NO. HHB CV15-6029080S	:	STATE OF CONNECTICUT
BERLIN PUBLIC SCHOOLS, ET AL.	:	SUPERIOR COURT
v.	:	JUDICIAL DISTRICT OF NEW BRITAIN
FREEDOM OF INFORMATION COMMISSION, ET AL.	:	FEBRUARY 2, 2016

Memorandum of Decision

Plaintiffs Berlin Public Schools and Superintendent, Berlin Public Schools appeal from the final decision of defendant freedom of information commission (commission) granting the complaint of defendants Adrienne DeLucca and Berlin Education Association, finding that the plaintiffs had waived their attorney-client privilege by partial disclosure, and ordering them to disclose fully a report from their attorney concerning his investigation into the chairman of the Berlin board of education. For the reasons that follow, the court sustains the appeal and remands the case for further proceedings.[1]

I

The record reveals the following historical facts. On March 10, 2014, the Berlin board of education met in executive session and received a report by Attorney D. Charles Stohler concerning his investigation of allegations made by the Berlin Interscholastic Coaches Association that Gary Brochu, the chairman of the board of education, used his position to intimidate coaches. (Return of Record (ROR), pp. 429, 517.) After returning to open session,

[1]Defendant Adrienne DeLucca is also the attorney for the Berlin Education Association. To avoid confusion, the court will refer to these defendants as the "association."

the board of education adopted as part of its minutes six paragraphs, with some changes, of what it deemed to be Stohler's "Recommendations." (ROR, p. 430.)

On March 17, 2014, the association made a request under the Freedom of Information Act; General Statutes § 1-200 et seq. (act); for "any and all documents" in connection with the investigation of Brochu. (ROR, p. 516.) The plaintiffs agreed to provide some items but objected to the release of the Stohler report on the ground that it constituted "communications privileged by the attorney-client relationship" under § 1-210 (b) (10).[2] (ROR, p. 518.)

The association filed a complaint with the commission. A hearing before a hearing officer took place on October 6, 2014. On March 25, 2015, the commission issued its final decision in favor of the association. (ROR, pp. 516-20.)

The commission initially found that the Stohler report was an attorney-client document. The commission ruled, however, that the plaintiffs waived the attorney-client privilege as to the entire report when they approved the inclusion of the six paragraphs of recommendations in the minutes of their meeting. The commission's key finding was as follows: "it is found that the [plaintiffs] disclosed the gist of attorney Stohler's report when they knowingly adopted and published his recommendations in the meeting minutes. It is found that the recommendations [in the minutes] consist of seven very detailed paragraphs,[3] taken nearly verbatim from the [Stohler] report itself . . . . It is found that the recommendations illuminate attorney Stohler's legal

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[2]Section 1-210 (b) (10) provides: "Nothing in the Freedom of Information Act shall be construed to require disclosure of . . . 10) Records, tax returns, reports and statements exempted by federal law or the general statutes or communications privileged by the attorney-client relationship . . . ."

[3]There is no dispute that there are only six paragraphs.

analysis and conclusions, and disclose his specific legal advice. It is found that the respondents disclosed the report's significant substance, leaving the remainder of the report a 'mere elaboration' of the material disclosed." (ROR, pp. 519-20.)

The plaintiffs have appealed.[4]

II

Under the Uniform Administrative Procedure Act (UAPA), General Statutes § 4-166 et seq., judicial review of an agency decision is "very restricted." (Internal quotation marks omitted.) *MacDermid, Inc. v. Dept. of Environmental Protection*, 257 Conn. 128, 136-37, 778 A.2d 7 (2001). Section 4-183 (j) of the General Statutes provides as follows: "The court shall not substitute its judgment for that of the agency as to the weight of the evidence on questions of fact. The court shall affirm the decision of the agency unless the court finds that substantial rights of the person appealing have been prejudiced because the administrative findings, inferences, conclusions, or decisions are: (1) In violation of constitutional or statutory provisions; (2) in excess of the statutory authority of the agency; (3) made upon unlawful procedure; (4) affected by other error of law; (5) clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record; or (6) arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion."

