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David Desroches,
Complainant(s)
against

Chairman, Board of Education, Darien Public Schools; and Board of Education, Darien Public Schools,
Respondent(s)

Notice of Meeting

Docket #FIC 2014-620

August 13, 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, lst floor, Hartford, Connecticut, at **2 p.m. on Wednesday, August 26, 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 August 24, 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 August 24, 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 **fifteen (15) copies** be filed ***ON OR BEFORE August 24, 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

W. Paradis
Acting Clerk of the Commission

Notice to: David Desroches
Thomas B. Mooney, Esq.

2015-08-13/FIC# 2014-620/Trans/wrbp/TCB//TAH

FREEDOM OF INFORMATION COMMISSION
OF THE STATE OF CONNECTICUT

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

David DeRoches,

Complainant

against | Docket #FIC 2014-620

Chairman, Board of Education,
Darien Public Schools; and
Board of Education, Darien
Public Schools,

Respondents | August 13, 2015

The above-captioned matter was heard as a contested case on June 2, 2015, at which time the complainant and the respondents appeared, stipulated to certain facts and presented testimony, exhibits and argument on the complaint.

At the request of the respondents, this Commission takes administrative notice of the administrative record and the decision in its Docket #FIC2013-717, David DesRoches and the Darien Times v. Superintendent of Schools, Darien Public Schools; and Darien Public Schools. The evidence from that case is hereby admitted as evidence is this matter pursuant to the Regulations of Connecticut State Agencies §1-27j-37(e).

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 the respondents are represented by the law firm of Shipman and Goodwin, LLP.

3. It is found that the respondents sought assistance and advice from attorneys at Shipman and Goodwin regarding a complaint filed with the State Department of Education against the respondent board by parents of special education students who attend the Darien Public Schools. It is found that the parents alleged that the respondents were in violation of the Individuals with Disabilities Education Act ("IDEA") and requested as a remedy that all special education funding be withheld from the respondents as punishment for any substantiated violations.

4. It is found that the State Department of Education investigated the claim and found that the respondents were in violation of the IDEA in two areas - parent involvement and predetermination - and found that the procedures used by the respondents were not adequately respecting the role the parents are entitled to have in the development of the educational program for their children.

5. It is found that attorneys at Shipman and Goodwin hired Duby McDowell Jewett Communications ("hereinafter MJC"), a public relations consulting firm, to assist them in their provision of professional services to the respondents. It is found that MJC was not hired by the respondents.

6. It is found that by e-mail dated August 15, 2014, the complainant made a request to the respondents for access to inspect and/or receive copies of "any and all communications and correspondence between Darien Board of Education members and employees of the town of Darien with Duby McDowell Communications and/or McDowell Jewett Communications …. " It is found that the request included:

a. "correspondence made by contracted and salaried employees of the town of Darien with McDowell;"

b. "all emails, U.S. Postal Service letters, private mail service letters, text messages, voice mails, facsimiles and hand-written notes or letters and any other form of correspondence;" and

c. "correspondence made by anyone contracted by McDowell who then corresponded with town of Darien employees or Board of Education members on behalf of McDowell."

It is found that the complainant sought records generated between January 1, 2013 and the most current date available.

7. It is found that by email dated August 15, 2014, the complainant amended his request to include "any communications from McDowell to any elected official in the Town of Darien, including, but not limited to, any current or past member of the Board of Finance, Board of Selectmen, Planning and Zoning Commission, Representative Town Meeting, and any other state, national or locally held elected position. This would also include volunteer and/or paid personnel appointed by elected officials to serve the town of Darien and/or the State of Connecticut."

8. It is found that by two emails dated September 5, 2014, the respondents' attorney informed the complainant that after searching for records responsive to the complainant's request (which search was not yet complete), they found only emails that were responsive and those are between Duby McDowell or McDowell Jewett

Communications and members of the Darien Board of Education or employees of the Darien Board of Education or the Town of Darien, which they claimed were confidential attorney-client communications and therefore exempt from disclosure and would not be provided.[1]

9. By email dated September 19, 2014 and filed on September 22, 2014, the complainant appealed to this Commission alleging that the respondents violated the Freedom of Information ("FOI") Act by failing to comply with his request.

