimed on the index.

34. Based upon the foregoing, it is concluded that the respondents did not violate the FOI Act in withholding the records, described in paragraphs 25, 26, 32 and 33 above, from the complainant. (ROR, pp., 1562-1568)

This court is asked on appeal to review the final decision by the FOIC applying the attorney-client privilege to these documents. The general standard of review of a FOIC decision has been stated by our Supreme Court: "Under the UAPA, it is [not] the function . . . of this court to retry the case or to substitute its judgment for that of the administrative agency. . . . Even for conclusions of law, [t]he court's ultimate duty is only to decide whether, in light of the evidence, the [agency] has acted unreasonably, arbitrarily, illegally, or in abuse if its discretion. . . . [Thus] [c]onclusions of law reached by the administrative agency must stand if the court determines that they resulted from a correct application of the law to the facts found and could reasonably and logically follow from such facts. . . . [Similarly], this court affords deference to the construction of a statute applied by the administrative agency empowered by law to carry out the statute's purposes. . . . Cases that present pure questions of law, however, invoke a broader standard of review than is . . . involved in deciding whether, in light of the evidence, the agency has acted unreasonably, arbitrarily, illegally or in abuse of its discretion. . . .

Furthermore, when a state agency's determination of a question of law has not previously been subject to judicial scrutiny . . . the agency is not entitled to special deference. . . . We have determined, therefore that the traditional deference accorded to an agency's interpretation of a statutory term is unwarranted when the construction of a statute . . . has not previously been subjected to judicial scrutiny. . . ." *Commissioner of Public Safety* v. *Freedom of Information Commission*, 312 Conn. 513, 525-26, 93 A.3d 1142 (2014).

In addition, "the present case involves applying the well settled meaning of [the exemptions laid out in] § 1-210(b) . . . to the facts of this particular case. The appropriate standard of judicial review, therefore, is whether the commission's factual determinations are reasonably supported by substantial evidence in the record taken as a whole." *Director, Information Technology* v. *Freedom of Information Commission*, 274 Conn. 179, 187-88, 874 A.2d 785 (2005).

Section 1-210 (b) (10) of the Freedom of Information Act allows an agency to decline access to records subject to the attorney-client privilege. Our Supreme Court has recognized four criteria for an agency to claim the privilege, as indicated in Finding #16 of the final decision: (1) the attorney must be acting in a professional capacity for the agency, (2) the communications must be made to the attorney by current employees or officials of the agency, (3) the communications must be related to the legal advice sought by the agency from the attorney, and (4) the communications must be made in confidence.

Lash v. *Freedom of Information Commission*, 300 Conn. 511, 516, 14 A.3d 998 (2011); *Shew* v. *Freedom of Information Commission*, 245 Conn. 149, 159, 714 A.2d 664 (1998).

The plaintiff claims that the FOIC erred in its findings that both Ritter and Boucher met the first criterion, because both attorneys were giving advice under the municipal government liaison services agreement (MGLSA), and not under a legal services contract. The court concludes, however, that the factual findings of the FOIC are supported by substantial evidence that the attorneys were acting"in [an attorney] professional capacity." (Findings ## 19, 28, Testimony of Hunt, Respondent's Exhibit 5, referenced above). In addition, the FOIC was correct in finding that Ritter and Boucher were "in legal practice" when they received and responded to the CRRA inquiries. "No valid distinction can be drawn between the part of the work of the lawyer which involves appearance in court and the part which involves advice and the drafting of instruments." *State Bar Assn.* v. *Connecticut Bank & Trust Co.*, 145 Conn. 222, 235, 140 A.2d 863 (1958). The court's in camera review of the records also supports this conclusion.

The plaintiff also raises a claim under criterion three, in that the advice "must relate to the *legal* advice" sought from the attorneys. He argues that the advice sought and received did not relate to legal advice. The court has reviewed the documents in this case and concludes that there was a mixture of advice given, some legal and some related to the MGLSA. The court found in its review that the two types of interchange between

attorney and client were not subject to separation or redaction.[3] Under *Olson* v. *Accessory Controls & Equipment Corp.*, 254 Conn. 145, 157, 757 A.2d 14 (2000) where legal advice is "inextricably linked" with non-privileged material, the communication still qualifies for the attorney-client privilege. See also *Blumenthal* v. *Kimber Manufacturing Co.,* 265 Conn. 1, 13, 826 A.2d 1088 (2003).[4]

A case from another jurisdiction, *Montgomery County* v. *Microvote Corp.*, 175 F.3d 296 (3d Cir. 1999), analyzed a situation where an attorney was retained as an expert consultant. This case supports the FOIC's reasoning in its final decision. In *Montgomery*, the attorney was retained by a county, to work with the county to prepare materials on appropriate voting machines. In a subsequent suit by the county, a defendant

---

3

The court also noted that there were a few times when one of the documents requested had nothing to do with advice at all. For example, Ritter Document # 7 merely relates that an employee is not available on a particular date. Looking at Ritter Document # 6, however, shows that this employee was being asked to review a legal matter. Ritter is also made a part of this email. Thus it was appropriate for the FOIC to place the two documents together in context and hold that they were subject to the attorney-client privilege.

