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Paul Kadri,
Complainant(s)
against

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

Notice of Meeting

Docket #FIC 2012-642

September 4, 2013

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, September 25, 2013.** 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 September 13, 2013***. 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 September 13, 2013***. **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 September 13, 2013***, 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: Paul Kadri
Floyd J. Dugas, Esq. and Jeffrey P. Mogan, Esq.

9/4/13/FIC# 2012-642/Trans/wrbp/VDH//TAH

FREEDOM OF INFORMATION COMMISSION
OF THE STATE OF CONNECTICUT

In The Matter of a Complaint by

Paul Kadri,

Complainant

against

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

Respondents

Report of Hearing Officer

Docket #FIC 2012-642

September 4, 2013

The above-captioned matter was heard as a contested case on May 2, 2013, August 1, 2013 and August 29, 2013, at which times the complainant 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, by letter dated August 29, 2012, the complainant sent the respondents the following request for copies of the records:

a. All email communications to or from the following individuals from April 1, 2012 to the present:

1. Each member of the Board of Education, more specifically; Kirstin Hoyt, Beverly Washington, Shelly Gardner, Rita Volkman, Robert Perruzzati, Elizabeth Giannacoplos, Patricia Doyle, Kim Watson and Chaz Zezulka;

2. Each member of the Superintendent's Cabinet, more specifically: Mary Ann Butler, Carolyn Dickey, Laurie LePine, Amy Smerjian, Paul Sikorski, Denise Doolittle, Wesley

Greenleaf;

3. Alisha Stripling;

4. Paula Halderman;

b. Bill Blake: A copy of the contract with Bill Blake to conduct the investigation of Mr. Kadri, as well as copies of any and all correspondence, including e-mails, between Mr. Blake and any member or representative of the Board of Education relating to the investigation, Mr. Blake's retention, and any directions or information provided to Mr. Blake. We would also like copies of any and all invoices or bills that have been submitted by Mr. Blake;

c. A copy of the contract with the redistricting consultants retained by the Board, including any amendments thereto, the amount of money budgeted, any and all bills or invoices received and any and all correspondence, including e-mails, that led to the recommendation and hiring of said firm;

d. Bercham, Moses & Devlin, P.C.: Copies of all bills for services performed for the Groton Board of Education from April 1, 2012 to the present;

e. A copy of the e-mail written by Floyd Dugas that was released to the press and parts of which were published in the New London Day on July 17, 2012; and

f. The calendar, e-mails, contacts and documents that reside on the computer used by Paul Kadri during the time he had served as Superintendent.

3. It is found that the respondents acknowledged receipt the complainant's request orally, and then again by letter dated September 19, 2012. It is found that, in the September 19, 2012 correspondence, the respondents indicated that the Board of Education was in the process of assembling the records, and stated that the request was "voluminous" and would take time to complete.

4. It is further found that, by several letters sent between September 19, 2012 and November 12, 2012, the complainant and the respondents continued to correspond about the status of the complainant's request.

5. By letter dated November 13, 2012 and filed November 14, 2012, the complainant appealed to this Commission, alleging that the respondents violated the Freedom of Information ("FOI") Act by denying his request for copies of the records described in paragraph 2, above.

6. As part of his appeal, the complainant requested that this matter be given expedited scheduling. By order dated November 20, 2012, this request was denied.

7. 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.

8. 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.

9. 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."

10. It is found that the records requested by the complainant are public records within the meaning of §§1-200(5), 1-210(a), 1-212(a), G.S.

11. At the May 2, 2013 contested case hearing, the parties made a joint motion to continue the hearing so that they could try to resolve the case without the need for additional hearings, or, at a minimum, to resolve as many outstanding matters as possible. The parties' motion was granted.

12. At the commencement of the August 1, 2013 continued hearing, the parties indicated on the record that they had resolved the issues with regard to the requested records except for request 2.e, above.

13. With regard to the matters that had been resolved, the parties requested and were permitted to make a joint statement for the record. In relevant part, the complainant stated that he did not believe that the respondents provided him with the records in a timely manner. The respondents stated that, from their perspective, the records were provided in a timely manner. The parties jointly requested that the hearing officer not make any findings with regard to promptness. The Commission respects the parties' request, and,

therefore, will not address this matter further.

