

**FREEDOM OF INFORMATION COMMISSION
OF THE STATE OF CONNECTICUT**

In the Matter of a Complaint by

FINAL DECISION

Margaret Miner and the
Rivers Alliance of Connecticut,

Complainants

against

Docket #FIC 2010-466

Commissioner, State of Connecticut,
Department of Public Works; and State of
Connecticut, Department of Public Works,

Respondents

May 25, 2011

The above-captioned matter was consolidated for hearing with Docket #FIC 2010-311; Margaret Miner and the Rivers Alliance of Connecticut v. Commissioner, State of Connecticut, Department of Public Works; State of Connecticut, Department of Public Works; and Town of Wallingford.

On October 5, 2010, a motion to dismiss was granted as to Commissioner, State of Connecticut, Department of Public Health; and State of Connecticut, Department of Public Health. In accord with the requirements of §1-210(d), G.S., the respondents Commissioner, Department of Public Works and Department of Public Health were joined as parties. Subsequently, a motion was granted by United Water Connecticut Inc. to be joined as an intervenor. The case caption above has been amended and restated.

On March 2, 2011, the respondents filed motions to dismiss the complaint, claiming the Freedom of Information Commission ("Commission") did not have jurisdiction in this case. By order dated March 7, 2011, the Commission denied the motion.

The above-captioned matter was heard as a contested case at consolidated hearings on February 25 and March 22, 2011. At both hearings, the complainants, respondents and the intervenor 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 (but not the intervenor United Water Company Inc.) are public agencies within the meaning of §1-200 (1)(A), G.S.

2. By email dated June 9, 2010, the complainants made a request to the Commissioner, Department of Public Health, for all records concerning:

- a) a proposed water diversion from Newtown to Brookfield, including construction and expansion plans, boundaries of public water supply areas, the Water Utility Coordinating Committees' service area boundaries, infrastructure assessment reports, annual reconciliation reports for adjustment charges for 2008 and 2009, and related correspondence, permits, and certificates, including approvals and denials regarding expansion of water supply through the Borough of Newtown to Brookfield; and
- b) "the water supply plans of Newtown, United Water and Greenridge".

3. By email dated June 9, 2010, the Department of Public Health acknowledged the complainant's request, indicating that it was determining whether the records at issue were subject to disclosure pursuant to the Freedom of Information Act.

4. By letter dated June 17, 2010 and filed with the Commission on June 18, 2010, the complainant appealed to the Commission, alleging that the respondents failed to provide the records at issue.

5. At the February 25, 2011 hearing, the respondents stated that they would continue their efforts to provide the complainants with redacted copies of the records at issue. By letter dated April 15, 2011 to the hearing officer, the respondents

stated their understanding that the Department of Public Health provided an electronic copy of the records with redactions on April 8, 2011.

6. On April 15, 2011, the respondents submitted four sets of records to the Commission:

- a) 882 pages of the records that were provided to the complainants without redaction;
- b) 240 pages of unredacted records that were provided to the complainants in redacted form (the records at paragraph 6.c);
- c) 125 pages of redacted records provided to the complainants; and
- d) three sets of large engineering drawings consisting of twenty-eight sheets in total.

The in camera records described at paragraph 6.b) are hereby identified as IC-2010-466-3 through IC-2010-466-245, and the in camera records described at paragraph 6.d) are hereby identified as “the engineering drawings”. The respondents described the entirety of the records as “the United Water Company’s water supply plan for New Milford, Newtown and Woodbury, including engineering drawings, and Water Utility Coordinating committees’ records.”

7. The redactions in the disclosed records described at paragraph 6.c) and the refusal to disclose the engineering drawings described at paragraph 6.d) (the “requested records” or sometimes “the records”) remain at issue in this case.

8. Sections 1-210(a) and 1-212(a), G.S., state, respectively, in relevant parts:

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.

...

Any person applying in writing shall receive, promptly upon request, a plain or certified copy of any public record.

9. Section 1-210(b), G.S., states in relevant part:

Nothing in the Freedom of Information Act shall be construed to require disclosure of:

.....

