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FREEDOM OF INFORMATION



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Adrienne DeLucca and the Berlin Education Association,
Complainant(s)
against

Notice of Meeting

Docket #FIC 2014-183

Superintendent of Schools, Berlin Public Schools; and Berlin Public Schools,
Respondent(s)

March 5, 2015

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, 1st floor, Hartford, Connecticut, at **2 p.m. on Wednesday, March 25, 2015**. 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 March 20, 2015**. 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 March 20, 2015**. **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 March 20, 2015**, 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


Linda Fasciano
Acting Clerk of the Commission

Notice to: Adrienne DeLucca
D. Charles Stohler, Esq.

2015-03-05/FIC# 2014-183/Trans2/lf/VRP//TAH

FREEDOM OF INFORMATION COMMISSION
OF THE STATE OF CONNECTICUT

In the Matter of a Complaint by

Proposed Final Decision

Adrienne DeLuca and the
Berlin Education Association,

Complainants

against

Docket #FIC 2014-183

Superintendent of Schools, Berlin
Public Schools; and Berlin Public
Schools,

Respondents

March 5, 2015

The above-captioned matter was heard as a contested case on October 6, 2014, at which time the complainants 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. A Report of Hearing Officer was issued on December 30, 2014. At its regular meeting of February 4, 2015, the Commission voted 2-2 on adoption of the Report. By virtue of the tie vote, the Hearing Officer's Report was not adopted. The Commissioners then voted to remand the matter back to staff for consideration of a revised report.

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 April 2, 2014, the complainants appealed to the Commission, alleging that the respondents violated the Freedom of Information ("FOI") Act by denying their request for certain records pertaining to an investigation of the Chairman of the Berlin Board of Education.
3. It is found that the complainants made a March 17, 2014 request to the respondents for copies of, or the opportunity to inspect, the following records:

... any and all documents in connection with a certain investigation regarding Mr. Gary Brochu, Chairman of the Board of Education, including any and all bills for legal services in connection with this matter. We further request copies of or the right to inspect any and all

documents provided to the Board of Education at their March 10, 2014 meeting concerning the Brochu investigation along with the minutes of the meeting....

4. It is found that the respondents replied on March 18, 2014 that they had not received any bills for legal services, but would provide a copy upon receipt; that the minutes of the March 10, 2014 Board of Education meeting were available on the Board of Education's website; and that the report responsive to the request, submitted by attorney C. Charles Stohler to the Berlin Board of Education at its March 10, 2014 meeting, was exempt from disclosure under §§1-210(b)(2)¹ and (10), G.S., and therefore would not be released.

5. It is found that the only document remaining at issue is the report by attorney Stohler, which concerns his investigation of allegations made by the Berlin Interscholastic Coaches Association that the chairman of the Board of Education used his position to intimidate coaches.

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

10. The respondents contend that the requested record is exempt from disclosure under §1-210(b)(10), G.S., as “communications privileged by the attorney-client relationship.”

¹ The respondents subsequently abandoned their claim of exemption under §1-210(b)(2), G.S.

11. 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.

12. 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. . . .

13. 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.

14. It is found that the Berlin Board of Education retained attorney Stohler to serve as independent legal counsel in the Brochu matter, and that the scope of his representation included uncovering the facts in order to provide legal advice. Attorney Stohler interviewed witnesses and reviewed relevant statutes and documents such as the Town Charter, Board Bylaws and the Board Member Handbook. His work culminated in a report to the Board that detailed his factual findings, interpretations, legal analysis, and recommendations.

16. The complainants contend that the investigation report was not transmitted in confidence because the chairman of the Board of Education, who was also the subject of the report, was present at the executive session during which the report was submitted and discussed by the Board, and that the chairman cannot both be the subject of the report and a member of the client agency for whom the report was prepared.

17. It is also found, however, that any conflicts created by the chairman’s status as the subject of the report do not vitiate his status as a member of the client Board of Education that commissioned the report. It is therefore found that the investigation report was transmitted in confidence to the client Board of Education, and relates to legal advice sought from attorney Stohler by the Board acting in the performance of its duties.

18. It is therefore concluded that any privilege that attached to attorney Stohler’s investigation report pursuant to §1-210(b)(10), G.S., was not waived due to the chairman’s presence at the executive session during which the report was submitted and discussed.

19. The complainants further contend that the respondents waived any privilege that attached to the report when they adopted and published attorney Stohler's "Recommendations" in the minutes of the respondents' meeting.

20. The Commission is guided by court decisions concerning the scope of a partial waiver of attorney-client privilege. Where disclosure of communications protected by attorney-client privilege occurs in an extrajudicial setting – i.e., outside of the context of an adversarial proceeding – waiver applies to "the particular matters actually disclosed[.]" In re von Bulow, 828 F.2d 94, 102 (2d Cir. 1987); U.S. v. Jacobs, 117 F.3d 82, 90 (2d Cir. 1997). An entire matter is "actually disclosed" when the "gist" of the communication is disclosed, leaving the remainder "merely an elaboration of the material disclosed." Id.

21. For example, in U.S. v. Jacobs, a client "actually disclosed" the entirety of his attorney's letters when he disclosed the substance of them to third parties. See, Long-Term Capital Holdings, v. U.S., 2002 U.S. Dis. LEXIS 23224 (3:01CV1290)(JBA) (D. Conn. 2002), *reconsidered*, 2003 U.S. Dist. LEXIS 7826 (3:01CV1290)(JBA) *28-29 (D. Conn. 2003) (disclosure of attorney's written opinion to tax accountant that it was "more likely than not that the loss can be taken" waived privilege as to entire document because "gist" of communication was revealed; "more than just a general reference" to written opinion, statement disclosed "legal advice that was memorialized in a formal legal opinion."); Mendillo v. The Prudential Insurance Co. of America, 2014 U.S. Dist. LEXIS 22451 (3:12CV1383)(WWE) *17-18 (D. Conn. 2014) (no waiver of privilege when client testified about attorney's letter in deposition because testimony did not reveal "specific and/or ... significant substance" of privileged document; testimony did not reveal attorney's "legal conclusions and the facts on which those conclusions were based").

23. Also see Lauren Cragg v. First Selectman, Town of Marlborough; and Town of Marlborough; Docket #FIC 2013-452 (May 28, 2014) (first Selectman waived attorney client privilege by disclosing substance of legal opinion at board of finance meeting); Glenn Morron v. J. Edward Brymer, Chief, Police Department, City of Middletown, et al.; Docket #FIC 2006-038 (December 13, 2006) (deputy chief of police waived privilege attached to entire legal memorandum by disclosing substance of advice communicated therein, leaving no legal advice beyond what was publicly disclosed).

24. Applying the principles articulated in the case law cited in paragraphs 20-23, above, and based upon careful review of the in camera records, it is found that the respondents 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 consist of seven very detailed paragraphs, taken nearly verbatim from the report itself, as the respondents concede on page 12 of their November 5, 2014 post-hearing brief. It is found that the recommendations illuminate attorney Stohler's legal 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. U.S. v. Jacobs, *supra*, 117 F.3d 90.

25. It is found, therefore, that the respondents waived the attorney-client privilege attached to attorney Stohler's entire report.

26. It is concluded, therefore, that §1-210(b)(10), G.S., does not exempt the report from mandatory disclosure, and the respondents violated §§1-210(a) and 1-212(a), G.S., by failing to disclose the report to the complainants.

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 a copy of the report by attorney Stoler to the complainants, free of charge.

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