14. With regard to the request detailed in paragraph 2.e, above, the respondents contend that the record is 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."

15. The complainant made a motion to have the hearing officer conduct an in camera review of the record claimed to be exempt from disclosure. The hearing officer granted the motion and, the conclusion of the August 1, 2012 hearing, the respondents submitted the record described in paragraph 2.e, above, to the Commission for an in camera review (hereinafter the "in camera records"). The in camera record can be described as follows: one two-page email.

16. 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.

17. 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. . . .

18. The Supreme Court has 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.

19. The parties do not dispute that the records described in paragraph 2.e, above, at one time comprised a confidential attorney-client communication. However, the complainant contends that the privilege that once attached to this communication has been waived because the records were intentionally disclosed to the New London Day. The respondents contend that the attorney-client privilege remains intact.

20. It is found that the complainant was the former superintendent for Groton Public Schools. It is found that the respondent board of education placed the complainant on administrative leave pending an investigation into the complainant's interactions with district employees. It is found that the complainant's last day of employment with the Groton Public School system was March 5, 2013.

21. It is found that, before the respondents' investigation was finalized, the chairperson from the board of education received a request from counsel for the complainant for a preview of the investigation report. It is further found that the chairperson requested that the board of education's attorney provide her with legal advice concerning the risks involved in revealing the report before it was finalized. It is found that, by email dated July 12, 2012, the board of education's attorney provided his legal advice to the chairperson. Thereafter, it is found that the chairperson shared the two page email with the eight other members on the board of education.

22. It is found that, approximately four days later, a staff writer for the New London Day published an article entitled, "Kadri's options for retaliation discussed in board attorney's email." It is found that the article revealed that the staff writer had obtained a copy of counsel's legal advice to the board of education. It is further found that the staff writer quoted the email in his article multiple times. In fact, it is found that the article quotes nearly half of the confidential communication verbatim, while paraphrasing an additional sentence. It is the complainant's contention that, because of this substantial disclosure, the email, including the remaining, undisclosed portions, is no longer protected by the attorney-client privilege.

23. In analyzing waiver, the Connecticut Supreme Court has adopted a "middle of the road" or moderate approach to strike the fairest balance between the competing policy interests of preserving confidential attorney-client communications and encouraging the party seeking the benefit of the attorney-client privilege to take care in handling of otherwise privileged material. See Harp v. King, et al., 266 Conn. 747, 768-69 (2002) ("This approach properly places a burden on that party to preserve the confidentiality of the material that inadvertently was disclosed notwithstanding those measures. Conversely, the approach allows for the recognition of waiver of the privilege when, in view of the totality of the circumstances, the party claiming the privilege has failed to take proper precautions to safeguard the confidentiality of the inadvertently disclosed material."). In the case of an "inadvertent" disclosure, the following five-step analysis is the guide to whether a waiver has occurred: 1) the reasonableness of the precautions taken to prevent the inadvertent disclosure in view of the extent of document production; 2) the number of inadvertent disclosures; 3) the extent of the disclosures; 4) the promptness of measures taken to rectify the disclosure; and 5) whether the overriding interest of justice would be served by relieving the party of its error. See id. at 966-67.

24. Although the complainant's contention in this case is that there was an intentional disclosure of privileged information, based on the evidence presented at the contested case hearings, the only finding that can be made about the disclosure is that it is unexplainable. Accordingly, the Harp analysis should be considered in determining

whether a waiver has occurred. See Maldonado v. State of New Jersey, et al., 225 F.R.D. 120, 129 (D. N.J. 2004) (finding that, in considering the second factor concerning the number of inadvertent disclosures, one, unexplained disclosure weighs against a finding the attorney-client privilege has been waived); see also In re Dayco Corp. Derivative Securities Litig., 102 F.R.D. 468 (S.D. Ohio 1984) (holding that a reporter who received an incriminating diary from an unknown source did not constitute a waiver).

