

FREEDOM OF INFORMATION COMMISSION
OF THE STATE OF CONNECTICUT

In the Matter of a Complaint by

FINAL DECISION

Michael Harrington,

Complainant

against

Docket #FIC 2017-0453

President, Materials Innovation and
Recycling Authority; and Materials
Innovation and Recycling Authority,

Respondents

April 11, 2018

The above-captioned matter was heard as a contested case on February 1, 2018, 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 July 5, 2017, the complainant requested copies of records of certain communications between Peter Boucher ("Boucher") and the staff and board of the respondent Materials Innovation and Recycling Authority ("MIRA") (formerly known as Connecticut Resources Recovery Authority or "CRRRA"). The complainant also requested copies of records of certain communications on which Boucher was copied.¹
3. It is found that the respondents did not respond to the request, described in paragraph 2, above.

¹ The request at issue in this case is directly related to an earlier request that was the subject of two prior contested cases decided by the Commission: Michael Harrington v. Laurie Hunt, Director, Legal Affairs Department, Connecticut Resources Recovery Authority, et al., Docket #FIC 2011-698 (August 8, 2012); and Michael Harrington v. Thomas Kirk, President, Connecticut Resources Recovery Authority, et al., Docket #FIC 2012-650 (October 23, 2013). The decision in Docket #FIC 2012-650 was appealed, first to the superior court, which upheld the Commission's decision, and then, to the Supreme Court, which reversed the decision and remanded the case to the Commission. See Harrington v. Freedom of Information Commission, 323 Conn. 1 (2016). The Commission held additional hearings and issued a Final Decision After Remand in that case, which decision is dated January 10, 2018.

4. By letter dated and filed August 4, 2017, the complainant appealed to this Commission, alleging that the respondents violated the Freedom of Information (“FOI”) Act by failing to provide him with copies of the requested records.

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 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 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 concluded that the requested records are public records within the meaning of §§1-200(5) and 1-210(a), G.S.

9. The respondents claimed that the majority of the requested records are exempt from disclosure pursuant to the attorney-client privilege. The respondents also withheld other responsive email communications that the Commission concluded, in Docket #FIC 2012-650 (Final Decision After Remand, January 10, 2018), were exempt from disclosure pursuant to §1-210(b)(4), G.S., as records of strategy or negotiation with respect to pending claims or pending litigation.

10. On January 26, 2018, the hearing officer ordered the respondents to submit the records they claimed were exempt from disclosure to the Commission, for in camera inspection, along with an index describing and numbering the records, and indicating the statutory exemption(s) claimed. On February 1, 2018, the respondents submitted records and an index to the Commission. Such records consist of 142 pages of email communications between Boucher and MIRA staff or board members, and email communications on which Boucher was copied.

Attachments to some of the email communications also were submitted for in camera inspection. It is found that some of the email communications and attachments submitted for in camera inspection were disclosed to the complainant prior to, or during, the hearing and therefore no longer are at issue.

11. With regard to the respondents' claim that the requested records still at issue, or portions thereof, are 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.

12. Section 52-146r(2), G.S., defines "confidential communications" as:

[a]ll 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...

13. 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).

14. It is found that Boucher was one of several attorneys with the law firm of Halloran & Sage, which firm acted as MIRA's general counsel at the time the email communications were created. It is found that, although Boucher was the primary contact person for MIRA at Halloran & Sage, other attorneys at that firm also provided legal advice to MIRA. It is found that Laurie Hunt ("Hunt") was the director of legal affairs for MIRA, served as in-house counsel, and directed the legal services provided by outside counsel. Hunt testified at the hearing in this matter as to the general subject matter of each email communication still at issue, and identified each sender and recipient (including those who were copied on such email communication) as either an attorney acting in a professional capacity for MIRA, or a MIRA employee. It is found that Hunt, in her role as in-house counsel, was the sender or a recipient of, or was copied on, virtually every email communication still at issue.

15. A careful in camera inspection of each email communication, or portions thereof, still at issue was conducted. Based upon the in camera inspection and Hunt's testimony, it is found that each such email communication was between an attorney acting in a professional capacity for MIRA and an employee or official of MIRA, and was related to legal advice sought by an employee or official of MIRA from the attorney. It is further found that the email communications at issue were not copied to any person other than an attorney acting in a professional capacity for MIRA or an employee of MIRA. Additionally, based upon the context in which each email communication was created (which context is apparent from a review of the email communication itself or in conjunction with Hunt's testimony), and the limited number of recipients of each email communication, it is found that each email communication was made in confidence.

16. It is concluded that the email communications, or portions thereof, still at issue and claimed to be protected by the attorney-client privilege, are so privileged, and there is no indication in the record that the privilege was waived with respect to any such communications. Accordingly, it is concluded that such email communications, or portions thereof, are exempt from disclosure.

17. After careful in camera inspection of the attachments still at issue, it is found that such attachments consist of memoranda prepared by an attorney with Halloran & Sage, acting in his or her professional capacity as counsel for MIRA, relating to legal advice sought by MIRA from Halloran & Sage, and that the communications contained in such memoranda were made in confidence.

18. It is concluded that the attachments still at issue are protected by the attorney-client privilege. There is no indication in the record that the privilege was waived with regard to the attachments, and it is therefore concluded that the attachments still at issue are exempt from disclosure pursuant to the attorney-client privilege.

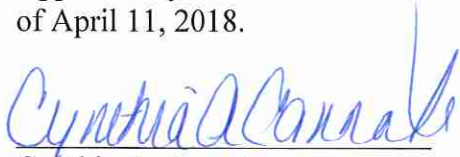
19. With regard to the email communications the respondents claimed are exempt from disclosure pursuant to §1-210(b)(4), G.S., in accordance with the Commission's decision in Docket #FIC 2012-650 (see paragraph 9, above), after careful in camera inspection of such records, it is found that the Commission concluded in Docket #FIC 2012-650, that such records are so exempt.

20. Based upon the foregoing, it is concluded 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 April 11, 2018.



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:

MICHAEL HARRINGTON, Murtha Cullina LLP, City Place I, 185 Asylum Street, Hartford, CT 06103

PRESIDENT, MATERIALS INNOVATION AND RECYCLING AUTHORITY; AND MATERIALS INNOVATION AND RECYCLING AUTHORITY, c/o Attorney Dan E. Labelle, Halloran & Sage, LLP, 315 Post Road West, Westport, CT 06880



Cynthia A. Cannata
Acting Clerk of the Commission