

FREEDOM OF INFORMATION COMMISSION  
OF THE STATE OF CONNECTICUT

In the Matter of a Complaint by

FINAL DECISION

Dmitry Zhdanov,

Complainant

against

Docket #FIC 2015-773

President, State of Connecticut,  
University of Connecticut; and  
State of Connecticut,  
University of Connecticut,

Respondents

July 13, 2016

The above-captioned matter was heard as a contested case on January 25, 2016, at which time the complainant 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. It is found that, by email dated September 11, 2015, the complainant requested that the respondents provide him with access to and/or copies of “public records that contain information regarding the process of the formation and operation of the University of Connecticut (“UCONN”) Senate Select Committee, which [committee] was hearing the tenure denial case of Dr. Dmitry Zhdanov in May [through] August 2015.” In addition, it is found that, by email also dated September 11, 2015, the complainant requested that the respondents provide him with access to and/or copies of “public records that contain information regarding your involvement with the Senate Select Committee, which [committee] was hearing the tenure denial case of Dr. Dmitry Zhdanov in May [through] August 2015.”
3. It is found that the complainant sent the requests referenced in paragraph 2, above, to Dr. Carol Polifroni, who at the time of the requests was the Chairwoman of the Senate Executive Committee, as well as to each member of the Senate Select Committee, as follows: Dr. Casey Cobb, Dr. Douglas Hamilton, Dr. Faquir Jain, Dr. Jacqueline McGrath, and Dr. Linda Pescatello (collectively, the “faculty members”)

4. It is found that, by letter dated September 14, 2015, the respondents acknowledged the complainant's requests<sup>1</sup>, indicating that the respondents' Office of Audit, Compliance and Ethics (the "Office of ACE") would be processing the requests and that, once responsive records had been compiled, the Office of ACE would contact the complainant about the charge for the records as well as the best method for delivery.

5. By letter dated and filed November 13, 2015, the complainant appealed to this Commission, alleging that the respondents violated the Freedom of Information ("FOI") Act by failing to provide him with access to, and copies of, the requested records described in paragraph 2, above.

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 that:

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 found that the requested records are public records within the meaning of §§1-200(5), 1-210(a), and 1-212(a), G.S.

10. At the contested case hearing, the complainant clarified that, with regard to the Senate Select Committee and the individuals referenced in paragraph 3, above, he was seeking

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<sup>1</sup> The Commission notes that, while the respondents' letters to the complainant acknowledge a single "request," it is clear through the evidence presented at the contested case hearing, particularly respondents' exhibit 1, that the respondents acknowledged and responded to both of the complainant's requests simultaneously.

all records in the possession of the committee or the individuals who formed part of the committee, which records reflected how the committee was formed and what it did in connection with the aforementioned tenure denial matter.

11. It is found that, on September 28, 2015, the complainant contacted the Office of ACE to inquire how much longer it would take to process his requests. It is found that, on September 30, 2015, Liz Vitullo, a Compliance and Information Specialist with the Office of ACE, informed the complainant that it would take approximately three more weeks to process the requests.

12. It is found that, under cover letter dated October 19, 2015, the respondents through Ms. Vitullo provided the complainant with 117 responsive records (the "October 19<sup>th</sup> disclosure"). In addition, Ms. Vitullo informed the complainant that the respondents were withholding certain other records because they were attorney-client privileged communications.

13. It is found that, by letter dated October 20, 2015, the complainant informed Ms. Vitullo that he believed that the respondents should have more responsive records in their possession. At the contested case hearing, the complainant explained that his belief was based on the fact that he had records in his possession that were not contained in the respondents' October 19<sup>th</sup> disclosure.

14. It is found that, by letter dated October 26, 2015, Ms. Vitullo informed the complainant that there were no additional, non-exempt responsive records.

15. In response to the complainant's contention about missing records, the respondents contended that they had thoroughly searched for responsive records, and had, in fact, repeated their search efforts two additional times after the complainant had questioned the sufficiency of their first search. The respondents further contended that, as of the date of the hearing, the only records that had not been disclosed to the complainant are those records claimed to be exempt as attorney-client privileged communications.

16. Ms. Vitullo appeared and testified at the contested case hearing on behalf of the respondents.

17. It is found that, although Ms. Vitullo acknowledged the complainant's requests for records on September 14, 2015, she was not able to turn her attention to the requests at the time she acknowledged them because a medical matter took her out of the office for approximately two weeks. However, it is found that, upon her return to the office on or around September 29, 2015, Ms. Vitullo immediately contacted the faculty members identified in paragraph 3, above, and requested that they forward to her all responsive records in their possession.

18. It is found that: on September 29<sup>th</sup>, Dr. Polifroni forwarded her responsive records to Ms. Vitullo; on September 29, 2015, Dr. Pescatello forwarded her responsive records to Ms. Vitullo; on October 1, 2015, Dr. Cobb forwarded his responsive records to Ms. Vitullo; and on October 2, 2015, Dr. Hamilton forwarded his responsive records to Ms. Vitullo. It is further found that Dr. Jain and Dr. McGrath contacted Ms. Vitullo to inform her that, after having

searched their records, they had no records in their possession that were responsive to the requests.

