

FREEDOM OF INFORMATION COMMISSION
OF THE STATE OF CONNECTICUT

In the Matter of a Complaint by

FINAL DECISION

Josh Kovner and the Hartford Courant,

Complainants

against

Docket #FIC 2017-0310

Commissioner, State of Connecticut,
Department of Correction; and State of
Connecticut, Department of Correction,

Respondents

December 13, 2017

The above-captioned matter was heard as a contested case on September 14, 2017, at which time the complainants and the respondents appeared, stipulated to certain facts 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, on June 5, 2017, the complainants requested by email:
 - a. A copy of the review of 25 medical cases done by Criminal Justice Institute, Inc. – a consultant hired by the Department of Correction... [and]
 - b. The names of the eight inmates whose deaths are among the group of 25 medical cases reviewed by the consultant...
3. It is found that, on June 5, 2017, the respondents informed the complainants by email that they denied the request based on “the attorney/client privilege and the attorney work product privilege.”
4. By email filed on June 5, 2017, the complainants appealed to this Commission, alleging that the respondents violated the Freedom of Information (“FOI”) Act by failing to provide copies of the records they requested.
5. 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, ... 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:

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, ... or (3) receive a copy of such records in accordance with section 1-212.

7. Section 1-212(a), G.S., provides in relevant part: "Any 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 requested records are public records, within the meaning of §§1-200(5), 1-210(a), and 1-212(a), G.S.

9. Section 1-210(b)(10), G.S., provides that disclosure is not required of "communications privileged by the attorney-client relationship."

10. 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.

11. 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. . . .

12. 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.

13. At the hearing in this matter, the respondents’ attorney, Assistant Attorney General Terrence O’Neill, testified extensively in support of the respondents’ claimed exemptions.¹ Attorney O’Neill and Commissioner Semple also submitted affidavits in support of the exemptions.

14. It is found that the requested report was created by a third-party consultant hired by the respondent Commissioner of Correction, at the direction of Assistant Attorney General O’Neill, as a result of confidential communications between the commissioner and his agency’s attorney concerning the quality of medical care provided to incarcerated individuals. It is found that the contract was for \$63,000 to “review approximately 20 medical cases that have led, or are anticipated to lead to, litigation against officials and employees of the [respondents] and/or its subcontractor, The University Connecticut Health Center’s Correctional Managed Health Care Program, involving the medical care provided to certain inmates as well as the procedures that govern the delivery of medical care in [the respondents’] correctional facilities.” (See Exhibit C). It is found that the review was performed by a physician hired by the consultant. It is found that the physician’s review and subsequent report requested by the complainant was created for the purpose of giving Assistant Attorney General O’Neill a medical expert’s assessment of the medical care provided to certain inmates. It is found that Assistant Attorney General O’Neill used the information in the report to inform the legal advice he provided to the respondent Commissioner.

15. It is found that the consultant’s report was provided directly to Assistant Attorney General O’Neill, who has shared the report only with the respondent Commissioner. It is found that the Commissioner and Attorney O’Neill consider the report to be highly confidential and have maintained the report’s confidentiality.

16. It is found that the complainants challenged the respondents’ claim of exemption, and at the conclusion of the hearing asked the hearing officer and FOI Commission to inspect the records in camera to determine whether the respondents had proven that the records were exempt from mandatory disclosure.

17. Over the respondents’ objection, the hearing officer granted the complainants’ request, and in a written order dated September 15, 2017, directed “the respondents to submit for an in camera inspection a copy of any records they maintain for which they claim an exemption from disclosure. In addition, the respondents are ordered to submit an index referencing each record, and each item within each record, claimed to be exempt from disclosure.” The hearing officer ordered the respondents to deliver such records by September 28, 2017. On September 27, 2017, the hearing officer granted the respondents’ request for an extension of time to respond to the Order for in camera inspection, and set a new deadline of October 12, 2017.

¹ Assistant Attorney General O’Neill did not file an appearance and all respondents are represented in this matter by other counsel.

18. On October 11, 2017, the respondents filed a *Motion for Reconsideration and To Vacate Order for In Camera Inspection*. The respondents submitted neither the in camera records nor an index. The complainants filed a written objection on October 17, 2017.

19. On October 26, 2017, the hearing officer denied the Respondents' *Motion* (see *Ruling on Respondents' Motion*, October 26, 2017), and ordered the respondents to submit the requested records for in camera inspection by November 3, 2017.

20. It is found that, on November 2, 2017, the respondents filed a *Petition for Administrative Appeal to the Full FOI Commission from the Order of the Hearing Officer Re: In Camera Inspection and Order Denying Reconsideration*. The complainants filed an Opposition to the Petition on November 3, 2017.

21. The FOI Commission considered the respondents' *Petition* and the complainants' *Opposition* at their regular meeting of November 15, 2017. After discussion, the Commission voted unanimously to deny the respondents' *Petition*. The Commission ordered the respondents to submit the requested records for in camera inspection by November 22, 2017.

22. On November 21, 2017, the respondents submitted the requested records for in camera inspection. Such records shall be referenced as IC-2017-0310-1 through IC-2017-0310-48.

23. Upon careful inspection of the in camera records, it is found that the records support the extensive testimony of the respondents' witnesses. It is found that the records are "facts," not "legal advice," comprising a medical expert's evaluation of medical data and conclusions from that data concerning the medical care afforded to certain inmates, as well as recommendations. It is found that the report is "the giving of information to the lawyer to enable counsel to give sound and informed advice." (Internal quotation marks omitted; citation omitted). Olson v. Accessory Controls and Equipment Corp., 254 Conn. 145, 157 (2000).

24. It is found that the in camera records are records prepared by an agent of a government attorney in furtherance of the rendition of legal advice, within the meaning of §52-146r, G.S. With respect to the records described in paragraph 2.b., above, it is found that disclosure of the names of the inmates whose cases were selected for review would reveal which cases Attorney O'Neill anticipated may result in litigation against the State, as well as other aspects of Attorney O'Neill's advice to, and communication with, his client.

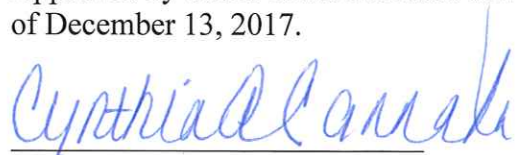
25. It is found that the records requested by the complainant are protected by the attorney-client privilege and are permissively exempt pursuant to §1-210(b)(10), G.S.

26. It is concluded, therefore, that the respondents did not violate the FOI Act as alleged.

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

1. The complaint is dismissed.

Approved by Order of the Freedom of Information Commission at its regular meeting of December 13, 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:

JOSH KOVNER, AND THE HARTFORD COURANT, 285 Broad Street, Hartford, CT 06115

COMMISSIONER, STATE OF CONNECTICUT, DEPARTMENT OF CORRECTION; AND STATE OF CONNECTICUT, DEPARTMENT OF CORRECTION c/o Assistant Attorney General Steven R. Strom, Office of the Attorney General, 110 Sherman Street, Hartford, CT 06105



Cynthia A. Cannata
Acting Clerk of the Commission