10. 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.

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, (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.

12. 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."

13. It is found that the requested records, to the extent they exist, are public records within the meaning of §§1-200(5), 1-210(a), and 1-212(a), G.S.

14. Pursuant to the Commission's June 2, 2015 "Order for Production of Records for In Camera Inspection", the respondents submitted the emails for *in camera* inspection which have been identified as *in camera* records 2014-620- 001 through 2014-620-230.

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[1] It is found that upon completion of their search, but after the complainant filed his complaint, the respondents found and provided the complainant with responsive records for which they did not claim an exemption from disclosure, on or about October 1, 2014.

15. The respondents contend that the *in camera* records are exempt from disclosure pursuant to §1-210(b)(10), G.S., which permits an agency to withhold from disclosure records of "communications privileged by the attorney-client relationship...." The respondents contend that MJC are agents of Shipman and Goodwin and that the emails exchanged between MJC, attorneys of Shipman and Goodwin, and themselves, are protected by the privilege because the communications were "connected intimately with the rendering of legal advice."

16. However, the complainant contends that MJC is simply a public relations firm and that its assistance to Shipman and Goodwin was limited to providing public relations advice which did not relate to any legal advice.

17. 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.

18. 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[2]. . . .

19. 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, id. at 149. (Emphasis added).

20. In addition, Shew v. Freedom of Information Commission, 245 Conn. 149 (1998), provides guidance. The sole issue on appeal was whether certain documents created by an attorney who had been retained by the town of Rocky Hill to conduct an

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[2] It is found that legal advice is "generally defined as the assessment and application of principles of law to a particular factual situation. It involves the application of legal principles to facts in a manner that (1) in effect predicts a specific resolution of a legal issue or (2) directs, counsels, urges, or recommends a course of action by a disputant or disputants as a means of resolving a legal issue." USLegal (August 5, 2015, 11:49 AM) http://definitions.uslegal.com/about/.

investigation of the town's police chief were subject to disclosure under the FOI Act. Id. at 151. The Court held that the report at issue was exempt from mandatory disclosure as privileged under §1-210(b)(10), G.S., because the attorney was acting in her capacity as an attorney and that *the communications related to the legal advice* the town sought from her. *Id.* at 160. (emphasis added).

21. However, the attorney-client privilege is strictly construed because it "tends to prevent a full disclosure of the truth in court" C. Tait & J. LaPlante, Connecticut Evidence (2d Ed.1988) § 12.5.1; Turner's Appeal, 72 Conn. 305, 318 (1899). The privilege does not protect every communication between the client and the attorney. For example "[a] communication from attorney to client solely regarding a matter of fact would not ordinarily be privileged, unless it were shown to be inextricably linked to the giving of legal advice." Ullmann v. State, 230 Conn. 698, 713 (1994). Our Supreme Court has also held that "the mere fact that a meeting took place between the plaintiff and his client did not constitute a communication and such information is not privileged for that reason." State v. Yates, 174 Conn. 16, 19–20, 381 (1977) ("[i]n its questioning of [the plaintiff], the state did not seek the substance of any communication that [the plaintiff] may have had with his client").

22. With respect to third parties, the Supreme Court has stated that, generally, "statements made in the presence of a third party are usually not privileged because there is then no reasonable expectation of confidentiality." State v. Cascone, 195 Conn. 183, 186, 487 A.2d 186 (1985); *see also* State v. Colton, 174 Conn. 135, 138-39 (1977). However, "[t]he presence of certain third parties . . . who are agents or employees of an attorney or client, and who are necessary to the consultation, will not destroy the confidential nature of the communications." State v. Gordon, 197 Conn. 413, 424; State v. Cascone, supra, at 186-87 n. 3; accord Shew v. Freedom of Information Commission, id. at 159 n. 12.

