

FREEDOM OF INFORMATION COMMISSION
OF THE STATE OF CONNECTICUT

In the Matter of a Complaint by

FINAL DECISION

Jacques Parenteau,

Complainant

Docket # FIC 2018-0529

against

President, State of Connecticut,
University of Connecticut; and
State of Connecticut, University
of Connecticut,

Respondents

August 28, 2019

The above-captioned matter was heard as a contested case on November 30, 2018, February 5, 2019, April 11, 2019, May 30, 2019, and June 20, 2019, at which times the complainant and respondents appeared, stipulated to certain facts and presented testimony, exhibits and argument on the complaint.

The respondents submitted the records at issue for an in camera inspection.

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 September 19, 2018, the complainant appealed to the Commission, alleging that the respondents violated the Freedom of Information (“FOI”) Act by denying his request for certain public records relating to the termination of Kevin Ollie’s employment.
3. It is found that the complainant made an August 29, 2018 request for over 30 categories of records.
4. It is found that the respondents began providing records to the complainant in September of 2018, and continued doing so in the ensuing months, but withheld some records and redacted others.

5. The records that were withheld from the complainant were submitted to the Commission for an in camera inspection.¹

6. 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.

7. 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.

8. 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.”

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

10. The respondents contended that portions (highlighted in yellow on the in camera submission) or entirety of records 0001, 0002, 0333, 0369, 0382, 0416, 0432, 0445, 0457, 0460, 0466, 0517, 0519, 0584-0589, 0591-0593, 0595, 0597, 0598, 0601-0608, 0610, 0611, 0614-0642, 0652, 0682, 0693-0696, 0699, 0702, 0703, 0705, 0706, 0711, 0713, 0717-0728, 0730-0734, 0737, 0738, 0743, 0823-0825, 0848, 0850, 0857, 0863, 0871, 0902, 0911, 0924, 0954-0956, 0963-0965, 0974-0978, 0997, 1005, and 1398-1449 are exempt from disclosure pursuant to §§1-210(b)(11) and (17), G.S., and the Family Educational Rights and Privacy Act, 20 U.S.C. §1232g (“FERPA”).

11. Section 1-210(b)(11), G.S., provides in relevant part that disclosure is not required of:

Names or addresses of students enrolled in any public school or college without the consent of each student whose name or address is to be disclosed who is eighteen years of age or older and a parent

¹ The respondents made several in camera submissions over the course of the hearings in this matter. As of the final hearing, most of the records redacted or withheld and still at issue were assembled by the respondents into a binder labeled “Respondent UConn’s Records Submitted for In Camera Inspection Revised.” In addition, the records submitted for in camera inspection on March 7, 2019 and Bate stamped 1006-1310 also remained at issue.

or guardian of each such student who is younger than eighteen years of age

12. Section 1-217(b)(17), G.S., provides that disclosure is not required of “[e]ducational records which are not subject to disclosure under the Family Educational Rights and Privacy Act, 20 USC 1232g....”

13. The Family Educational Rights and Privacy Act (“FERPA”), 20 U.S.C. §1232g(b)(2), provides in relevant part that:

No funds shall be made available under any applicable program to any educational agency or institution which has a policy or practice of releasing, or providing access to, any personally identifiable information in education records other than directory information, or as is permitted under paragraph (1) of this subsection unless –
 (A) there is written consent from the student’s parents specifying records to be released, the reasons for such release, and to whom, and with a copy of the records to be released to the student’s parents

14. “Education records” are defined at 20 U.S.C. §1232g(a)(4)(A) as “those records, files, documents, and other materials which -- (i) contain information directly related to a student; and (ii) are maintained by an educational agency or institution or by a person acting for such agency or institution.” Further, Title 34, §99.3 of the Code of Federal Regulations provides:

Personally Identifiable Information

The term includes, but is not limited to –

- (a) The student’s name;
- (b) The name of the student’s parent or other family members;
- (c) The address of the student or student’s family;
- (d) A personal identifier, such as the student’s social security number, student number, or biometric record;
- (e) Other indirect identifiers, such as the student’s date of birth, place of birth, and mother’s maiden name;
- (f) Other information that, alone or in combination, is linked or linkable to a specific student that would allow a reasonable person in the school community, who does not have personal knowledge of the relevant circumstances, to identify the student with reasonable certainty; or
- (g) Information requested by a person who the educational agency or institution reasonably believes knows the identity of the student to whom the education record relates.