(19) Records when there are reasonable grounds to believe disclosure may result in a safety risk, including the risk of harm to any person, any government-owned or leased institution or facility or any fixture or appurtenance and equipment attached to, or contained in, such institution or facility, except that such records shall be disclosed to a law enforcement agency upon the request of the law enforcement agency. Such reasonable grounds shall be determined (A) (i) by the Commissioner of Public Works, after consultation with the chief executive officer of an executive branch state agency, with respect to records concerning such agency; and (ii) by the Commissioner of Emergency Management and Homeland Security, after consultation with the chief executive officer of a municipal, district or regional agency, with respect to records concerning such agency; (B) by the Chief Court Administrator with respect to records concerning the Judicial Department; and (C) by the executive director of the Joint Committee on Legislative Management, with respect to records concerning the Legislative Department. As used in this section, “government-owned or leased institution or facility” includes, but is not limited to, an institution or facility owned or leased by a public service company, as defined in section 16-1, a certified telecommunications provider, as defined in section 16-1, a water company, as defined in section 25-32a, or a municipal utility that furnishes electric, gas or water service, but does not include an institution or facility owned or leased by the federal government, and “chief executive officer” includes, but is not limited to, an agency head, department head, executive director or chief executive officer. Such records include, but are not limited to:

...

(viii) Emergency plans and emergency preparedness, response, recovery and mitigation plans, including plans provided by a person to a state agency or a local emergency management agency or official; and

(ix) With respect to a water company, as defined in section 25-32a, that provides water service: Vulnerability assessments and risk management plans, operational plans, portions of water supply plans submitted pursuant to section 25-32d that contain or reveal information the disclosure of which may result in a security risk to a water

company, inspection reports, technical specifications and other materials that depict or specifically describe critical water company operating facilities, collection and distribution systems or sources of supply; (emphasis added)

10. Section 1-210(d), G.S., states in relevant part:

(d) Whenever a public agency, except the Judicial Department or Legislative Department, receives a request from any person for disclosure of any records described in subdivision (19) of subsection (b) of this section under the Freedom of Information Act, the public agency shall promptly notify the Commissioner of Public Works or the Commissioner of Emergency Management and Homeland Security, as applicable, of such request, in the manner prescribed by such commissioner, before complying with the request as required by the Freedom of Information Act and for information related to a water company, as defined in section 25-32a, the public agency shall promptly notify the water company before complying with the request as required by the Freedom of Information Act. If the commissioner, after consultation with the chief executive officer of the applicable agency or after consultation with the chief executive officer of the applicable water company for information related to a water company, as defined in section 25-32a, believes the requested record is exempt from disclosure pursuant to subdivision (19) of subsection (b) of this section, the commissioner may direct the agency to withhold such record from such person. In any appeal brought under the provisions of section 1-206 of the Freedom of Information Act for denial of access to records for any of the reasons described in subdivision (19) of subsection (b) of this section, such appeal shall be against the chief executive officer of the executive branch state agency or the municipal, district or regional agency that issued the directive to withhold such record pursuant to subdivision (19) of subsection (b) of this section, exclusively, or, in the case of records concerning Judicial Department facilities, the Chief Court Administrator or, in the case of records concerning the Legislative Department, the executive director of the Joint Committee on Legislative Management. (emphasis added)

11. The Commission takes administrative notice of its decision in the companion docket, Docket #FIC 2010-311; Margaret Miner and the Rivers Alliance of Connecticut v. Commissioner, State of Connecticut, Department of Public Works; State of Connecticut, Department of Public Works; and Town of Wallingford. Specifically, the Commission incorporates herein by reference paragraphs 11 through 15, inclusive, of Docket #FIC 2010-311 concerning threats to drinking water in the United States generally, Connecticut in particular, and the redaction process used in both cases.

12. It is found that, just as in the companion case, Docket #FIC 2010-311, the in camera records are water supply plans, one of the six categories of records specifically enumerated at §1-210(b)(19)(ix), G.S. However, it is noted that §1-210(b)(19)(ix), G.S., expressly states that only “the portions of water supply plans” are exempt “that contain or reveal information the disclosure of which may result in a security risk to a water company” (emphasis added).

