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The Attorney-Client Privilege In The Public Sector: The Dangers Of "Public" Reliance Upon Opinions And Careless Disclosures

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Public agencies often secure opinions from legal counsel to guide their actions. A couple of recent decisions by Connecticut's Freedom of Information Commission ["FOIC"] highlight the landmines that municipal attorneys face in privately guiding clients in a public arena.

"Loose Lips Sink Ships"

In *Cragg v. First Selectman Town of Marlborough,* #FIC 2013-452 (May 28, 2014), a citizen requested a copy of opinions from the Town Attorney and Bond Counsel explaining the status of a Town Meeting budget vote, along with a copy of the billing records for all attorneys working for the Town. The Town asserted that the legal opinions were privileged communications exempt from disclosure. In addition, even when producing copies of the billing records, the Town indicated that it was redacting from the bills "privileged information." The citizen appealed to the FOIC, alleging that the Town violated the Freedom of Information Act ["FOIA"] by failing to provide her with all of records she requested.

The FOIC agreed with the Town that the redacted portions of the attorney billing records were exempt from disclosure under the FOIA exception permitting agencies to withhold records of "communications privileged by the attorney-client relationship." *Connecticut General Statutes §1-210(b)(10).* The portion of billing records which reveal the identity of the client, the amount of the fee, the identification of payment by matter name, and the **general** purpose of the work performed are usually **not** protected from disclosure by the attorney-client privilege. However, the portion of billing records which 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. In *Cragg*, the billing records included detailed entries describing the specific nature of the work being performed, including the focus of the legal research. The FOIC found that the redacted information contained in the descriptive section of the billing records was protected by the attorney-client privilege.

With regard to the written legal opinion, the FOIC found that the opinion letter at issue clearly met the statutory and common law thresholds for a privileged communication. See *Maxwell v. FOIC,* 260 Conn. 143, 149 (2002); *Connecticut General Statutes §52-146r*. However, the FOIC agreed with the complaining citizen

that the Town waived the attorney-client privilege when its First Selectman publicly disclosed the substance of the legal opinion during a presentation at a public Board of Finance meeting. Specifically, the First Selectman referred to and discussed the legal opinion (and her conversations with) legal counsel. The First Selectman at times paraphrased the advice provided by counsel and at other times used the same exact language contained in the legal opinion. Thus, as the legal opinion was no longer exempt from disclosure, the Town was required to disclose the opinion under the FOIA.

"Now Where Did I Place Our Lawyer's Opinion Letter?"

Conversely, the FOIC issued a ruling that appears to give comfort to the careless with regard to the accidental disclosure of a written opinion letter, noting that "inadvertent" or "unexplainable" releases of otherwise privileged communication will not destroy the attorney-client privilege. In *Kadri v. Chairman, Board of Education, Groton Public Schools*, #FIC 2012-642 (September 25, 2013), an embattled Superintendent of Schools made a request under the FOIA for, *inter alia*, a copy of an e-mail written by the Board of Education's attorney. The e-mail contained a legal opinion that had been requested by the Board of Education's Chairperson (and subsequently shared by her with the other Board members). This e-mail opinion was mysteriously leaked to a newspaper reporter, who then wrote an article which quoted nearly half of the confidential e-mail verbatim while paraphrasing an additional sentence.

The Superintendent asserted that in light of this substantial disclosure, the e-mail*, including the remaining, undisclosed portions*, was no longer protected by the attorney-client privilege. The Board asserted that the release of the privileged e-mail was inadvertent, and that it had taken precautions to prevent disclosure, thus preserving the privilege.

The Superintendent asserted that a Board member intentionally disclosed the communication, as the Board's legal bills revealed research by the Board's attorney in the days following the article's publication concerning "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."[1] The FOIC found that the release was not intentional but rather was "unexplainable." The FOIC found that while the attorney's entries could indicate that a Board member leaked the e-mail, they could also indicate that the attorney was researching these issues in case such an event occurred. Thus, the FOIC found that there was no evidence in the record from which it could conclusively determine that it was a Board member who leaked the confidential communication to the press, let alone that such action was done intentionally.

In recognizing the precautions taken by the Board, the FOIC noted that the Board Chairperson, as per her usual policy of safeguarding privileged communications, labeled the e-mail as privileged and reiterated to the Board members that the document at issue was privileged and was not to be shared outside of the Board. Furthermore, the Board had previously discussed the importance of handling privileged communications. The

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FOIC also found the measures taken by the Board to rectify any inadvertent (one–time) disclosure to be persuasive. Upon learning that the e-mail had been leaked to the press, the Board Chairperson immediately contacted the Board members and the Board's attorney to discuss the disclosure of the e-mail and determine what the Board's next steps should be. The Chairperson also contacted the press to determine how it obtained a copy of the e-mail, and was informed that the document was anonymously dropped off. The Board 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. The Board then convened a public FOIA training session presented by the FOIC, at which time the attorney-client privilege was discussed. In this context, the FOIC concluded that the unexplained — and unauthorized — disclosure of the privileged e-mail did not constitute a waiver of the attorney-client privilege, and the Board did not violate the FOIA by refusing to disclose the e-mail.

Conclusions

By discussing the details of a legal opinion in any manner (beyond simply stating that the agency secured an opinion and as a result the agency is taking a certain action or believes that it has acted legally), an agency may eliminate the confidential nature of the opinion. While there may be times that an agency wants to have an opinion released to the public (and to broadcast to the world that its attorney has blessed its actions), its attorney may have a different viewpoint, since the opinion could contain items from a strictly legal standpoint best left unsaid publicly. It is important that the agency and its attorney be on the same page with regard to any public pronouncements.

On the other hand, public agencies that take reasonable steps to protect the attorney-client privilege, and take prompt measures to rectify any inadvertent release, may be positioned to protect the privileged nature of such communications. As with most things that fall within the ambit of the FOIA, an ounce of prevention and prompt efforts to rectify an error will serve an agency well.

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[1] These entries might have been exempt from disclosure under the new *Cragg* standard.

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