15. It is concluded that the following portions of the records described in paragraph 10, above, contain personally identifiable information within the meaning of FERPA:

0604: The information contained in the top left-hand box (identifying the student); the information contained in the top right-hand box (the student's secondary school); the information contained in the bottom left-hand box (information about the student and his secondary school); and the names of the schools contained in the large box in the center of the page;

0605: The name and address of the student contained at the top right of the page; the information contained in the box at the bottom of the page; the fax number at the top of the page;

0621: The information contained in the two boxes at the top of the page (identifying the student and his secondary school);

0622: The information contained in the two boxes at the top of the page (identifying the student and his secondary school); the fax number at the bottom of the page;

0623: the information at the top of the page (the student's name, date of birth, parent or guardian, address, school name, address, code, phone and district); and the information at the bottom of the page identifying the school and the school official signing the record; the fax number at the top of the page;

0624: the name of the student at the top of the page, and the stamp of the school at the bottom right of the page;

0625: the name and address of the student, and the student's secondary school and its address, at the top of the page; the fax number at the bottom of the page;

0632: the student's name, date of birth, email address and telephone number; the NCAA ID number;

0722: At the top of the page, the name and address of the student's secondary school, the student's name, address, date of birth, telephone number and guardian's name; the names of teachers;

0980 and 0981: The student's name and identification number;

0983, 0984 and 0986: The student's name, date of birth, and secondary school name and address (including the city in which the school is located, which appears elsewhere in the records); and the name of the first course listed in the transcript, which could lead to the identification of the student);

0996-0998: The student's name, identification number, date of birth date, and secondary school name and address.

0997: The instructors' name and initials.

16. It is concluded that, apart from the personally identifiable information described in paragraph 15, above, the remainder of the information contained in the records described in paragraph 15 is not personally identifiable information, and that the respondents violated the FOI Act by withholding those nonexempt portions of those records.

17. It is concluded that the remainder of the records or portions of records described in paragraph 10, above, contain personally identifiable information within the meaning of FERPA,

and that the respondents did not violate the FOI Act by withholding those exempt portions of the in camera records.

18. Next, the respondents contended that portions (highlighted in yellow on the in camera submission) or the entirety of records 1006-1310, consisting of emails between attorneys for the respondents and the respondents' employees, are exempt from disclosure pursuant to §1-210(b)(10), G.S., the attorney-client privilege.

19. 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.

20. 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. . . .

21. 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.

22. It is found that, with the exception of records 1045-1056, the records described in paragraph 18, above, were transmitted in confidence between the respondents' employees acting within the scope of their employment and their attorneys, relating to legal advice sought by the respondents from that attorney, and that there is no claim that the communications were shared with third parties.

23. It is found, however, that records 1045-1056, which otherwise satisfy the elements of the privilege, are emails among the respondents' employees and attorneys, and a third-party vendor acting as the attorney's agent.

24. It is found that the third party vendor was retained for the purpose of putting electronic information obtained from the client into a form usable by the attorney.

25. 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”).

26. 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.

27. It is therefore concluded that the privilege was not waived by the inclusion of the third-party vendor in the emails comprising records 1045-1056.

28. It is concluded that the respondents did not violate the FOI Act by withholding the privileged records or portions of records identified in paragraph 18, above.

29. The respondents contended that the portions (highlighted in yellow on the in camera submission) or the entirety of records 1314-1326, 1328-1329, 1343, and 1345-1347, which consist of attorney billing statements, are also exempt from disclosure pursuant to §1-210(b)(10), G.S., the attorney-client privilege.

