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Jean McCarthy,
Complainant(s)
against

Assessor, Town of Redding; and
Town of Redding,
Respondent(s)

Notice of Meeting

Docket #FIC 2013-003

October 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, November 13, 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 November 1, 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 November 1, 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 November 1, 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

W. Paradis
Acting Clerk of the Commission

Notice to: William S. Fish, Jr., Esq.
Elliott B. Pollack, Esq.

10/24/13/FIC# 2013-003/Trans/wrbp/VRP//TAH

FREEDOM OF INFORMATION COMMISSION
OF THE STATE OF CONNECTICUT

In the Matter of a Complaint by

Jean McCarthy,

Complainant

against

Assessor, Town of Redding; and
Town of Redding,

Respondents

Report of Hearing Officer

Docket #FIC 2013-003

October 23, 2013

The above-captioned matter was heard as a contested case on June 14, 2013, at which time the complainant and the respondents appeared, stipulated to certain facts and presented testimony, exhibits and argument on the complaint. The respondents submitted the records at issue in this case for an in camera inspection. At the request of the complainant, and without objection by the respondents, the Town Attorney, Town of Redding has been added as a respondent, and the case caption amended accordingly. This case was consolidated for hearing with Docket #FIC 2013-002, Jean McCarthy v. First Selectman, Town of Redding; Town Attorney, Town of Redding; and Town of Redding.

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. By letter of complaint filed January 3, 2013, the complainant appealed to the Commission, alleging that the respondents violated the Freedom of Information ("FOI") Act by denying their request for certain records pertaining to the assessment of real property in the Town of Redding.

3. It is found that the complainant made a December 7, 2012 request for copies of the following records:

1. All documents that identify, refer to or otherwise relate to any appraiser or appraisal company that has been retained or engaged to appraise Meadow Ridge's real and/or personal property with respect to the 2012 assessment and/or revaluation. This includes all email records, all correspondence, all electronic records, all voicemail

recordings and all records and recordings stored or maintained on any backup system.

2. All documents that identify, refer to or otherwise relate to any appraisal that has been conducted with respect to Meadow Ridge's real and/or personal property with respect to the 2012 assessment and/or revaluation. This includes all email records, all correspondence, all electronic records, all voicemail recordings and all records and recordings stored or maintained on any backup system.
3. All documents that identify, refer to or otherwise relate to any appraiser or appraisal company that has been retained or engaged to do a revaluation of real property in Redding, CT with respect to the 2012 assessment and/or revaluation. This includes all email records, all correspondence, all electronic records, all voicemail recordings and all records and recordings stored or maintained on any backup system.
4. All documents that refer to or relate to any conversation or communication with counsel and/or third persons that refers to or otherwise relates to any appraisal that has been conducted with respect to Meadow Ridge's real and/or personal property with respect to the 2012 assessment and/or revaluation. This includes all email records, all correspondence, all electronic records, all voicemail recordings and all records and recordings stored or maintained on any backup system.
5. All documents that refer to or relate to any conversation or communication with counsel and/or third persons that refers to or otherwise relates to any appraiser or appraisal company that has been retained or engaged to appraise Meadow Ridge's real and/or personal property with respect to the 2012 assessment and/or revaluation. This includes all email records, all correspondence, all electronic records, all voicemail recordings and all records and recordings stored or maintained on any backup system.

4. It is found that the respondent Assessor provided redacted copies of records, primarily emails, on December 19, 2012.

5. It is found that the Town Attorney replied by letter dated December 19, 2012 that he believed that records in his custody were exempt from disclosure because they were not kept on file by the Town of Redding, because they were protected by virtue of the attorney work product privilege and the attorney client privilege, and because Town Counsel did not consider himself to be a public agency.

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:

> 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. Following the hearing, the respondents submitted for in camera inspection copies of the requested records, which consist of letters, emails, and attachments: between the Town Attorney and the Assessor; between the Town Attorney and appraiser Norman LeZotte; and between the Assessor and LeZotte.

