

FREEDOM OF INFORMATION COMMISSION
OF THE STATE OF CONNECTICUT

In the Matter of a Complaint by

FINAL DECISION

John DiIorio,

Complainant

against

Docket #FIC 2019-0650

Commissioner, State of Connecticut,
Department of Banking; and State of
Connecticut Department of Banking,

Respondents

August 26, 2020

The above-captioned matter was heard as a contested case on January 23, 2020, 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. By letter of complaint filed on October 24, 2019, the complainant appealed to the Commission, alleging that the respondents violated the Freedom of Information (“FOI”) Act by failing to provide copies of certain public records in response to his August 26, 2019, request.
3. By letter dated August 26, 2019, the complainant requested the following records from the respondents:
 - a. All correspondence and communications, in electronic or paper form, related to the cancelation [sic] of 1st Alliance, LLC’s bond(s), sent by, received by, or copied to any of the following individuals on or after March 1, 2019: Stacey Serrano, Carmine Costa, Richard Cortes, Amy Grillo, Matt Smith, and/or Jorge Perez.
 - b. All correspondence and communications, in electronic or paper form, related to the suspension of 1st Alliance Lending, LLC’s Mortgage Lender’s License on July 31, 2019, sent by, received by, or copied to any of the following individuals on or after

March 1, 2019: Stacey Serrano, Carmine Costa, Richard Cortes, Amy Grillo, Matt Smith, and/or Jorge Perez.

- c. All correspondence and communications, in electronic or paper form, containing any reference to Joseph Ballinger (in any form), sent by, received by, or copied to any of the following individuals during the period January 1, 2018 to December 5, 2018: Stacey Serrano, Carmine Costa, Richard Cortes, Amy Grillo, Matt Smith, and/or Jorge Perez.

4. Section 1-200(5), G.S., defines “public records or files” as follows:

Any recorded data or information relating to the conduct of the public's business prepared, owned, used, received or retained by a public agency, ...whether such data or information be handwritten, typed, tape-recorded, printed, photostated, photographed or recorded by any other method.

5. Section 1-210(a), G.S., 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, 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.

6. Section 1-212(a), G.S., 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.”

7. It is found that the records requested by the complainant, to the extent that such records exist, are public records within the meaning of §§1-200(5), 1-210(a), and 1-212(a), G.S.

8. It is of note that throughout the time this matter was under consideration, the complainant was a principal in a corporation regulated by the respondents and that such corporation was the subject of an investigation by the respondents. The circumstances of such investigation were the topic of numerous media reports. At the time of the hearing on this matter and as of the date of this report, the regulatory controversy between the parties remained pending.

9. It is found that the respondents acknowledged the complainant’s request on August 28, 2019. It is further found that within their acknowledgment, the respondents described the search terms to be used in conducting their search and defined the scope of their search.

10. It is found that on September 27, 2019, the complainant followed up on his request asking the respondents when compliance with the request could be expected.

11. It is found that on October 1, 2019, the respondents replied to the complainant's inquiry of September 27, 2019, and advised him that production of the requested records would occur the following week.

12. It is found that on October 11, 2019, the respondents notified the complainant that certain portions of the complainant's request required an exercise of discretion in determining if certain records were responsive to the complainant's request. The respondents contended that because they needed to exercise discretion in determining what records fell within the scope of the complainant's request, that such action constituted research and the FOI Act does not require conducting research to fulfill an FOI request.¹ Nonetheless, it is found that the respondents developed a list of search terms, conducted a search and identified and later disclosed 634 pages of records responsive to the complainant's request. Additionally, it is found that the respondents withheld 143 records or parts thereof, contending such withheld records were exempt from disclosure.

13. On January 23, 2020, the respondents were ordered to submit the responsive records for which exemptions were being claimed to the Commission for an in camera inspection. On February 13, 2020, the respondents complied with such order and submitted to the Commission 143 pages of records for in camera inspection along with the required in camera index. The in camera records are identified as ICFOI00001 through ICFOI00143.

14. On March 19, 2020, the respondents submitted an affidavit prepared by Attorney Paul Bobruff, the respondents' employee who coordinated the disclosure of records to the complainant. In his affidavit, Attorney Bobruff attested to the specific exemptions to disclosure claimed by the respondents on their previously submitted in-camera index. On May 5, 2020, the complainant filed an objection to Attorney Bobruff's affidavit that included a memorandum of law arguing that the exemptions claimed by the respondents were misapplied. On May 12, 2020, the respondents filed a reply brief in response to the complainant's objections. The affidavit of Attorney Bobruff was admitted as evidence and marked as respondents' after-filed exhibit #1.

15. It is found that the in camera index submitted by the respondents claimed entire records were exempt from disclosure, yet on some of the actual records the respondents included notes that indicated only certain lines on the record were being claimed exempt from disclosure while other parts had already been disclosed to the complainant. The in camera index did not accurately reflect the respondents' contentions regarding which records or portions thereof, they were claiming to be exempt from disclosure.² On May 22, 2020, the respondents were ordered to revise the in camera index to more accurately reflect which records or portions thereof were being withheld from disclosure. However, in a response dated June 2, 2020, the respondents

¹ It should be noted that at the contested case hearing in this matter, the respondents did not raise any argument regarding research.