4

A case relied upon by the plaintiff, *In re Grand Jury*, 179 F.Supp. 270, 283, 285 (S.D.N.Y. 2001) inadequately discusses the "inextricable linked" concept in holding an attorney-lobbyist could not claim the privilege. The case also notes a hostility to the attorney-client privilege in the grand jury context. Cf. *Woodbury Knoll, LLC* v. *Shipman & Goodwin, LLP*, 305 Conn. 750, 767 (2012): "On numerous occasions we have reaffirmed the importance of the attorney-client privilege and have recognized the long-standing, strong public policy of protecting attorney-client communications." The court also does not agree with the plaintiff's claim that *Olson* requires that the primary purpose of an "inextricably linked" relationship be to obtain legal advice.

voting machine manufacturer sought to obtain written communications between the county and the attorney. The county refused to disclose the documents on the ground of attorney-client privilege. In upholding the objection, the Third Circuit ruled that while there was evidence that the county referred to the attorney as a voting machine "consultant," and not as an attorney, the attorney-client privilege still protected the documents from disclosure.

The court declared: "Engaging an attorney as a consultant for advice in solving a serious legal problem no more strips him of his legal attributes than does the consultation with a doctor over a medical problem relieve the doctor of his medical attributes. It is not uncommon for public entities, including state and local governments, which have appointed attorneys, to engage outside lawyers for advice or for trial in meeting difficult or unusual problems. It is very important in the practice of law, especially matters of great public interest to a county such as a troublesome controversy over an expensive but highly unsatisfactory electronic voting system, that the county have complete freedom of consultation fostered by the client-attorney privilege. The services need not be rendered in conjunction with actual or potential litigation to qualify for the privilege. . . .

"Carson's contention that [Attorney] Shamos negotiated the contract as a lay consultant does not warrant discussion; there is no evidence to support it. We reject it. Lay people rarely draft and negotiate contracts in behalf of a governmental entity; that

would constitute the unauthorized practice of law.

"The County sought Shamos's legal services despite its earlier solicitation, prior to retaining Shamos, of four election consultants who were not attorneys. Although the County explored retaining a consultant who was not a member of the bar, the County decided to retain Shamos, an attorney. Thereafter, the County sought, and Shamos performed, legal services, including negotiating a contract and rendering advice. Even if the County had not contemplated utilizing Shamos's legal acumen when it initially solicited his services, the County, notwithstanding some of its officials' occasional characterizations of Shamos as a consultant, ultimately had Shamos perform legal services for it." Id., 303. The FOIC has appropriately ruled in this similar circumstance where the attorneys were receiving requests and providing advice to their client that sufficiently meets the attorney-client privilege.

The plaintiff also claims that Ritter cannot claim the attorney-client privilege as to documents that he merely was sent a copy of an exchange between two non-lawyers at CRRA. While this is correct as a general rule, see, e.g., *Solonche* v. *Immediate Medical Care Center*, Superior Court, judicial district of Hartford, Docket No. CV 93-0531674 (December 15, 1998), the factual record here leads to the opposite conclusion. The FOIC had substantial evidence to support a finding that communications to Ritter were made as part of a design to keep the attorneys involved in the CRRA decision-making process.

(ROR, Respondent's Exhibit 5, p. 664 discussing how the CRRA arranged to receive advice from their outside attorneys).

The plaintiff argues further that the confidentiality prong of the test was not met on certain of the emails, because two persons associated with Ritter's law firm were copied on certain of the emails. The court agrees, however, with the analysis of the FOIC that these persons were agents of Ritter in assisting him in giving advice to the CRRA. Thus the confidentiality of the documents was not lost. See *Olson*, supra, 157; *State* v. *Cascone*, 195 Conn. 183, 186, n.3, 487 A.2d (1985).

Finally, the plaintiff claims that the FOIC chairman erred in that he and other members of the commission took a recess at the meeting of October 23, 2013 to examine some of the documents, returned after recess, and approved the findings of the hearing officer. He claims that the FOIC was not allowed to rely upon the hearing officer's review, especially after having looked at some of the documents themselves. The court does not agree. Section 4-179 (a) requires the FOIC to review the objections of the aggrieved party to the proposed final decision before rendering a final decision. There is no obligation imposed upon the FOIC to review each document. See *Joyell* v. *Commissioner of Education*, 45 Conn. App. 476, 488, 696 A.2d 1039, cert. denied, 243 Conn. 910, 701 A.2d 330 (1997). Even assuming that the objection was that the hearing officer made a mistake, the FOIC is not restrained by § 4-179 (a) from concluding that the

hearing officer acted in good faith and that the proposed final decision was fair and adequate.

For the foregoing reasons, the appeal is dismissed.

Henry S. Cohn, Judge