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SUPERIOR COURT

DOCKET NO. HHB-CV-19-6055846 2020 SEP 10: PM SUPERIOR COURT

SEBASTIAN GIULIANO, ET AL JUDICIAL DISTRICT JUDICIAL DISTRICT
NEW BRITAIN OF NEW BRITAIN

VS. : ADMINISTRATIVE APPEALS
: SESSION
FREEDOM OF INFORMATION :
COMMISSION, ET AL : SEPTEMBER 10, 2020

MEMORANDUM OF DECISION

INTRODUCTION:

This is an administrative appeal seeking review of a decision of the Freedom of Information Commission (FOIC) in the matter of *Drew v. Giuliano*, Freedom of Information Commission, Docket # FIC 2018-0598. Daniel Drew was the mayor of Middletown. Sebastian Giuliano (Giuliano) and Mary Bartolotta (Bartolotta) were members of the Common Council of Middletown.

FACTS AND PROCEDURAL HISTORY:

In December of 2017, a city employee complained that the mayor had unlawfully harassed her. Around the same time, the city also received a complaint from a union representing city employees alleging that the mayor had been improperly soliciting campaign contributions from city employees. In response to the complaints, the Common Council hired the law firm of LeClairRyan to conduct an investigation, and to report findings and recommendations to the Common Council. The Common Council established a subcommittee to administer the

electronic notice sent to all counsel of record.
mailed to Reporter of Judicial Decisions.
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investigation, and Giuliano and Bartolotta were members of that subcommittee. The Clerk of the Common Council acted as an agent for the Common Council and for the subcommittee.

As relevant here, Mayor Drew requested the following records from the Common Council pursuant to the Freedom of Information Act (FOIA):“all emails, text messages, calendars, written communications in any form, unredacted legal bills, and cellular telephone logs pertaining to this investigation between members of the subcommittee, any employee/associate/partner of LeClair Ryan, and any staff of the City of Middletown”¹ *Drew v. Giuliano*, supra, Docket # FIC 2018-0598, p. 2. The Clerk of the Common Council maintained records responsive to the foregoing request.

Responsive documents were provided to Mayor Drew, but some documents were withheld based upon a claim of attorney-client privilege.² Mayor Drew filed a complaint with FOIC and a contested case hearing was held. At the hearing, Mayor Drew contested, inter alia, the withholding of documents based upon attorney-client privilege. The hearing officer inspected the documents in question in camera. Based upon the findings of the hearing officer, the FOIC allowed some documents to be withheld as attorney-client privileged, but required others to be disclosed. In its final decision, the FOIC ordered that the documents specified in numbered

¹ Other document requests were made, but are not relevant to this appeal.

² The responsive documents had been reviewed by outside counsel for the city to determine which documents were covered by the attorney-client privilege, and the documents deemed privileged by the outside counsel were withheld.

paragraph forty-eight of its final decision be produced, finding that the specified documents were not covered by the attorney-client privilege.

Giuliano and Bartolotta were the respondents in the administrative proceeding below. Giuliano, Bartolotta, and Linda Reed (Reed), the Clerk of the Common Council, appealed the final decision of the FOIC to this court. The Clerk of the Common Council was and remains a city employee and the Clerk of the Common Council. Giuliano and Bartolotta were members of the Common Council when this appeal was filed, but are no longer members of the Common Council.

STANDARD OF REVIEW:

This appeal is brought pursuant to the Uniform Administrative Procedure Act (UAPA), General Statutes § 4-183.³ Judicial review of an administrative decision in an appeal under the UAPA is limited. See *Murphy v. Commissioner of Motor Vehicles*, 254 Conn. 333, 343, 757 A.2d 561 (2000). “[R]eview of an administrative agency decision requires a court to determine whether there is substantial evidence in the administrative record to support the agency’s

³ Section 4-183 (j) provides in relevant part: “The court shall not substitute its judgment for that of the agency as to the weight of the evidence on questions of fact. The court shall affirm the decision of the agency unless the court finds that substantial rights of the person appealing have been prejudiced because the administrative findings, inferences, conclusions, or decisions are: (1) In violation of constitutional or statutory provisions; (2) in excess of the statutory authority of the agency; (3) made upon unlawful procedure; (4) affected by other error of law; (5) clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record; or (6) arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion. If the court finds such prejudice, it shall sustain the appeal and, if appropriate, may render a judgment under subsection (k) of this section or remand the case for further proceedings.”

findings of basic fact and whether the conclusions drawn from those facts are reasonable. . . . Neither [the Supreme Court] nor the trial court may retry the case or substitute its own judgment for that of the administrative agency on the weight of the evidence or questions of fact. . . . Our ultimate duty is to determine, in view of all of the evidence, whether the agency, in issuing its order, acted unreasonably, arbitrarily, illegally or in abuse of its discretion.” (Internal quotation marks omitted.) *Id.*, 343.

