FREEDOM OF INFORMATION COMMISSION
OF THE STATE OF CONNECTICUT

In the Matter of a Complaint by FINAL DECISION

David Collins and the
New London Day,

Complainants

against Docket #FIC 2019-0670

Chairman, State of Connecticut,
Connecticut Port Authority; and
State of Connecticut, Connecticut
Port Authority,

Respondents August 12, 2020

The above-captioned matter was heard as a contested case on January 30, 2020, at which time the complainants and the respondents appeared and presented testimony, exhibits and argument on the complaint. At the start of the hearing, counsel for the respondents asked the hearing officer to "recuse" the staff attorney assigned to the case, arguing that the staff attorney was biased against the respondents. The hearing officer denied such request.

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 email dated October 9, 2019, the complainants requested all legal bills and invoices from law firms for the Connecticut Port Authority for the last two years.

3. It is found that, by two separate emails each dated October 18, 2019, the respondents provided legal bills and invoices responsive to the request. It is found that such records were redacted.

4. By email dated November 6, 2019, the complainants appealed to this Commission, alleging that the respondents violated the Freedom of Information Act by over-redacting the 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...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 found that the requested records are public records within the meaning of §§1-200(5) and 1-210(a), G.S.

9. It is found that, by email dated December 18, 2019, the respondents provided a second set of responsive records to the complainants, which set contained fewer redactions. It is found that, by email dated January 29, 2020, the respondents provided additional records that had not previously been provided, as well as some "reformatted" invoices, the content of which was contained in the documents provided previously.

10. The respondents claimed that the requested records, or portions thereof, are exempt from disclosure pursuant to §§1-210(b)(10), 1-210(b)(4), 1-210(b)(2), 1-210(b)(24), 1-210(b)(5), and 1-210(b)(7) G.S.

11. By written notice dated January 31, 2020, the hearing officer ordered the respondents to submit the records claimed to be exempt from disclosure to the Commission for in camera inspection, as well as an in camera index. Such records and index were submitted on March 2, 2020, and it is found that the in camera records consist of legal bills and invoices for legal services provided to the respondents. The in camera records shall be identified herein as IC 2019-0670-001 through IC 2019-0670-382.

12. With regard to the respondents' claim that portions of the in camera records are exempt from disclosure pursuant to §1-210(b)(10), G.S., such statute permits a public agency to withhold from disclosure records of "communications privileged by the attorney-client relationship."

13. 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.

14. 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...

15. The Supreme Court has also 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, 260 Conn. 149.

16. In the context of an attorney's billing records, "it is generally accepted...that attorney billing statements and time records are protected by the attorney-client privilege *only to* the extent that they reveal litigation strategy and/or the nature of services performed." Bruno v. Bruno, FA0540049006S, 2009 WL 2451005, at *2 (Conn. Super. Ct. July 10, 2009). "[T]he identity of the client, the amount of the fee, the identification of payment by case file name, and the general purpose of the work performed are usually not protected from disclosure by the attorney-client privilege.... However, . . . bills . . . and time records which also 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." Id. at *2, citing Clarke v. American Commerce National Bank, 974 F.2d 127 (9th Cir. 1992). In Bruno, the court determined that "[m]ost of the billing records...in question merely refer to conferences with client or e-mails to and from client or others as well as appearances at hearings. None of that information falls within the attorney-client privilege." Id. at *3.

17. In City of New Haven v. FOIC, et al, 4 Conn. App. 216, 220 (1985), the trial court found, after conducting an in camera review of the billing records, that there was nothing in such records to suggest they came within the purview of the attorney-client privilege. "Questions as to where and when a client had conversations with his attorney have been found not to be within the attorney-client privilege...nor have questions propounded to an attorney seeking the client's name and the capacity in which the attorney was employed been held to fall within the attorney-client privilege." Id. at 220. See also Docket #FIC 2014-240, Suzanne Carlson and the Hartford Courant v. Executive Director, East Hartford Housing Authority; and East Hartford Housing Authority (March 25, 2015) (date of service, initials of attorney, hours and rate and amount billed were not exempt from disclosure pursuant to either the attorney-client privilege or §1-210(b)(4), G.S.);

Docket #FIC 2011-619, Joseph Sargent v. Office of the Corporation Counsel, City of Stamford; and City of Stamford (October 10, 2012) (those sections of billing records that reveal how many hours were worked by each attorney and the cost of such work were not exempt from disclosure pursuant to either the attorney-client privilege or §1-210(b)(4), G.S.).