19. It is found that Ms. Vitullo reviewed the records that she received from the faculty members and provided the records that she believed were not exempt from disclosure to the complainant by email on October 19, 2015.

20. It is found that, by email dated October 20, 2015 the complainant corresponded with Ms. Vitullo, questioning the sufficiency of the respondents' search and indicating that he believed the faculty members should have more responsive records in their possession.

21. It is found that, by email dated October 23, 2015, Ms. Vitullo corresponded with each of the faculty members again, requesting that they confirm that they had no additional responsive records. It is found that, between October 23, 2015 and October 24, 2015, each faculty member confirmed that he or she did not have any additional responsive records.

22. Thereafter, by email dated November 20, 2015, Ms. Vitullo sent the following email to each of the faculty members:

Please see the attached letter from Professor Zhdanov regarding his complaint to the Freedom of Information Commission. I know that you have all responded that you have no additional documentation responsive to the request, but as a courtesy and so that I may testify to our due diligence, I wonder if you could check your email again in case something was missed. Please email me to let me know if you have any additional information or if nothing new exists. If you do not find anything else, please let me know that as well. (Emphasis supplied).

23. It is found that, by email dated November 20, 2015, Dr. Pescatello informed Ms. Vitullo that she had no additional responsive records; by email dated November 20, 2015, Dr. Polifroni informed Ms. Vitullo that she had no additional responsive records; by email dated November 20, 2015, Dr. Hamilton informed Ms. Vitullo that he had no additional responsive records; and by separate emails dated November 20, 2015 and November 21, 2015, Dr. McGrath and Dr. Jain again confirmed with Ms. Vitullo that they had no records responsive to the request.

24. Finally, it is found that, by email dated November 28, 2015, Dr. Cobb informed Ms. Vitullo that, upon researching his records, he found one additional responsive record. It is found that Dr. Cobb forwarded such record to Ms. Vitullo. By email dated December 11, 2015, it is found that Ms. Vitullo forwarded the additional responsive record to the complainant and informed him that the other five faculty members had nothing more to disclose.

25. Based on the totality of the evidence produced at the hearing, it is found that the respondents conducted a thorough search for responsive records.

26. At the conclusion of the testimony, the complainant moved, without objection, to have the Commission conduct an in camera inspection of the responsive records claimed to be exempt from disclosure.

27. On February 4, 2016, the respondents submitted records to the Commission for in camera inspection. While the respondents contended at the contested case hearing, as well as in the index that accompanied the in camera records, that there were seven pages of exempt records, the respondents' in camera submission contained only five pages of records. Accordingly, by order dated May 10, 2016, the hearing officer raised this discrepancy with the respondents, and ordered them either to file an amended index to accompany the five pages of records on file with the Commission, or to submit the seven pages of records to the Commission, along with a new index.

28. On May 12, 2016, the respondents submitted the seven pages of records, along with a new index, to the Commission for in camera inspection. The in camera records, which may be referred to herein as IC-2015-773-1 through IC-2015-773-7 are fairly described as seven pages of email communications. The respondents contend that each of these pages is entirely exempt pursuant to §1-210(b)(10), G.S.

29. In relevant part, §1-210(b)(10), G.S., permits the nondisclosure of “communications privileged by the attorney-client relationship. . . .”

30. The applicability of the exemption contained in §1-210(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.

31. 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. . . .

32. The Supreme Court has 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.

33. The Supreme Court has further stated that, “[i]n Connecticut, the attorney-client privilege protects both the confidential giving of professional advice by an attorney acting in the capacity of a legal advisor to those who can act on it, as well as the giving of information to the lawyer to enable counsel to give sound and informed advice. Olson v. Accessory Controls and Equipment Corp., et al., 254 Conn. 145, 157 (2000). As a general rule, “communications between client and attorney are privileged when made in confidence for the purpose of seeking legal advice.” Id.; citation omitted.

34. After a careful inspection of the in camera records, it is found that IC-2015-773-1 is exempt from disclosure pursuant to §1-210(b)(10), G.S. In this regard, it is found that IC-2015-773-1 contains the legal advice that the respondents sought and/or received from their attorneys. It is further found that the respondents were acting within the scope of their duties with regard to current agency business when they sought and/or received this advice. It is further found that the communications were made in confidence. Finally, it is found that the respondents did not waive their attorney-client privilege.

35. Accordingly, it is concluded that the respondents did not violate the FOI Act when they denied the complainant a copy of IC-2015-773-1.

36. However, it is found that IC-2015-773-2 through IC-2015-773-7 are not communications transmitted in confidence between a public agency client and a government attorney, within the meaning of §52-146r(2), G.S.

37. It is therefore concluded that IC-2015-773-2 through IC-2015-773-7 are not exempt from disclosure pursuant to §1-210(b)(10), G.S.

38. It is further concluded that the respondents violated the FOI Act when they failed to disclose IC-2015-773-2 through IC-2015-773-7 to the complainant.

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 to the complainant a copy of the records described in paragraph 37 of the findings, above, free of charge.

Approved by Order of the Freedom of Information Commission at its regular meeting of July 13, 2016.

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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:

Dmitry Zhdanov  
45 Brigham Road  
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and State of Connecticut, University of Connecticut  
c/o Holly J. Bray, Esq.  
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Cynthia A. Cannata  
Acting Clerk of the Commission