Although the courts ordinarily afford deference to the construction of a statute applied by the administrative agency empowered by law to carry out the statute’s purposes, “[c]ases that present pure questions of law . . . invoke a broader standard of review than is . . . involved in deciding whether, in light of the evidence, the agency has acted unreasonably, arbitrarily, illegally or in abuse of its discretion.” (Internal quotation marks omitted.) *Dept. of Public Safety v. Freedom of Information Commission*, 298 Conn. 703, 716, 6 A.3d 763 (2010).

ANALYSIS:

A. Aggrievement and Standing

The FOIC has challenged the standing of the plaintiffs to bring this appeal. The FOIC has also asserted that the plaintiffs are not aggrieved. During oral argument of the merits of this appeal, the plaintiff’s attorney conceded that his client Reed was not aggrieved and could be dismissed from the appeal. Reed was not party in the underlying contested case and the orders entered are not directed to her. Further, Reed did not intervene in the administrative case below.

Accordingly, the court respectfully finds that Reed is not aggrieved and dismisses her claim in this appeal.

Giuliano and Bartolotta were members of the Common Council when this appeal was filed, but subsequently were not re-elected. In fact, Giuliano and Bartolotta were appointed by the Common Council to a subcommittee tasked with initiating and controlling the investigation that gave rise to the complaint in this matter. They were both respondents in the contested administrative case below. The complaint filed by Mayor Drew with the FOIC names Giuliano and Bartolotta as respondents at their home addresses and states: “This request was made directly to members of the Middletown Common Council Sebastian Giuliano and Mary Bartolotta.”

Drew v. Giuliano, supra, Docket # FIC 2018-0598, complaint. This appeal lists their addresses as their official address as council members in Middletown.⁴ Most importantly, the final decision of the FOIC enters the following orders: “1. The **respondents** shall forthwith provide the complainant, free of charge, with a copy of the records identified in paragraph 48, of the findings, above. 2. In complying with this order, the respondents may redact from such records . . .” (Emphasis added.) *Drew v. Giuliano*, supra, Docket # FIC 2018-0598, p. 10. Further, the

⁴ The capacity in which Giuliano and Bartolotta acted is a bit muddled. The complaint filed with the FOIC by Mayor Drew lists “Councilman Sebastian Giuliano” and “Councilwoman Mary Bartolotta,” and each person’s personal home address. The caption in the final FOIC decision lists “Sebastian Giuliano, as Member of City Council” and “Mary Bartolotta, as Member of City Council” as respondents. The summons lists Sebastian Giuliano and Mary Bartolotta as plaintiffs at their formal address as council members. The complaint affirmatively alleges that the two are council members. The court concludes that the appeal is brought by these two plaintiffs in the same capacity they served as respondents below.

final FOIC decision expressly finds that “the **respondents** violated” FOIA. (Emphasis added.)

Id. There is no doubt that Giuliano and Bartolotta were included in the respondents below in the administrative case. Thus, the final decision of the FOIC contains ongoing orders directed to Giuliano and Bartolotta, and finds that they violated FOIA.

The FOIC attempts to challenge the plaintiff’s authorization to bring this appeal. In doing so, the FOIC attempts to introduce an unverified hearsay letter from an unknown source that was not part of the record below. The letter presents unsupported opinions without reasoning or supporting evidence. This hearsay letter was not subject to discovery, cross examination, or testing of any kind. Accordingly, the court credits it with no weight as competent evidence.

Giuliano and Bartolotta were found by the FOIC to have violated FOIA, and were specifically ordered by the FOIC to produce the documents specified. Although the documents are now in the possession of the city, the finding and orders remain as against Giuliano and Bartolotta. If successful in this appeal, the court could remove the finding of violation as against Giuliano and Bartolotta, and remove the orders pending against them. In view of all of the foregoing, the court finds that Giuliano and Bartolotta have standing to prosecute this appeal and are aggrieved by the final decision of the FOIC being appealed.

B. Attorney-Client Privilege

The plaintiffs assert that the documents specified in numbered paragraph forty-eight of the FOIC's final decision are covered by the attorney-client privilege and should not be disclosed.

General Statutes § 1-210 (a) 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 . . . 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."