18. It is found that the respondents, at all times relevant, were represented by the law firm of Robinson and Cole on a variety of legal matters, and also were represented by the law firm of Mayer Brown.

19. After careful inspection of the in camera records, it is found that the legal bills and invoices contain very detailed descriptions of the specific legal work performed by the respondents' attorneys. It is further found that the information claimed to be exempt from disclosure pursuant to the attorney-client privilege is limited to the description of the specific legal services provided.

20. Accordingly, it is found that the portions of the in camera records redacted pursuant to the attorney client privilege, as indicated on the in camera index, are exempt from disclosure.[1]

21. It is therefore concluded that the respondents did not violate §§1-210(a) and 1-212(a), G.S., by withholding those portions.

22. The respondents also claimed that certain portions of the in camera records are exempt from disclosure pursuant to §1-210(b)(5)(B), G.S. That provision states that disclosure is not required of "[c]ommercial or financial information given in confidence, not required by statute."

23. Section §1-210(b)(5)(B), G.S., consists of three elements, which must all be proven for the exemption to apply: (1) commercial or financial information (2) given in confidence, (3) not required by statute.

24. After careful inspection of the in camera records, and based on the exhibits submitted by the respondents in this matter, it is found that the information claimed to be exempt from disclosure pursuant to §1-210(b)(5)(B), G.S., consists of wire transfer instructions.

25. Connecticut appellate case law has not defined "commercial or financial information, given in confidence" as used in §1-210(b)(5)(B), G.S. However, the similar provision in the federal FOI Act exempts "trade secrets and commercial or financial information obtained from a person and privileged or confidential." 5 U.S. Code §552 (b)(4). "Although our Freedom of Information Act does not derive from any model act or the federal Freedom of

[1] The respondents also claimed that these same portions are exempt from disclosure pursuant to §§1-210(b)(2), 1-210(b)(4), 1-210(b)(7) and 1-210(b)(24), G.S. Because such portions have been found to be exempt from disclosure pursuant to the attorney-client privilege, the Commission need not consider the applicability of these other exemptions to these portions.

Information Act, other similar acts, because they are in pari materia,[2] are interpretatively helpful, especially in understanding the necessary accommodation of the competing interests involved." Wilson v. FOI Comm'n, 181 Conn. 324, 333 (1980); Dept. of Public Utilities v. FOI Comm'n, Superior Court, judicial district of New Britain, Docket #CV99-0498510 (Jan. 12, 2001).

26. "Commercial" and "financial," as used in the federal FOI Act, 5 U.S.C. 552, have been given their ordinary meanings. See Watkins v. U.S. Bureau of Customs and Border Protection, 643 F.3d 1189, 1194 (9th Cir. 2011); Pub. Citizen Health Research Group v. FDA, 704 F.2d 1280, 1290 (D.C. Cir. 1983); James Craven and the Norwich Bulletin v. Governor, State of Connecticut; and State of Connecticut, Office of the Governor, Docket #FIC 2011-152, (March 14, 2012).

27. Under a standard first articulated by the federal District of Columbia Circuit Court, commercial or financial information voluntarily provided to the government may be withheld from disclosure under Exemption 4 of the federal FOI Act if it "would customarily not be released to the public by the person from whom it was obtained." Critical Mass Energy Project v. Nuclear Regulatory Commission, 975 F.2d 871, 878-79 (D.C.Cir. 1992) (en banc), cert. denied, 507 U.S. 984 (1993).

28. "The exemption does not apply if identical information is otherwise in the public domain." Inner City Press/Community on the Move v. Board of Governors of the Federal Reserve System, 463 F.3d 239, 244 (2d Cir. 2006).

29. Two Connecticut Superior Court decisions have ruled that commercial information "given in confidence" is exempt pursuant to §1-210(b)(5)(B), G.S., if given under an express or implied assurance of confidentiality. See Dept. of Public Utilities, supra; Chief of Staff, Office of the Mayor, City of Hartford v. CT FOI Comm'n, Superior Court, judicial district of New Britain, Docket No. CV 980492654 (August 12, 1999). "Whether the circumstances show an implied assurance of confidentiality is ordinarily a question of fact." Id.; James Craven and the Norwich Bulletin v. Governor, State of Connecticut; and State of Connecticut, Office of the Governor, supra.