30. Specifically, the respondents have highlighted as exempt the descriptions of the services rendered.

31. Our courts have distinguished between privileged and non-privileged information contained in an attorney billing statement. See, for example, *Emerick v. Emerick*, Docket No. FA-14-4073480-S, Superior Court, J.D. of Hartford, Memorandum of Decision dated April 20, 2015 (Albis, J.):

An attorney's billing invoices may be protected by the attorney-client privilege to the extent that they include information that reveals litigation strategy or the nature of the services rendered. See *Pryor v. Pryor*, Superior Court for the Judicial District of Fairfield at Bridgeport, Docket No. FA08 402 66 74S (January 22, 2010) [49 Conn. L. Rptr. 274].

32. See also *Bruno v. Bruno*, Docket No. FA-05-40049006-S, Superior Court, JD. Of Danbury, Memorandum of Decision dated July 10, 2009 (Axelrod, J.T.R.):

It is generally accepted ... that “attorney billing statements and time records are protected by the attorney-client privilege *only* to the extent that they reveal litigation strategy and/or the nature of services performed.” *United States v. Keystone Sanitation Co.*, 885 F.Supp. 672, 675 (M.D.Pa.1994) (citing cases) (emphasis in original). ...

It appears that both privileged and non-privileged material may exist side-by-side For example, a typical time sheet may contain several different pieces of information, such as the attorney's name, the client's name, the general matter being worked on if the attorney has represented the client on more than one matter, the date and time the services were provided, as well as a

description of the actual legal services performed. In this example, only the last item of information would generally be protected under the attorney-client privilege and should be redacted before production. ...

In *Clarke v. American Commerce National Bank*, 974 F.2d 127, (9th Cir.1992), the court also stated in part as follows:

Not all communications between attorney and client are privileged. Our decisions have recognized that the identity of the client, the amount of the fee, the identification of payment by case file name, and the general purpose of the work performed are usually not protected from disclosure by the attorney-client privilege. See, e.g., *Tornay*, 840 F.2d at 1426; *In re Grand Jury Witness (Salas and Waxman)*, 695 F.2d 359, 361-62 (9th Cir.1982); *Hodge and Zweig*, 548 F.2d at 1353; *United States v. Cromer*, 483 F.2d 99, 101-02 (9th Cir.1973). However, correspondence, bills, ledgers, statements, and *time records which also reveal* the motive of the client in seeking representation, litigation strategy, or the specific nature of the services provided, such as *researching particular areas of law, fall within the privilege.* *Salas*, 695 F.2d at 362.

[Emphases in original.]

33. It is concluded that the information redacted by the respondents, which describes the nature of the services provided, is exempt from disclosure pursuant to §1-210(b)(10), G.S., and that the respondents did not violate the FOI Act by withholding those portions of the billing records.

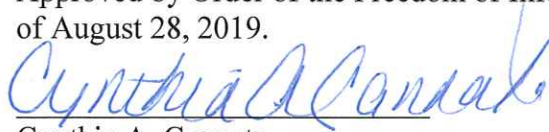
34. It is concluded that it is unnecessary to address the respondents' additional claims of exemption, all of which apply to records already concluded to be exempt in this decision.

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

1. If they have not already done so, the respondents shall forthwith provide to the complainant copies of all non-exempt records or portions of records as described in the findings and conclusions, above.

2. In complying with paragraph 1 of this order, the respondents may also, consistent with long-standing Commission precedent, redact the social security numbers contained in records 0613 and 0973.

Approved by Order of the Freedom of Information Commission at its regular meeting of August 28, 2019.



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:

JACQUES PARENTEAU, c/o Attorney Jacques J. Parenteau, Madsen, Prestley & Parenteau, LLC, 105 Huntington Street, New London, CT 06320 and Attorney Claire Howard, Madsen, Prestley & Parenteau LLC, 402 Asylum Street, Hartford, CT 06103

**PRESIDENT, STATE OF CONNECTICUT, UNIVERSITY OF CONNECTICUT;
AND STATE OF CONNECTICUT, UNIVERSITY OF CONNECTICUT**, c/o Attorney Nathan LaVallee, Office of the General Counsel, 343 Mansfield Road, Unit 1177, Storrs, CT 06238



Cynthia A. Cannata
Acting Clerk of the Commission