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Michael C. Harrington,
Complainant(s)
against

Thomas Kirk, President, Laurie Hunt, General Counsel, Connecticut Resources Recovery Authority; and Connecticut Resources Recovery Authority,
Respondent(s)

Notice of Meeting

Docket #FIC 2012-650

September 24, 2013

Transmittal of Proposed Final Decision

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-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, October 23, 2013.** 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 October 11, 2013.*** 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, an **original and fourteen (14) copies** must be filed ***ON OR BEFORE October 11, 2013.*** **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 **fourteen (14) copies** be filed ***ON OR BEFORE October 11, 2013,*** 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: Michael C. Harrington
Dan E. LaBelle, Esq.
Peter G. Boucher, Esq.

9/24/13/FIC# 2012-650/Trans/wrbp/KKR//LFS

FREEDOM OF INFORMATION COMMISSION
OF THE STATE OF CONNECTICUT

In the Matter of a Complaint by | Report of Hearing Officer

Michael Harrington,

Complainant | Docket #FIC 2012-650

against

Thomas Kirk, President, Laurie Hunt, Director of Legal Services, Connecticut Resources Recovery Authority; and Connecticut Resources Recovery Authority

Respondents | September 24, 2013

The above-captioned matter was heard as a contested case on May 28, June 25, August 9, and September 3, 2013, at which times the complainant and the respondents appeared and presented testimony, exhibits and argument on the complaint. Respondent Laurie Hunt is the Director of Legal Services for Connecticut Resources Recovery Authority (CRRA) and was misidentified as General Counsel in the original case caption. Accordingly, the case caption has been amended.

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 record and decision in Docket #FIC 2011-698 (August 8, 2012), Michael Harrington v. Laurie Hunt, Director, Legal Affairs Department, Connecticut Resources Recovery Authority; and Connecticut Resources Recovery Authority (Harrington I). In that case, the Commission concluded that the respondents violated the FOI Act by failing to promptly comply with the complainant's request for records. In fact, at the time the final decision was adopted in that case, the respondents had not concluded their review of all responsive records to determine which, if any, would be claimed exempt from disclosure. Accordingly, the Commission ordered the respondents to adopt a schedule for completion of the response to the request, to complete compliance and to provide responsive records, within 90 days of the final decision. The respondents were also ordered, to the extent any records were withheld, to provide a privilege log to the complainant, indicating which records were withheld and the basis for any claimed exemption. The Commission further invited

the complainant, in the event that he "takes issue with any of the claimed exemptions, [to] file an appeal with the Commission...."

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.

4. On April 11, 2013, the Commission issued a Notice of Hearing and Order to Show Cause ("Notice"), which stated, in relevant part, that "[t]his appeal alleges a failure, within the meaning of §1-240(b), G.S., to comply with an order of the Freedom of Information Commission." On April 26, 2013, the respondents filed an Application for More Definite Statement and Detailed Statement, dated April 25, 2013, asserting that the complaint, attached to the Notice, did not reference any order of the Commission, or state how the respondents allegedly failed to comply with any such order.

5. On April 29, 2013, the Commission issued a Notice, cancelling the scheduled hearing, and indicating that an amended Notice of Hearing and Order to Show Cause would be issued.

6. On May 7, 2013, the Commission issued an amended Notice of Hearing and Order to Show Cause, which stated, in relevant part, that "[t]his appeal alleges violations of the FOI Act, as set forth in Chapter 14 of the Connecticut General Statutes.

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; "all bills from and payments made to Brown Rudnick...for legal and municipal liaison services provided" from January 1, 2007 to present; and "all documents and communications between the CRRA staff and Board concerning the 2011 municipal liaison RFP..."

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 (Ritter emails); emails to or from Mr. Boucher and CRRA staff and Board members and emails on which Mr. Boucher was copied (Boucher emails), as well as certain law firm billing records/invoices (billing records), and emails and memoranda regarding the RFP (RFP records). The billing records are identified herein, in accordance with the page numbers assigned to them by the respondents, as IC 2012-650-BR1 through IC 2012-650-BR4.

9. It is found that, in response to the request for the records, described in paragraph 7, above, the respondents provided the complainant with approximately 2000 pages of Ritter emails, as well as certain Boucher emails and communications determined not to be privileged or otherwise exempt from disclosure. The respondents claim the remainder of the Ritter emails and the Boucher emails, or portions thereof, are exempt from disclosure pursuant to the attorney-client privilege. At the hearing in this matter, the complainant withdrew his complaint as it pertains to the request for certain Boucher emails, and, accordingly, the allegations pertaining to such records will not be considered herein. The respondents further claim that the billing records are exempt from disclosure pursuant to §1-210(b)(4), G.S., and that the RFP records are exempt pursuant to §§1-210(b)(10) and (b)(1), G.S.

10. Section 1-200(5), G.S., defines "public records or files" as

> 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.

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

12. Section 1-212(a), G.S., provides in relevant part that "any person applying in writing shall receive, promptly upon request, a plain, facsimile, electronic or certified copy of any public record."

13. It is found that the records, described in paragraphs 7 and 8, above, are public records within the meaning of §§1-200(5), 1-210(a) and 1-212(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 §1-210(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.

15. 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...

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 a 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 bluring 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 Controlsand 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 develping 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 opportunites 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 liasion 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 that 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, based 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.[1]

27. With regard to the Boucher emails still remaining at issue, it is found that Mr. Boucher is an attorney with 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 relate 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, 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 Boucher emails.