30. "To imply" is defined as "to indicate by "logical inference, association, or necessary consequence rather than by direct statement." Webster's Third New International Dictionary of the English Language, Unabridged (Springfield, MA: Merriam-Webster, 1993).

31. The Connecticut Supreme Court in Lash v. FOI Comm'n, 300 Conn. 511, 519-520 (2011), construed the term "made in confidence" as part of a four-part test to determine whether the attorney-client privilege applied to records requested pursuant to the FOI Act. The test requires, inter alia, that "communications must be made in confidence." The Court concluded that a communication made in confidence is one that is intended to be a confidential communication, based on the context in which it is made, including indicia such as the content of the communication and whether any other party ever had access to the document at issue.

---

[2] *In pari materia*: "on the same subject; relating to the same matter." Black's Law Dictionary, 8th Ed. (1994).

32. It is concluded, based on all of the above, that "given in confidence" within the meaning of §1-210(b)(5)(B), G.S., requires an intent to give confidential information, based on context or inference, such as where there is an express or implied assurance of confidentiality, where the information is not available to the public from any other source, or where the information is such that would not customarily be disclosed by the person who provided it.

33. Further, with respect to the phrase "required by statute," it is found that such term is not defined in the FOI Act. However, in the construction of statutes, words and phrases must be construed according to the commonly approved usage. See §1-1(a), G.S. ("Words and phrases. Construction of statutes.").

34. The term "require" is defined, in relevant part, as: "[T]o demand as necessary or essential (as on general principles or in order to comply with or satisfy some regulation)...." (Webster's Third New International Dictionary, supra), and "to direct, order, demand, instruct, command, claim, compel, request, need, exact." Black's Law Dictionary (6th Ed., 1990). See also Lewis v. Connecticut Gaming Policy Bd., 224 Conn. 693, 706 (1993) (the Supreme Court held that the phrase "required by statute" "in §4-166(2) [, G.S.], if construed to its commonly approved usage, can only mean that before a proceeding qualifies as a contested case, *an agency must be obligated by an act promulgated by the legislature* to determine the legal rights, duties or privileges of a party.") (emphasis added); Advisory Opinion #69, In the Matter of a Request for Advisory Opinion, Connecticut Association of Assessing Officers, Applicant (the FOI Commission opined that "in the absence of *any express legal authority* that would enable assessors *to compel* disclosure of the information at issue...such information, when given to assessors, is 'not required by statute'...") (emphasis added); Advisory Opinion #82, In the Matter of a Request for Advisory Opinion, Under Secretary, Intergovernmental Policy Division, Office of Policy Management, Applicant (the FOI Commission opined that "statutes [did] *not require* the submission of the cost of acquisition data at issue. Rather, they *merely authorize[d]* the Secretary of OPM to prescribe forms, or mandate documentation, that may require such data.") (emphasis added).

35. The respondents did not offer any evidence at the hearing in this matter regarding the three elements of the exemption. However, the Commission takes administrative notice of the fact that some information in a wire transfer instruction is publicly available on the internet.

36. After careful inspection of the in camera records, or portions thereof, claimed on the index to be exempt from disclosure pursuant to §1-210(b)(5)(B), G.S., it is found that the respondents redacted the following information: the name, street address, city, state and zip code of their attorneys' financial institutions; the financial institutions' routing numbers and SWIFT codes; and their attorneys' checking account numbers and federal tax identification numbers.

37. It is found that the respondents offered no evidence that the names, addresses, routing numbers and SWIFT numbers of financial institutions are not publicly available from another source. The Commission takes administrative notice that such information is available on the internet. Even assuming that the names, addresses, routing and SWIFT numbers of financial institutions are "commercial or financial information," as those terms are used in §1-

210(b)(5)(B), G.S., it is found that the respondents failed to prove that such information was "given in confidence" by the law firms.