General Statutes § 1-212 (a) 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." (Emphasis added.) Thus, FOIA makes all records kept or maintained by any public agency public records subject to inspection or copy by members of the public unless such records are exempt by federal or state law. Accordingly, there is a presumption that all public records are open to the public unless an exemption is found in law. Further, FOIA has a promptness standard requiring requests to be promptly handled.

One exception to FOIA disclosure allows non-disclosure to the extent such non-disclosure is required to preserve the attorney-client privilege. General Statutes § 1-210 (b) (10), as well as the common law, provides for the non-disclosure of information covered by the attorney-client privilege. The attorney-client privilege exists both to protect the giving of legal

advice by an attorney, and to protect the giving of information to the attorney to enable the giving of informed legal advice. In order to be covered by the attorney-client privilege in this context: (i) the attorney must be acting in a professional capacity as an attorney, (ii) the communication must be made to or from current employees or officials acting in the performance of their duties, (iii) the communication must relate to legal advice, and (iv) the communication must be made in confidence. See *Shew v. Freedom of Information Commission*, 245 Conn. 149, 159, 714 A.2d 664 (1998). Here there is no doubt that the LeClairRyan attorney was acting in her professional capacity as an attorney. The attorney was hired to conduct a workplace harassment investigation, and report her findings and recommendations to the Common Council. The documents in question are clearly communications between the attorney and either the Clerk of the Common Council, who acted as an agent for the Common Council, or other employees of the city who were participating in the investigation being conducted by the attorney. The communications were made in confidence and were confidential absent some disclosure here. Thus, the only remaining element to be considered is whether the communications were related to legal advice.

The documents in question can be characterized as follows⁵:

⁵ The court reviewed these documents as submitted to the court by the FOIC. The documents were submitted to the court in hard copy and were numbered in pencil in the lower right corner of each document as pages 1 through 411. At the hearing on the merits the court confirmed that the foregoing documents were the documents specified in numbered paragraph forty-eight of the FOIC's final decision.

1. Communications, primarily from the Clerk of the Common Council, providing information to the attorney in furtherance of the attorney's investigation.
2. Communications from employees of the city seeking to speak with the attorney in connection with the attorney's investigation, each of which was officially interviewed by the attorney in the conduct of her investigation.
3. Communications from the attorney to the Clerk of The Common Council conveying information about the investigation.
4. Communications from the attorney to Common Council members concerning the investigation.
5. Communications from the attorney to specific city employees concerning interviewing the employees as part of the attorney's investigation.

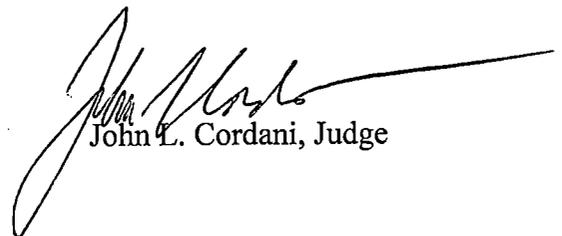
Although some of these documents contain logistical information concerning the investigation, the information in the documents in question: (i) supports the results of the investigation, (ii) reveals the attorney's thinking and strategy concerning the investigation by revealing her choices of information needed, employees to interview, and the time spent with each employee, (iii) potentially suggests to the alleged harasser the results of the investigation by revealing whether the correct employees were interviewed, (iv) gives indications of what information certain employees have relevant to the investigation and the employees' attitudes, and (v) reveals the thoroughness of the investigation and the nature of the services provided. Clearly, the foregoing

documents relate to the legal advice to be provided, and the communications made therein were made in furtherance thereof.

In view of the foregoing, the court finds that the documents specified in paragraph forty-eight of the FOIC's final decision are: (i) communications with an attorney who was acting in a professional capacity as an attorney, (ii) communications between the attorney and current employees or officials acting in the performance of their duties, (iii) communications that relate to legal advice, and (iv) communications made in confidence. See *Shew v. Freedom of Information Commission*, supra, 245 Conn. 159. Accordingly, the court finds that the documents in question are covered by the attorney-client privilege and should not be disclosed pursuant to this FOIA request.

ORDER:

The appeal is sustained. The plaintiffs have not violated FOIA by non-disclosure of the documents specified in paragraph forty-eight of the FOIC's final decision. The documents specified in paragraph forty-eight of the FOIC's final decision are exempt from disclosure pursuant to § 1-210 (b) (10) and should not be disclosed. As noted herein, plaintiff Reed is not aggrieved, and the claims asserted by her in this appeal are dismissed.


John L. Cordani, Judge