Stated differently, "[r]eview of an administrative agency decision requires a court to determine whether there is substantial evidence in the administrative record to support the agency's findings of basic fact and whether the conclusions drawn from those facts are reasonable. . . . Neither [the appellate] court nor the trial court may retry the case or substitute its

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[4]The Stohler report is a sealed part of the record.

own judgment for that of the administrative agency on the weight of the evidence or questions of fact. . . . Our ultimate duty is to determine, in view of all of the evidence, whether the agency, in issuing its order, acted unreasonably, arbitrarily, illegally or in abuse of its discretion." (Internal quotation marks omitted.) *Okeke v. Commissioner of Public Health*, 304 Conn. 317, 324, 39 A.3d 1095 (2012). "It is fundamental that a plaintiff has the burden of proving that the [agency], on the facts before [it], acted contrary to law and in abuse of [its] discretion." (Internal quotation marks omitted.) *Murphy v. Commissioner of Motor Vehicles*, 254 Conn. 333, 343, 757 A.2d 561 (2000).

III

The plaintiffs initially claim that the commission's decision was made upon unlawful procedure because the apparent authors of the proposed final decision did not conduct a hearing. This claim arises as follows. After the initial October 6, 2014 hearing, the hearing officer, Victor Perpetua, issued a proposed final decision in which he found that there was a only partial waiver of the attorney-client privilege in that "the portions of the [Stohler] report that were subsequently disclosed in the minutes of the Board of Education, as to which the privileged was waived, did not themselves disclose the remainder of the investigative report . . . ." (ROR, p. 195.) At a full commission meeting on February 4, 2015, the commission split 2-2 on whether it should adopt the proposed final decision. The commission then voted 2-1, with one abstention, to remand the matter back "to the staff" for consideration of a "revised opinion." (ROR, pp. 294, 516.)

Perpetua requested that the commission not remand the matter to him because he would not have a different opinion. (ROR, p. 287.) On March 5, 2015, a second and unsigned proposed final decision was issued without any additional hearing. The second proposal

recommended that the commission find that the plaintiffs disclosed the "gist" of Stohler's report in the meeting minutes and that the remainder of the report was a "'mere elaboration.'" Accordingly, the second proposal recommended the conclusion that the plaintiffs had waived the privilege as to the entire report. (ROR, pp. 308-09.)

The full commission considered the second proposed final decision at its March 25, 2015 meeting. At the meeting, the commission's executive director, Colleen Murphy, admitted that, while acting as a staff member and not a hearing officer, she drafted the second proposed decision with help from an "Attorney Segal." (ROR, p. 474.)[5] The commission then adopted the second proposed decision "with the understanding that paragraphs 1 through 14 of that report reflect the findings of fact of the hearing officer at a regular meeting on October 6, 2014." (ROR, pp. 512-13.)

The plaintiffs now argue that the commission violated General Statutes § 4-179 (c), which is a provision of the UAPA stating that "[e]xcept when authorized by law to render a final decision for an agency, a hearing officer shall, after hearing a matter, make a proposed final decision." General Statutes § 4-179 (c). The plaintiffs contend that Murphy and Segal acted as hearing officers and therefore could only make a proposed final decision "after hearing [the] matter," which they did not do. They also cite the commission's March 5, 2015 letter to the parties transmitting the second proposed decision, which states: "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-

[5]The transcript states that the comments came from a "Ms. Kobus." (ROR, p. 474.) The commission has represented, and there is no dispute, that the transcript was in error and that the comments actually came from Murphy.

captioned matter." (ROR, p. 304.)

The court finds no substantial prejudice in what took place. It is true that the commission's March 5 letter was inaccurate because the second proposed decision was not "prepared by the hearing officer" in this case. Instead, Murphy and Segal, who did not conduct a hearing, prepared the second proposal. However, there was no violation of § 4-179 (c) because Perpetua, who was a hearing officer, did, "after hearing a matter, make a proposed final decision." General Statutes § 4-179 (c). The commission simply did not adopt Perpetua's proposal, which the commission was free to do.

Contrary to the plaintiffs' claim, Murphy and Segal did not serve as de facto hearing officers, as they did not hear the matter. Instead, they constituted "the staff" to which the commission remanded the matter. Our Supreme Court has recognized that "[w]hen . . . the administrative decision makers have not themselves 'heard the case or read the record,' § 4–179 permits the drafting of a proposal for decision by a person who has either conducted the hearing, and so heard all of the evidence, or who has read the record in its entirety." (Emphasis omitted; footnote omitted.) *Pet v. Dept. of Health Services*, 228 Conn. 651, 672, 638 A.2d 6 (1994). There is no dispute that Murphy or Segal had read the entire record before drafting the second proposal. Therefore, they were authorized to draft the second proposed decision.