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

11. Is found that the requested records concern the assessment and/or revaluation of real property owned by Redding Life Care LLC, and known as Meadow Ridge, a continuing care retirement facility in the town of Redding.

12. It is found that Meadow Ridge was last revalued as of October 1, 2012.

13. It is found that the duties of the respondent Assessor include hiring appraisal firms to value properties in the town, and that the act of valuing properties for purposes of assessment is the Assessor's ultimate responsibility.

14. It is found that all of the properties in Redding other than Meadow Ridge were valued using a "mass appraisal" computer system.

15. It is found that valuation of the Meadow Ridge property was beyond the scope of the mass appraisal firm hired by the town, and that a specialized appraiser, Norman LeZotte, performed that valuation, valuing the property at some $112.5 million.

16. It is found that the town's assessment of Meadow Ridge as of October 1, 2007, the date of the previous revaluation, had been appealed by Redding Life Care to the Superior Court, and was argued before the Supreme Court on April 26, 2012. It is also found that Redding Life Care also appealed the 2011 Grand List valuation of Redding Ridge.

17. It is found that the Assessor, expecting that the October 1, 2012 revaluation would likely also be appealed by Redding Life Care, informed LeZotte that the Town Attorney would be contacting LeZotte regarding the appraisal of Meadow Ridge for 2012. In anticipation of that expected tax appeal litigation, the Town Attorney retained Mr. LeZotte.

18. It is found that, after LeZotte and the Assessor inspected Meadow Ridge in August 2012, Mr. Lezotte provided a verbal valuation of the property to the Town Attorney, who in turn conveyed it to the Assessor.

19. It is founded that the in camera records reflect the communications among the Town Attorney, the Town Assessor, and Mr. LeZotte, concerning the valuation of Meadow Ridge.

20. The respondents contend that the requested records are exempt from disclosure under §1-210(b)(10), G.S., as "communications privileged by the attorney-client relationship."

21. The applicability of the exemption contained in §1-210(b)(10), G.S., is governed by established Connecticut law defining the privilege. Maxwell v. FOI Commission, 260 Conn. 143 (2002). In Maxwell, the Supreme Court stated that §52-146r, G.S., which established a statutory privilege for communications between public agencies and their attorneys, merely codifies "the common-law attorney-client privilege as this court previously had defined it." Id. at 149.

22. 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. . . .

23. The Supreme Court has also stated that "both the common-law and statutory privileges protect those communications between a public official or employee and an attorney that are confidential, made in the course of the professional relationship that

exists between the attorney and his or her public agency client, and relate to legal advice sought by the agency from the attorney." Maxwell, supra at 149.

24. It is found that the requested records relate to obtaining a confidential assessment of real and personal property.

25. Is also found that the communications between the Town Attorney and the Town Assessor were transmitted in confidence and relate to legal advice sought from the Town Attorney by the Assessor, acting in the performance of his duties, from the attorney.

26. It is therefore concluded that the communications between the Town Attorney and the Town Assessor are privileged, and exempt from disclosure pursuant to §1-210(b)(10), G.S.

27. The respondents maintain that they are also entitled, under the attorney-client privilege, to withhold records of communication between the Assessor and LeZotte, and between the Town Attorney and LeZotte, concerning the assessment by LeZotte of Meadow Ridge.

28. It is concluded that, as a general rule, the attorney-client privilege extends to all persons who act as the attorney's agents. See State v. Hanna, 150 Conn. 457, 465 (1963); 8, Wigmore on Evidence § 2301, at 583 (1961). The Connecticut Supreme Court has recognized that the attorney-client privilege extends to expert witnesses. See State v. Toste, 178 Conn. 626, 268 (1979) (where an expert "is retained by a criminal defendant ... for the sole purpose of aiding the accused and his counsel in the preparation of his defense, the attorney-client privilege bars the state from calling the expert as a witness").

