

FREEDOM OF INFORMATION COMMISSION
OF THE STATE OF CONNECTICUT

In the Matter of a Complaint by

FINAL DECISION

Patricia Cofrancesco,

Complainant

against

Docket #FIC 2016-0817

Mayor, City of Derby; Police
Commission, City of Derby; and
City of Derby,

Respondents

June 14, 2017

The above-captioned matter was heard as a contested case on February 23, 2017, at which time the complainant and the respondents appeared 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 letter dated October 13, 2016, the complainant requested from the respondents a copy of:
 - (a) the personnel file for Police Chief Gerald Naroski;
 - (b) any and all emails generated over the last five years by and between Gerald Naroski and one Gina Gottawala; and
 - (c) any report/investigation/findings rendered by the City of Derby and/or its representative to the Derby Board of Police Commissioners arising out of the conduct of Gerald Naroski over the past five years.
3. It is found that, by letter dated November 2, 2016, the respondents provided a copy of the records described in paragraphs 2(a) and 2(b), above, to the complainant, but denied the request for a copy of the report, described in paragraph 2(c), above (“report”), claiming such report is exempt from disclosure pursuant to the attorney-client privilege.

4. By letter dated November 15, 2016 and filed November 18, 2016, the complainant appealed to this Commission, alleging that the respondents violated the Freedom of Information (“FOI”) Act by denying the request for the report.

5. Section 1-200(5), G.S., provides:

“[p]ublic 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.

6. Section 1-210(a), G.S., provides in relevant part that:

[e]xcept 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 . . . (3) receive a copy of such records in accordance with section 1-212. (Emphasis added).

7. 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.”

8. It is found that the report is maintained by the respondent police commission (“commission”), not by the mayor. At the hearing in this matter, the complainant withdrew her complaint against the respondent mayor.

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

10. It is found that a complaint was filed by a former city employee against the Derby police chief alleging misconduct by the chief. It is found that, upon receipt of the complaint, the chairman of the commission initially sought legal advice from the city’s corporation counsel regarding the process that should be followed to investigate the complaint, and to ensure that all legal requirements related to that process were followed. It is found that corporation counsel informed the chairman that he could not advise him due to a conflict, and suggested the chairman obtain outside counsel. It is found that, at its December 14, 2015 meeting, the commission voted to hire Attorney Eric Brown to conduct an investigation of the allegations contained in the complaint, and to provide legal advice to the commission with respect to the complaint specifically, and the process generally.

11. It is found that Attorney Eric Brown conducted an investigation into the allegations contained in the complaint and issued a written report containing the results of his investigation (i.e., fact finding), and his legal advice. The complainant requested, and was denied, a copy of this report. See paragraphs 2(c) and 3, above.

12. It is found that, by letter dated March 8, 2016, in advance of the commission's March 16, 2016 special meeting at which the report was to be discussed, the commission provided a copy of the report to the police chief. It is found that the police chief is not a member of the commission.

13. It is found that, at a special meeting on March 16, 2016, the commission, after discussing the report in executive session, voted in open session to find that the police chief had violated §2.2.3.1 of the Derby Police Department's Social Media Policy, to notify the police chief in writing of this finding, and to place a copy of such written notification in the police chief's personnel file. The commission further voted that the written notification should be removed from the chief's personnel file on October 20, 2016.

14. With regard to the respondents' claim that the report is 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. Based upon the evidence offered at the hearing, it is found that, with regard to the communication at issue, i.e., the report, Attorney Eric Brown acted in his professional capacity as an attorney on behalf of the commission. In addition, the chairman testified, and it is found, that the commission would not have hired Attorney Brown to conduct the investigation and to prepare the report had he not been an attorney. Furthermore, it is found that the communication to the legal advice sought by the commission; and the communication was made in confidence.

18. It is concluded, based upon the foregoing, that, initially, the report was a privileged communication between Attorney Brown and the commission.

19. However, the privilege is waived when the communications are voluntarily disclosed to third parties. See State v. Taft, 258 Conn. 412 (2001); State v. Turner, 252 Conn. 714 (2000); and Ullman v. State, 230 Conn. 698 (1994). “It is the client’s responsibility to insure continued confidentiality of his communications.” In In re Von Bulow, 828 F.2d 94, 101 (2d Cir. 1987).

20. At the conclusion of the hearing in the matter, the hearing officer ordered the parties to brief the issue of waiver, and the parties filed briefs with this Commission on March 23, 2017. The respondents, in their brief, claimed that the privilege was not intentionally waived when the commission disclosed the report to a third party, i.e., the police chief, because they were required by the due process clauses in the 5th and 14th amendments to the Constitution,¹ and §7-278, G.S., to provide a copy of the report to him.

21. The Commission does not question the assertion that the police chief was entitled to due process before he was disciplined. However, it is found that the respondents failed to prove that due process required that the chief receive a copy of the report.

22. Section 7-278, G.S., provides:

[n]o active head of any police department of any town, city or borough shall be dismissed unless there is a showing of just cause by the authority having the power of dismissal and such person has been given notice in writing of the specific grounds for such dismissal and an opportunity to be heard in his own defense, personally or by counsel, at a public hearing before such authority. Such public hearing, unless otherwise specified by charter, shall be held not less than five nor more than ten days after such notice. Any person so dismissed may appeal within thirty days following such dismissal to the superior court for the judicial district in which such town, city or borough is

¹ The 5th Amendment to the United States Constitution provides, in relevant part: “[n]o person shall...be deprived of life, liberty, or property, without due process of law....” The 14th Amendment provides, in relevant part: “[n]o State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.”

located. Service shall be made as in civil process. Said court shall review the record of such hearing, and, if it appears upon the hearing upon the appeal that testimony is necessary for an equitable disposition of the appeal, it may take evidence or appoint a referee or a committee to take such evidence as it directs and report the same to the court with his or its findings of fact, which report shall constitute a part of the proceedings upon which the determination of the court shall be made. The court, upon such appeal, and after a hearing thereon, may affirm the action of such authority, or may set the same aside if it finds that such authority acted illegally or arbitrarily, or in the abuse of its discretion, with bad faith, malice, or without just cause.

23. As noted in paragraph 13, above, the police chief was disciplined, not dismissed. Based upon the plain language of §7-278, G.S., it is concluded that such statute applies only in situations in which there is a dismissal of a police chief. Moreover, even if §7-278, G.S., applied in a situation in which a police chief is disciplined and not dismissed, it is concluded that such statute did not require the commission to provide a copy of the report to the police chief, but rather, required only that the commission provide notice "in writing of the specific grounds for such dismissal."

24. Based upon the foregoing, it is concluded that the commission voluntarily disclosed the report to the police chief, and it is concluded that such disclosure constituted a waiver of the attorney-client privilege.

25. Accordingly, it is concluded that the respondents violated §§1-210(a) and 1-212(a), G.S., by denying the request, described in paragraph 2(c), above.

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 a copy of the record, described in paragraph 2(c), above, to the complainant, free of charge.

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

Approved by Order of the Freedom of Information Commission at its regular meeting of June 14, 2017.



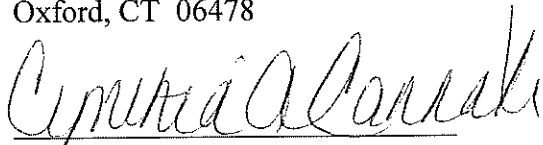
Cynthia A. Cannata
Acting Clerk of the Commission

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:

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Mayor, City of Derby; Police Commission, City of
Derby; and City of Derby
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Cynthia A. Cannata
Acting Clerk of the Commission