The plaintiffs had a full opportunity, which they used, to argue before the commission that it should not adopt the second proposed decision. (ROR, pp. 440-515.)[6] The commission

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[6]Thus, before the full commission, counsel for the board of education began his legal argument as follows: "My client, the Board of Education, the Berlin Public Schools, strongly, strongly disagrees with the unsigned proposed final decision 2 [sic]. We urge that you do not adopt that because it is not a mere elaboration. We believe that it's an incorrect [reading] of the law and I'll go through a couple of the cases that are cited in there." (ROR, p. 449.)

simply disagreed with their arguments and chose to adopt the second proposal instead of the first. The plaintiffs can make no argument that the commission had no authority to make that choice.

The plaintiffs also suggest that the commission adopted factual findings from the second proposal without the benefit of a hearing. On the contrary, as mentioned, the commission adopted most its factual findings from Perpetua's proposal. If there were any factual findings that the commission adopted from the second proposal, they are not material. At this point, resolution of the merits of this case depends entirely on analysis of the applicable law and comparison of the meeting minutes with the sealed Stohler report. There are no disputed, material factual issues stemming from the second proposed decision. Therefore, the plaintiffs have not established substantial prejudice from the procedure used in this case. General Statutes § 4-183 (j).

IV

The Connecticut appellate courts have recognized that "[v]oluntary disclosure of the content of a privileged attorney communication constitutes waiver of the privilege." (Internal quotation marks omitted.) *McLaughlin v. Freedom of Information Commission*, 83 Conn. App. 190, 197, 850 A.2d 254 (2004) (quoting *State v. Taft*, 258 Conn. 412, 421, 781 A.2d 302 (2001)). But our appellate courts have not had occasion to apply this doctrine in the context here of a partial disclosure of a privileged communication.[7]

The leading case in the Second Circuit, and perhaps nationally, appears to be *In re Von Bulow,* 828 F.2d 94 (2d Cir. 1987). In *Von Bulow,* the court discussed the "fairness doctrine,"

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[7]In *McLaughlin v. Freedom of Information Commission*, supra, 83 Conn. App. 190, the court found that a letter that was disclosed to the public did not contain privileged attorney-client communications and therefore the court did not reach the partial waiver issue. Id., 197-98.

under which "testimony as to part of a privileged communication, in fairness, requires production of the remainder." Id., 102. 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., 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.[8]

The *Von Bulow* court recognized, however, that disclosure of a privileged communication in an extrajudicial context – as opposed to disclosure in the course of litigation – does not implicate these concerns and therefore should not result in the waiver of the privilege as to "the undisclosed portions of the communication." Id., 102. Instead, in the extrajudicial context, the waiver should extend only "to the particular matters actually disclosed." Id. Applying this standard, the court held that public disclosure in a book of portions of attorney-client conversations waived the privilege as to "the particular matters *actually disclosed* in the book, [but not] those portions of the four identified conversations which, because they were not published, remain secret." (Emphasis in original.) Id.

Several Second Circuit cases have applied the *Von Bulow* standard.[9] The commission in

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[8]A subsequent Second Circuit case has referred to the doctrine whereby a "party's assertion of factual claims can, out of considerations of fairness to the party's adversary, result in the involuntary forfeiture of privileges for matters pertinent to the claims asserted" as the "implied waiver" rule or the "'at issue' waiver." *John Doe Co. v. United States,* 350 F.3d 299, 302 (2d Cir. 2003). See also *McLaughlin v. Freedom of Information Commission*, supra, 83 Conn. App. 195 ("The at issue exception to the protection of the attorney-client privilege is a doctrine of implied waiver by a party of that right.")