13. More specifically, it is found that the redactions to and pages withheld from IC-2010-466-3 through IC-2010-466-204, and IC-2010-466-234 through IC-2010-466-245, all contain information in one of the five other categories set forth at §1-210(b)(19)(ix), G.S., namely: 1) vulnerability assessments and risk management plans; 2) operational plans; 3) inspection reports; 4) technical specifications; and 5) other materials that depict or specifically describe critical water company operating facilities, collection and distribution systems or sources of supply. Indeed, the information withheld from the records herein closely follows the model used for withholding information in the companion case, Docket #FIC 2010-311.

14. It is also found that IC-2010-466-205 through IC-2010-466-233 are emergency plans or response and recovery plans, as set forth at §1-210(b)(19)(viii), G.S.

15. It is further found that the engineering drawings described at paragraph 6.d) set forth “technical specifications” in considerable detail and “depict or specifically describe critical water company operating facilities, collection and distribution systems”, as set forth at §1-210(b)(19)(ix), G.S.

16. It is further found that the requested records contain a level of technical description concerning water facilities that far exceeds information available on the internet or that can be derived from ready visual inspection. For example, a reservoir may be marked as such on Google Earth or may be visible from a highway. But only the water supply plan would indicate that a given reservoir was in active use or where its physical intake points are located.

17. It is also found that the requested records reflect a detailed effort to withhold information sparingly. While entire pages of many tables are withheld, most withheld information is in the form of line by line, word by word redactions of the locations, types and capacities of specific facilities. Maps, many photographs and technical specifications of facilities have been redacted. Only in the case of emergency plans are entire sections withheld.

18. It is concluded that the United Water Company is a “a water company, as defined at section 25-32a”, as set forth at §1-210(b)(19), G.S. Therefore, for purposes of §1-210(b)(19), G.S., the facilities of the United Water Company are defined to be

“government-owned or leased... facility[ies]”. It is also concluded that the requested records are “water supply plans submitted pursuant to section 25-32d”, as set forth at §1-210(b)(19)(ix), G.S.

19. It is further concluded that the General Assembly established the standard as being whether “there are reasonable grounds to believe disclosure may result in a safety risk...” (emphasis added). Section 1-210(b)(19), G.S.

20. With reference to the redactions and withholding of the requested records, it is concluded that the respondent Commissioner of Public Works, State of Connecticut, Department of Public Works did have “reasonable grounds to believe that disclosure of such records may result in a safety risk, including the risk of harm to any person, any government-owned or leased institution or facility or any fixture or appurtenance and equipment attached to, or contained in, such institution or facility...”, as set forth at §1-210(b)(19), G.S.

21. It is finally concluded that the redactions and withheld requested records are exempt from mandatory disclosure pursuant to §1-210(b)(19), G.S. This result tracks the general guidance of §1-210(b)(19)(ix), G.S., that “portions of water supply plans” may be exempt. The respondents did not violate §§1-210(a) and 1-212(a), G.S., when they directed the Department of Public Health to make the redactions contained in the records provided to the complainants.

22. Again, the Commission states its understanding that §1-210(b)(19), G.S., in general, and subsection (ix) of §1-210(b)(19), G.S., in particular, restrict the complainants’ ability to review water company plans. At the March 22, 2011 hearing, the complainants stated their concern that United Water Company might be seeking to profit from selling water outside its service area, at the expense of desirable stream flow levels. If the complainants feel that the exemption at §1-210(b)(19), G.S., denies them information needed to evaluate their legitimate environmental concerns, the complainants may seek a remedy in the General Assembly.

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

1. The complaint is hereby dismissed.

Approved by Order of the Freedom of Information Commission at its regular meeting of May 25, 2011.

S. Wilson
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:

Margaret Miner and the
Rivers Alliance of Connecticut
C/o Keith Ainsworth, Esq.
Evans, Fieldman & Ainsworth, LLC
261 Bradley Street
P.O. Box 1694
New Haven, CT 06507

Commissioner, State of Connecticut,
Department of Public Works; and
State of Connecticut, Department
of Public Works
C/o Charles H. Walsh, Esq.
Assistant Attorney General
Office of the Attorney General
55 Elm Street
P.O. Box 120
Hartford, CT 06141

Intervenor

United Water Connecticut, Inc.
C/o Kent J. Mancini, Esq. and
Ted D. Backer, Esq.
Cramer & Anderson, LLP
51 Main Street
New Milford, CT 06776

S. Wilson
Acting Clerk of the Commission

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