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[1] Based upon this finding, and the finding in paragraph 25, above, it is unnecessary for the Commission to consider the additional claims of exemption for the emails and attachments listed on the index.

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 privileged 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 found that all of the attachments are attorney-client privileged, as claimed on the index.[2]

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.

35. With regard to the billing records, the respondents claim such records are exempt from disclosure pursuant to §1-210(b)(4), G.S., which permits the nondisclosure of "[r]ecords pertaining to strategy and negotiations with respect to pending claims or pending litigation to which the public agency is a party until such litigation or claim has been finally adjudicated or otherwise settled."

36. After careful in camera review of the billing records, it is found that such records indicate the dates work was performed, time/hours spent on work performed, corresponding dollar amounts billed, total amounts billed, previous balances, previous payments, balance due, the names of attorneys who performed work, law firm letterhead, dates the billing statements were issued, and the name and office address of the public agency to which the bill was submitted. IC 2012-650-BR1, IC 2012-650-BR2 and IC 2012-650-BR4 do not contain any description of any litigation strategy, or description of the specific nature of the services provided, and accordingly are not exempt from disclosure pursuant to §1-210(b)(4), G.S. With regard to IC 2012-650-BR3, which contains a description of the work performed, it is found that certain information only is exempt from disclosure pursuant to §1-210(b)(4), G.S., as follows: under the caption Description, in the first entry, everything after the word "to;" in the second entry, everything after the word "regarding"; in the third entry, everything after the word "regarding;" in the fourth entry, from the word "draft" in the first line, to the word "Continue" in the fifth line, and everything after the word "to" in the seventh line, to the word "(.4)" in the last line.

37. Based upon the foregoing, it is concluded that the respondents violated the FOI Act by failing to comply with the request for IC 2012-650-BR1, IC 2012-650-BR2, and IC 2012-650-BR4, and those portions of IC 2012-650-BR3 not specifically found to be exempt in paragraph 36, above.

38. Finally, the respondents claim the RFP records are exempt from disclosure on the grounds that they are attorney-client privileged, and that they constitute preliminary drafts or notes, within the meaning of §1-210(b)(1), G.S.

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[2] Based upon this finding, and the finding in paragraph 32, above, it is unnecessary for the Commission to consider the additional claims of exemption for the emails and attachments listed on the index.

39. It is found that the RFP records consist of emails from CRRA staff members to respondent Laurie Hunt, in which the staff members requested legal advice from Attorney Hunt pertaining to a draft email and draft memoranda to CRRA Board members. It is found that such communications were intended to be confidential. After careful review of the RFP records, it is concluded that such records meet all four parts of the four-part test for attorney-client privilege and therefore are exempt from disclosure. It is further concluded that the attachments to such emails, consisting of the draft memoranda, are attorney-client privileged and therefore also exempt from disclosure.

40. Accordingly, it is concluded that the respondents did not violate the FOI Act by withholding the RFP records, described in paragraph 39, above, from the complainant.[3]

41. With regard to the request for the imposition of civil penalties against the respondents, as noted in paragraph 7, above, the issue before the Commission in this case is whether the respondents improperly withheld responsive records from the complainant. Because the majority of the records at issue in this case have been found herein to be exempt from disclosure, the Commission declines to consider the imposition of a civil penalty.

42. On August 7, 2013, the respondents filed an "Application for Hearing Pursuant to General Statutes Section 1-206(b)(2)," alleging that the complaint in this matter was filed frivolously, without reasonable grounds and solely for the purpose of harassing CRRA.[4] In support of their application, the respondents asserted: "Mr. Harrington, being an attorney, knew full well that [a request for all communications between CRRA and Mr. Boucher, CRRA's general counsel], was certain to create an enormous burden upon the respondent agency and was certain to generate a large number of well-founded attorney client privilege claims." At the hearing in this matter, the respondents argued that they are entitled to a hearing on their application pursuant to §1-206(b)(2), G.S.

43. Section 1-206(b)(2), G.S., provides, in relevant part:

> If the commission finds that a person has taken an appeal under this subsection frivolously, without reasonable grounds and solely for the purpose of harassing the agency from which the appeal has been taken, after such person has been given an opportunity to be heard at a hearing conducted in accordance with sections 4-176e to 4-184, inclusive, the commission may, in its discretion, impose against that person a civil penalty of not less than twenty dollars nor more than one thousand dollars.

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[3] Based upon this finding, it is unnecessary for the Commission to consider the additional claims of exemption for the emails and attachments listed on the index.

[4] In their application, the respondents also ask the Commission to consider a July 13, 2012 records request by the complainant to the respondents as part of the inquiry into whether sanctions against the complainant are appropriate. As the July 13th request is not at issue before this Commission, such request will not be considered at this time.

44. It is found that the complainant did not take the appeal herein frivolously, without reasonable grounds and solely for the purpose of harassing CRRA, in view of the fact that the respondents were found to have violated the FOI Act. Accordingly, a hearing pursuant to §1-206(b)(2), G.S., permitting *the complainant* an opportunity to be heard, is not required.

45. For the reasons set forth above, the respondents' application is denied.

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 the complainant with a copy of the in camera records, described in paragraph 37 of the findings, above.

2. Henceforth, the respondents shall strictly comply with the requirements of §§1-210(a) and 1-212(a), G.S.

Kathleen K. Ross
as Hearing Officer

FIC 2012-650/hor/kkr/09242013