29. It is concluded that a line of federal appellate cases beginning with Judge Friendly's opinion for the court in United States v. Kovel, 296 F.2d 918 (2d Cir. 1961), has recognized that the attorney-client privilege can attach to reports of third parties made at the request of the attorney or the client where the purpose of the report was to put in usable form information obtained from the client. Thus in Kovel an accountant employed by a tax law firm to sit in on client's conversations with attorneys was held properly to have exercised an attorney-client privilege when he refused to answer questions in a grand jury concerning one such conversation. The court analogized the role of the accountant to that of a translator who puts the client's information into terms that the attorney can use effectively. Beyond this limited role, however, the privilege would not extend:

> What is vital to the privilege is that the communication be made in confidence for the purpose of obtaining legal advice from the lawyer. *If what is sought is not legal advice but only accounting service, ... or if the advice sought is the*

> *accountant's rather than the lawyer's, no privilege exists.* [Emphasis added.]

296 F.2d at 922.

30. On the strength of Kovel an attorney-client privilege has been accorded to a psychiatrist hired by the defense to aid in the preparation of an insanity defense, United States v. Alvarez, 519 F.2d 1036, 1045-46 (3d Cir. 1975), an audit of the client prepared by an accountant at the attorney's request to aid in advising his client whether to file an amended tax return, United States v. Cote, 456 F.2d 142, 144 (8th Cir. 1972), and a statement of the client's net worth prepared by an accountant at the attorney's request, United States v. Judson, 322 F.2d 460, 462-63 (9th Cir. 1963). Olson v. Accessory Controls and Equipment Corp., 254 Conn 145 (2000).

31. However, it is also concluded that the attorney-client privilege extends to persons who act as the attorney's agents only if the information provided by the agent is used by the attorney to render legal advice to the client. Thus, as observed in Olson, above, at 161-162:

> Courts have been reluctant to extend the privilege to reports compiled by third parties absent a clear indication that the information was submitted confidentially by an agent to the attorney for legal advice. For example, in United States Postal Service v. Phelps Dodge Refining Corp., 852 F. Supp. 156 161 (E.D.N.Y. 1994), the court refused to apply the privilege to communications made by two environmental consultants to the defendants and their in-house counsel. The consultants had been retained to conduct environmental studies and to develop a remedial program for cleaning up the defendants' property in connection with a request from the New York state department of environmental conservation. The court refused to extend the attorney-client privilege because "neither consultant [could] be considered an agent [of the attorney] encompassed by the privilege." The court noted that the consultants "were not employed by [the defendants'] attorneys specifically to assist them in rendering legal advice ... [but] were hired by [the] defendants to formulate a remediation plan acceptable to the [state agency] and to oversee remedial work at the [p]roperty." The court found that "none of the documents revealed any confidential communications by the defendants or their attorneys to the consultants," and concluded that the notations on the documents by the attorneys did not amount to legal advice.

> Similarly, in In re Grand Jury Matter, 1476 F.R.D. 82 (E.D. Pa. 1992), the court denied a motion to quash a subpoena duces tecum directed at documents that had been compiled by an expert environmental consultant for a company, and concluded that the attorney-client privilege did not apply. The company had asserted the privilege in the context of a federal criminal investigation for violations of waste handling and disposal statutes and maintained that the environmental reports had been prepared in connection with proceedings initiated by the Pennsylvania department of environmental resources. The court refused to apply the attorney-client privilege to the reports, and determined that "the documents [had been] made in the course of the expert consultant's provision of environmental services to the company, and not for the purpose of assisting the law firm in providing legal advice to the company." [Citations omitted.]

32. Although it is not disputed that the Town Attorney did, and would, in the course of his legal representation of the Town, provide legal advice to the Town in connection with any litigation concerning the assessment of Meadow Ridge, it is found that the record is devoid of any evidence that LeZotte's assessment itself of Meadow Ridge was used by the Town Attorney to render legal advice to the town, whether in defense of a tax appeal or otherwise.

33. Rather, it is found that LeZotte's assessment was conducted for the purpose of valuing the property for tax purposes, not for the purpose of assisting the Town Attorney in providing legal advice to the town. It is found that the advice given to the Town Assessor was that of LeZotte, not the Town Attorney.

34. Additionally, it is found that the record is similarly devoid of evidence that any confidential information was submitted by the respondent Assessor to LeZotte or the Town Attorney.