23. In this respect, the Supreme Court's decision in Olson v. Accessory Controls and Equipment Corporation, 254 Conn. 145 (2000), is informative. In Olson, the Court held that the attorney-client privilege extended to a report that was compiled by an environmental consultant, and the related communications, because the report was produced and the communications were made in confidence for the purpose of obtaining legal advice. Id. at 160 (the attorney-client privilege "*may* attach to technical reports communicated to an attorney if done so for legal opinion or interpretation") (emphasis in original) (citations and internal quotation marks omitted).

24. However, in extending the attorney-client privilege to the communications to a third party agent of the attorney, the courts caution that if what is sought from the agent is not legal advice, no privilege exists. In Olson, an accountant had been engaged to assist an attorney in rendering tax advice to a client. The Court recognized that "the privilege must include all the persons who act as the attorney's agents" when the assistance of the agent is "indispensable" to the attorney's work. The court cautioned, however, that *"[i]f what is sought is not legal advice but only accounting services ... or if the advice sought is the accountant's rather than the lawyer's, no privilege exists*." Olson

v. Accessory Controls and Equipment Corporation, id. at 160., citing United States v. Kovel, 296 F.2d 918, 922 (2d Cir.1961)(emphasis added).

25. With respect to public relations firms specifically, two cases provide guidance in this regard: Calvin Klein Trademark Trust v. Wachner, 198 F.R.D. 53 (2000) and In re Grand Jury Subpoenas, March 24, 2003, 265 F.Supp.2d 321, United States District Court, S.D. New York.

26. In Calvin Klein, the attorneys for the plaintiff in preparation of filing a law suit, hired a public relations firm and claimed that it did so for the purpose of assisting them in understanding the possible reaction of various constituents to the litigation, in providing legal advice, and to ensure that the media relations with respect to the case would be handled responsibly. The plaintiff claimed that the communications between the public relations firm and the plaintiff were protected by the attorney client privilege. However the court rejected the claim for the following reasons:

a. Few if any of the records "contained or revealed confidential communications from the underlying client...made for the purpose of obtaining legal advice."

b. The evidence showed, with respect to the documents, that the public relations firm was only providing public relations advice and not legal advice; and

c. There was no justification to broaden the privilege where the work performed by the public relations firm was not "materially different" from the work they would have performed had they been hired directly by the plaintiff.

27. In In re Grand Jury Subpoenas, attorneys hired a public relations firm during an investigation of their client which investigation had received intense media coverage. The attorneys claimed that the public relations firm was hired to help them communicate to the media in a manner that would bring balance and accuracy to the media coverage and reduce the risk of prosecutors and regulators feeling pressured to bring charges against their client due to, what was then, very negative media coverage. The attorneys claimed that what distinguished the public relations work for them from the work it ordinarily performed was that its audience was not the public but rather the prosecutors and the regulators involved in the investigation. Based on those two claims, the attorneys argued that the two conversations and certain portions of an email at issue were protected as attorney-client privileged communications.[3] However, the Court found that neither communications were made for the purpose of obtaining legal advice, they were not

[3] One conversation concerned the substantial media coverage on a particular day and the consultants' view of that coverage and the other concerned a problem with a wire service story. The email at issue was one between just the public relations firm and the client concerning a posting on the Wall Street Journal.

directed at helping the attorneys formulate their strategy, and there had been no showing that there was a nexus sufficiently close to the provision or receipt of legal advice. In re Grand Jury Subpoenas, id. at 331 and 332.

28. While courts have been "persuaded that the ability of lawyers to perform some of their most fundamental client functions . . . would be undermined seriously if lawyers were not able to engage in frank discussions of facts and strategies with the lawyers' public relations consultant," they stress that the privilege applies to "the confidential communications from the underlying client made for the purpose of obtaining legal advice" as those are "the only communications that the privilege protects." Calvin Klein, id. at 54.