[9]Other Circuits have also cited and followed it. See *In re Keeper of the Records (Grand Jury Subpoena Addressed to XYZ Corp.),* 348 F.3d 16, 24 (1st Cir. 2003) (citing *Von Bulow* and holding that an "extrajudicial disclosure of attorney-client communications, not thereafter used

this case relied on *United States v. Jacobs,* 117 F.3d 82 (2d Cir. 1997), abrogated on other grounds by *Loughrin v. United States,* 134 S. Ct. 2384, 2388 n.2 (2014), in which the court decided that the "actually disclosed" rule means that disclosure of the "gist" of a communication warrants disclosure of the remainder of the communication to the extent that it is "merely an elaboration of the material disclosed." Id., 90. The plaintiffs rely instead on *John Doe Co. v. United States,* 350 F.3d 299 (2003), in which the Second Circuit did not cite *Jacobs* and instead merely applied the rule that "whether fairness requires disclosure . . . is best decided on a case by case basis, and depends primarily on the specific context in which the privilege is asserted." (Internal quotation marks omitted.) Id., 302.

The commission's reliance on *Jacobs* is questionable. First, as noted, the United States Supreme Court has abrogated *Jacobs*, albeit on unrelated grounds. In *Loughrin v. United States,* supra, 134 S. Ct. 2387-88 & n.2, the Court resolved a Circuit split and held that *Jacobs* and cases from other Circuits incorrectly had decided that, under the federal bank fraud statute, 18 U.S.C. § 1344 (2), the government must prove intention to defraud a bank. See *United States v. Jacobs,* supra, 117 F.3d 92-93.

Second, the holding of *Jacobs* that disclosure of the "gist" of a statement requires disclosure of the entire statement has not been widely followed. As far as can be ascertained, the Second Circuit has not applied it again. Although one Connecticut district court has explicitly

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by the client to gain adversarial advantage in judicial proceedings, cannot work an implied waiver of all confidential communications on the same subject matter."); *Chevron Corp. v. Penzoil Co.*, 974 F.2d 1156, 1162 (9th Cir. 1992) (citing *Von Bulow* to support the proposition that "the disclosure of information resulting in the waiver of the attorney-client privilege constitutes waiver only as to communications about the matter actually disclosed.") [Internal quotation marks omitted.]

cited the *Jacobs* rule, the court ultimately rejected its application because a broad rule of disclosure would result in a "windfall." *Long-Term Capital Holdings v. United States*, No. 3:01 CV 1290 (JBA), 2003 WL 1548770, at *8 (D. Conn. Feb. 14, 2003). Instead, the court relied on the *Von Bulow* standard and found that "disclosure of part of a communication protected by the attorney-client privilege waived the attorney client privilege to the limited portion of the opinion that confirms what was actually disclosed." Id., at *9 (citing *In re Von Bulow,* supra, 828 F.2d 102.) Stated differently, "fairness considerations limit the waiver to that portion of the [legal] opinion which reflects the matters actually disclosed." Id. (citing *In re Von Bulow,* supra, 828 F.2d 102.)[10]

The court believes that the *Von Bulow* standard is a better statement of the law in the extrajudicial context. In that context, the fairness doctrine should not apply, as there is no concern about "distortion of the judicial process that may be caused by the privilege-holder's selective disclosure during litigation of otherwise privileged information." *In re Von Bulow,* supra, 828 F.2d 101. Reliance on a broader standard of "gist" and "elaboration" could result in a "windfall" for an undeserving party; *Long-Term Capital Holdings v. United States*, supra, 2003 WL 1548770, at *9; and an unwarranted loss of privileged information.

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

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[10] *Jacobs* also involved an unusual situation in which the client orally misrepresented to an undercover FBI agent that his attorney had approved the legality of his financial scheme. The court approved disclosure of the actual communication from the attorney – which consisted of two letters – in part on the ground that "[a]n inaccurate statement of a privileged communication waives the privilege with respect to that communication." Id., 90 (citing *United States v. Mendelsohn,* 896 F.2d 1183, 1188-89 (9th Cir. 1990)).

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 way as in the report.[11]

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.

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[11]A review of what are labeled "recommendations" in the meeting minutes reveals that they not only recommend taking or not taking action, but they also contain factual summaries and analysis of the evidence. In other words, it would be more accurate to label these six paragraphs as "findings of the investigation" rather than just "recommendations."

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.[12] 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."

V

The court sustains the appeal and remands the case for further proceedings consistent with this opinion.

It is so ordered.

Schuman, J.

Carl J. Schuman
Judge, Superior Court

[12]Section 4-183 (j) provides in part that "[i]f the court finds . . . prejudice, it shall sustain the appeal and . . . remand the case for further proceedings." There is no dispute that disclosure of any part of the plaintiffs' confidential attorney-client communication would cause them prejudice. General Statutes § 4-183 (j).