35. It is therefore concluded that the in camera records that are communications between the Town Attorney and LeZotte, and LeZotte and the Assessor, are not privileged by the attorney-client relationship, and therefore not exempt from disclosure pursuant to §1-210(b)(10), G.S.

36. The respondents further contend that the in camera documents are exempt from disclosure pursuant to that portion of §1-210(b)(10), G.S., that exempts from mandatory disclosure:

> ... communications privileged by ... any other privilege established by the common law or the general statutes, including any such records, tax returns, reports or

> communications that were created or made prior to the establishment of the applicable privilege under the common law or the general statutes

37. Specifically, the respondents claim that the in camera records are exempt from disclosure by virtue of the work-product exception to discovery.

38. It is concluded that the work product doctrine protects from discovery in litigation an attorney's "interviews, statements, memoranda, correspondence, briefs, mental impressions, personal beliefs and countless other tangible and intangible [items]." Hickman v. Taylor, 329 U.S. 495, 511 (1947). To be protected under this doctrine, the work of the attorney must be such that it forms an essential step in the procurement of data and must involve duties normally performed by attorneys. Stanley Works v. New Britain Redevelopment Agency, 155 Conn. 86, 95 (1976). Barksdale v. Harris, 30 Conn. App. 754 (1993).

39. It is concluded, however, that the work product doctrine is not a "privilege established by the common law or the general statutes" within the meaning of §1-210(b)(10), G.S. Rather, it is concluded that the work product doctrine is an interpretation of the rules of discovery of federal civil procedure. As explained by the U.S. Supreme Court:

> In our opinion, neither Rule 26 nor any other rule dealing with discovery contemplates production under such circumstances. This is not because the subject matter is privileged or irrelevant, as those concepts are used in these rules. Here is simply an attempt, without purported necessity or justification, to secure written statements, private memoranda, and personal recollections prepared or formed by an adverse party's counsel in the course of his legal duties. *As such, it falls outside the arena of discovery and contravenes the public policy underlying the orderly prosecution and defense of legal claims. Not even the most liberal of discovery theories can justify unwarranted inquiries into the files and mental impressions of an attorney.*
>
> ....
>
> We do not mean to say that all written materials obtained or prepared by an adversary's counsel with an eye toward litigation are necessarily free from discovery in all cases.... But the general policy against invading the privacy of an attorney's course of preparation is so well recognized and so essential to an orderly working of our system of legal procedure that a burden rests on the one who would invade that privacy to establish adequate reasons to justify

> production through a subpoena or court order. *That burden, we believe, is necessarily implicit in the rules as now constituted.* [Emphasis added]

Hickman v. Taylor at 510-512

40. Moreover, it is concluded that an interpretation of the work product exclusion from the rules of discovery as an exception to disclosure under the FOI Act would contradict our Supreme Court's ruling in Chief of Police, Hartford Police Department v. FOIC, 252 Conn. 377, 386 (2000). In that case, the Court concluded that:

> ... requests for records under the [FOI] act are to be determined by reference to the provisions of the act, irrespective of whether they are or otherwise would be disclosable under the rules of state discovery ... whether civil or criminal.

41. If the Commission were to conclude that the attorney work product exception under the rules of discovery governs a request for records under the FOI Act, it would require the Commission either to act in contravention of our Supreme Court, or to conclude that the legislature implicitly overruled the Supreme Court when it enacted the language in §1-210(b)(10), G.S., regarding privileges. This the Commission declines to do.

42. It is therefore concluded that the attorney work product exception to the rules of discovery does not constitute an exception to the FOI Act under §1-210(b)(10), G.S.

43. It is therefore concluded that the respondents violated the FOI Act by failing to disclose the in camera records that constitute communications between LeZotte and the respondent Town Assessor, and LeZotte and the Town Attorney.

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 all of the requested records comprising communications between Lezotte and the Town Attorney, and LeZotte and the Town Assessor.

Victor R. Perpetua
As Hearing Officer

HOR/FIC2013-003/VRP/07012013