29. At the hearing on this matter, the respondents testified that what they saw as the center of the complaint filed against them, as described in paragraph 3 and 4, above, was the relationship between the Darien Public School District and the parents.

30. The respondents further testified that as the attorneys for Shipman and Goodwin provided them with legal advice to make appropriate remedial steps to fix the problem, the attorneys felt it was very important for them, the attorneys, to understand how certain communications sent out to the parent community would be perceived "because . . . this problem of parent involvement in special education will only be fixed by creating an environment of trust between the school officials and the parents." The respondents testified that as the attorneys considered various remedial steps it was important, to effectuate this legal advice, to understand, and be sensitive to, how those steps should be communicated to remedy "the problem."

31. Counsel for the respondents testified that, although he had never retained a public relations consultant before, he did so in this case because of the issues of trust, the rights of the parents, and the feelings of the parent community, which in his assessment, made the case unique. He testified that he wanted to put the information out into the public in such a manner that other parents would feel they were being given a "straight story" and would not feel the need to file their own complaints against the respondents in which the respondents would have to defend themselves in countless and expensive hearings.

32. The respondents testified that the work MJC performed largely entailed editing statements prepared by the attorneys for public dissemination so that they would be more understandable to the public. The work was described as different from the work the firm does ordinarily because their work ordinarily includes speaking directly with the media, drafting press releases (rather than simply editing them), organizing press conferences, and being very proactive in representing the client and getting the client's message out to the public.

33. With the legal standard and the facts related to the hiring of and work performed by MJC set forth, the Commission turns to the *in camera* records at issue.

34. It is found that the *in camera* records are email exchanges that were intended to be confidential communications between the respondents' attorneys, the respondents, and MJC.

35. It is found, however, after careful review, that there is no showing in the *in camera* records that there is a nexus sufficiently close to the provision or receipt of legal advice. It is found rather that MJC provided standard public relations advice for which there was no evidence that such advice impacted the *legal* strategy or *legal* advice of Shipman and Goodwin attorneys to the respondents with respect to the State's investigation of the alleged violations of the IDEA or its ultimate findings. It is found, rather, that MJC's involvement, as far as the in camera records are concerned, was directly related to helping the attorneys advise the respondents on creating an environment of trust between the school officials and the parents which is not *legal* advice even in light of the respondents' contention that such trust would help avoid future complaints to the State Department of Education.

36. It is also found that, although the work performed by MJC as shown in many of the in camera records, was significantly more limited, it was consistent with, rather than materially different than, the work the firm performs ordinarily for their other clients. It is found that the records "appear on their face to be routine suggestions from a public relations firm as to how to put the 'spin' most favorable to" the respondents. Calvin Klein, id. at 54.

37. It is further found that MJC did not perform the interpretive or "translator" function wherein its advice enabled the attorneys at Shipman and Goodwin to "understand aspects of the [respondents'] own communication that could not otherwise be appreciated in the rendering of legal advice." Calvin Klein, id. at 54. It is found, rather, that MJC provided general media strategy advice aimed at improving the public image and reputation of the respondents. Calvin Klein, id. at 54.

38. Therefore, based on the findings in paragraphs 34 through 37, above, it is concluded that the *in camera* records are not privileged attorney-client communications within the meaning of §1-210(b)(10), G.S., and therefore it is also concluded that they are not exempt from mandatory disclosure under that provision.

39. Consequently, it is concluded that the respondents violated §1-210(a), G.S., by failing to provide the complainant with a copy of the *in camera* records.

The following order by the Commission is hereby recommended on the basis of the record concerning the above-captioned complaint:

1. The respondents shall provide the complainant with a copy of the in camera records described in paragraph 14 of the findings, above.

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

Attorney Tracie C. Brown
as Hearing Officer

FIC2014-620/hor/tcb/2015812