38. With regard to the bank account numbers and federal tax identification numbers, it is found that such information constitutes "commercial or financial information" that is not readily available to the public and would not customarily be disclosed to the public. In the past, the Commission has declined to order disclosure of this type of information. See e.g., Docket #FIC 2012-711, Kevin Litten and the Waterbury Republican-American v. Chief, Police Department, City of Torrington (July 24, 2013); Docket #FIC 2000-624, Theodore Piwon v. Board of Education, Brookfield Public Schools (July 13, 2001).

39. Accordingly, it is concluded that respondents violated §§1-210(a) and 1-212(a), G.S., by redacting the names, addresses, routing numbers and SWIFT numbers of the financial institutions from the in camera records. It is also concluded, however, that the respondents did not violate §§1-210(a) and 1-212(a), G.S., by redacting the checking account numbers and federal tax identification numbers from such records.

40. The respondents also claimed on the index that certain portions of the in camera records are exempt from disclosure solely pursuant to §1-210(b)(7), G.S, which provides that disclosure is not required of:

> [t]he contents of real estate appraisals, engineering or feasibility estimates and evaluations made for or by an agency relative to the acquisition of property or to prospective public supply and construction contracts, until such time as all of the property has been acquired or all proceedings or transactions have been terminated or abandoned, provided the law of eminent domain shall not be affected by this provision.

41. The respondents did not offer any evidence at the hearing in this matter in support of this claim of exemption. After careful inspection of those portions of the in camera records claimed by the respondents to be exempt from disclosure solely pursuant to §1-210(b)(7), G.S, it is found that such portions are not "the contents of real estate appraisals, engineering or feasibility estimates [or]... evaluations made for or by an agency relative to the acquisition of property or to prospective public supply and construction contracts."

42. It is therefore found the portions of the in camera records described in paragraph 40, above, are not exempt from disclosure pursuant to §1-210(b)(7), G.S.

43. Accordingly, it is concluded that the respondents violated §§1-210(a) and 1-212(a), G.S., by redacting those portions.

44. The respondents also claimed on the index that a portion of one record, IC 2019-0670-65, is exempt from disclosure solely pursuant to §1-210(b)(4), G.S., which provides that disclosure is not required of "[r]ecords pertaining to strategy and negotiations with respect to

pending claims or pending litigation to which the public agency is a party until such litigation or claim has been finally adjudicated or otherwise settled."

45. At the hearing in this matter, there was conflicting testimony from the respondents' witnesses regarding whether there was a pending claim or pending litigation. But, even assuming the existence of a pending claim or pending litigation, after careful in camera inspection of the portion of IC 2019-0670-65 claimed to be exempt from disclosure solely pursuant to §1-210(b)(4), G.S., it is found that such portion does not pertain to strategy or negotiations with respect to a pending claim or pending litigation, and is therefore not exempt from disclosure pursuant to that exemption.

46. Accordingly, it is concluded that the respondents violated §§1-210(a) and 1-212(a), G.S., by withholding the information described in paragraph 44, above, from the complainants.[3]

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

1. Forthwith, the respondents shall provide an unredacted copy of the in camera records to the complainants, free of charge.

2. In complying with paragraph 1 of the Order, above, the respondents may redact only the information claimed on the index to be exempt from disclosure pursuant to the attorney-client privilege, bank account numbers and federal tax identification numbers.

3. Henceforth, the respondents shall strictly comply with §§1-210(a) and 1-212(a), G.S.

Approved by Order of the Freedom of Information Commission at its regular meeting of August 12, 2020.

Cynthia A. Cannata
Acting Clerk of the Commission

[3] The Commission notes that the information in IC 2019-670-65, claimed to be exempt from disclosure pursuant to §1-210(b)(4), G.S., appears in many of the in camera records, but was not claimed to be exempt from disclosure in such other records.

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:

DAVID COLLINS AND THE NEW LONDON DAY, 47 Eugene O'Neill Drive, New London, CT 06320

CHAIRMAN, STATE OF CONNECTICUT, CONNECTICUT PORT AUTHORITY; AND STATE OF CONNECTICUT, CONNECTICUT PORT AUTHORITY, c/o Attorney Keisha Palmer, Attorney Christopher Hug, and Attorney Melanie Dykas, Robinson & Cole LLP, 280 Trumbull Street, Hartford, CT 06103

Cynthia A. Cannata
Acting Clerk of the Commission

FIC 2019-0670/FD/CAC/8/12/2020