25. With regard to the first factor in the Harp analysis, the reasonableness of the precautions taken to prevent the inadvertent disclosure, it is found that the email at issue was prominently marked "Confidential: Subject to the Attorney Client Privilege" and was sent by counsel to Kristen Hoyt, the Chairman of the Board of Education. Based on the Chairman Hoyt's testimony at the August 29, 2013 hearing, it is found that she has a policy of safeguarding privileged communications. It is found that, before forwarding this particular email on to the other board members, Chairman Hoyt reiterated to the members that the document attached to her email contained privileged legal advice, and should not be shared outside of the board. It is found that the board members have on previous occasions discussed as a group the importance of carefully handling attorney-client privileged communications. Finally, it is found that, with regard to the record in question, Chairman Hoyt added her own "attorney-client privilege" notation to the email before forwarding it on to the other board members.

26. The second factor in the analysis concerns the number of inadvertent disclosures. It is found that this factor weighs against a finding of waiver because there was just one disclosure, and it was not inadvertent, but rather, unexplainable.[1] The complainant contends that the Commission should find that a board member intentionally disclosed the confidential communication because, in the days following the article's publication, the board's attorney's began to research such issues as "remedies for leak"; "procedures re: removal of a Board member and code of ethics"; and "the effect of the attorney client privilege on one member of the board releasing to a third party confidential protected communication without permission from entire board." However, it is found that, while counsel's entries could indicate that a board member leaked the email to the press, these entries could just as easily indicate that counsel is researching these issues in case such an event occurred. There is no evidence in this record from which the Commission can conclusively determine that it was a board member who leaked the

[1] While the complainant contends that the respondent agency has a history of disclosing privileged information, such a finding cannot be made on the record in this case. Specifically, the complainant contends that, while he was superintendent, he would conduct board briefings. Before such briefings, the complainant would send letters to the board members, which letters he believed were confidential. In March 2011, the complainant contends that one of his letters was anonymously leaked by a board member to certain town leaders. The complainant contends that, because his erroneous belief that the briefing letters were confidential was shared by all of the board members, this incident should be factored into the Harp analysis to show a history of leaking confidential communications by this respondent agency. However, the complainant's argument fails in the first instance because he cannot provide reliable evidence concerning the various board member's beliefs. The complainant's argument fails in the second instance because, even if the board members did believe the briefing letters were confidential, just as in the instant case, other than the complainant's contention that the disclosure was intentional, all that can ultimately be found about the March 2011 disclosure is that it too is unexplainable.

confidential communication to the press, let alone that such action was done intentionally.

27. With regard to the third and fourth factors, namely, the extent of the inadvertent disclosure and the time taken to rectify the error, it is found that, upon learning that the email had been leaked to the press, Chairman Hoyt immediately contacted the board members and the board's attorney to discuss the disclosure of the email and determine what the board's next steps should be. It is further found that the Chairman also contacted the press to determine how it obtained a copy of the email, and was informed that the document was anonymously dropped off. It is further found that the board of education convened in public to discuss the disclosure, at which time the individual board members expressed their outrage about the disclosure, and reviewed the importance of safeguarding privileged documents. In addition, it is found that, after the disclosure of the email in question, the Board of Education convened a public meeting to attend a FOI training session presented by the Commission's Freedom of Information Officer, at which time the attorney-client privilege was discussed.

28. Finally, with regard to the fifth factor, namely, whether the overriding interest of fairness would be served be relieving the respondents of this error, it is found this consideration also weighs against a finding of waiver. There is no doubt in this case that the record at issue was prepared by counsel in direct response to his client's request for legal advice. Because the source of the disclosure remains unexplained, the Commission cannot say that the client was the source of the disclosure. However, what can be said, and what is found in this case, is that the disclosure of the email in question was not authorized by the respondent agency. Moreover, the fifth factor focuses only on whether the act of "restoring immunity to an inadvertently disclosed document would be unfair," and not, as the complainant contends, whether respecting the privilege deprives the complainant of pertinent information. See Harp, 366 Conn. at 774. (Citation omitted).

29. Accordingly, based on the facts of this case, it is concluded that the unexplained disclosure of the privileged email did not constitute a waiver of the attorney-client privilege. It is further concluded that the respondents did not violate the FOI Act by refusing to disclose the email.

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.

Valicia Dee Harmon

Valicia Dee Harmon
as Hearing Officer

FIC2012-642/HOR/vdh/08/29/2013