² Records for which the respondents claimed partial exemption based upon notes affixed to the records but not properly noted on the in camera index are: ICFOI00043 Lines 1-27; ICFOI00046 Lines 1-16; ICFOI00068 Lines 1-5; ICFOI00071 Lines 1-29; ICFOI00076 Lines 1-27; ICFOI00078 Lines 1-10; ICFOI00099 Lines 1-26; ICFOI00103 Lines 1-21; ICFOI00106 Lines 1-23; ICFOI00109 Lines 1-23; ICFOI00114 Lines 1-32; ICFOI00118 Lines 1-15; ICFOI00140 Lines 1-12; and ICFOI00142 Lines 1-5. The specific exemptions claimed for each of these partial records and the Commission's finding regarding such claims are included throughout this report. It is noted that ICFOI00022, ICFOI00023, ICFOI00047 and ICFOI00119 are entirely blank and therefore not responsive to the complainant's request.

declined to make any revisions to the in camera index.³

16. It is found that the respondents contended that a number of records withheld from disclosure were confidential records of the Connecticut Department of Banking and thus exempt from disclosure pursuant to §36a-21, G.S. The respondents further contended that the remaining records were exempt from disclosure pursuant to the Connecticut FOI Act as either preliminary drafts, trade secrets, or confidential attorney-client communications in accordance with §§1-210(b)(1), 1-210(b)(5) and 1-210(b)(10), G.S.

17. The respondents contended that the in camera records identified as ICFOI00001-ICFOI00042; ICFOI00050-ICFOI00052 and ICFOI00122-ICFOI00139 were confidential records of the Connecticut Department of Banking and therefore are exempt from disclosure pursuant to §§36a-21(a)(1), 36a-21(a)(2), 36a-21(a)(3) or 36a-21(d), G.S.

18. Section 36a-21, G.S., states in relevant part:

(a) Notwithstanding any provision of state law and except as provided in subsections (b) and (d) of this section and subdivision (2) of subsection (a) of section 36a-534b, the following records of the Department of Banking shall not be disclosed by the commissioner or any employee of the Department of Banking, or be subject to public inspection or discovery:

(1) Examination and investigation reports and information contained in or derived from such reports, including examination reports prepared by the commissioner or prepared on behalf of or for the use of the commissioner;

(2) Confidential supervisory or investigative information and records obtained or collected by a state, federal or foreign regulatory or law enforcement agency;

(3) Information obtained, collected or prepared in connection with examinations, inspections or investigations, and complaints from the public received by the Department of Banking, if such records are protected from disclosure under federal or state law or, in the opinion of the commissioner, such records would disclose, or would reasonably lead to the disclosure of: (A) Investigative information the disclosure of which would be prejudicial to such investigation, until such time as the investigation and all related administrative and legal actions are concluded; (B) personal or financial information, including account or loan information,

³ The respondents disputed the Commission's assertion that each page constituted a record and argued that the printing of the electronic records on 8.5 x 11 paper was done only for the convenience of the Commission. It is the respondents' contention that a "record" as contemplated by the FOI Act, for example an email and any attachments, constitute a single "record" without regard for the number of pages. It is noted that the respondents' position does not comport with the Commission's regulations regarding in camera records pursuant to §1-21j-37(f), Regulations of Connecticut State Agencies.

without the written consent of the person or persons to whom the information pertains; or (C) information that would harm the reputation of any person or affect the safety and soundness of any person whose activities in this state are subject to the supervision of the commissioner, and the disclosure of such information under this subparagraph would not be in the public interest; and . . .

(b) The commissioner may, without waiving any privilege, disclose the records described in subsection (a) of this section for any appropriate supervisory, governmental, law enforcement or other public purpose. Any such disclosure shall be made under safeguards designed to prevent further dissemination of such records. In any proceeding before a court, the court may issue a protective order in appropriate circumstances to protect the confidentiality of any such record and order that any such record on file with the court or filed in connection with the court proceeding be sealed and that the public be excluded from any portion of the proceeding at which any such record is disclosed.

(c) No director, officer, employee or agent of any Connecticut bank, Connecticut credit union or licensee under section 36a-380 or 36a-628 shall disclose without the prior written consent of the commissioner any information contained in an examination report about such bank, credit union or licensee which information is not otherwise a matter of public record.

(d)(1) Except as otherwise provided in this section, the requirements under any federal or state law regarding the privacy or confidentiality of any information or material provided to the system, as defined in section 36a-2, and any privilege arising under federal or state law, including the rules of any federal or state court, with respect to such information or material, shall continue to apply to such information or material after the information or material has been disclosed to the system. Such information and material may be shared with all federal and state regulatory officials with mortgage or other financial services industry oversight authority without the loss of privilege or the loss of confidentiality protection provided by federal or state law. For purposes of this subsection, the commissioner may enter into agreements or sharing arrangements with other governmental agencies, the Conference of State Bank Supervisors, the American Association of Residential Mortgage Regulators, or associations representing governmental agencies.

(2) Any information or material that is under subdivision (1) of this subsection subject to privilege or confidentiality shall not be subject to (A) disclosure under any federal or state law governing disclosure to the public of information held by an officer or agency

of the federal government or the respective state; or (B) subpoena, discovery or admission into evidence in any private civil action or administrative process, except a person may, at such person's discretion, waive in whole or in part a privilege held by the system concerning such information and material.

(3) Any law of this state relating to the disclosure of confidential supervisory information or of any information or material described in subdivision (1) of this subsection that is inconsistent with subdivision (1) shall be superseded by the requirements of this subsection

19. After a careful examination of the in camera records, it is found that the in camera records described in paragraph 17, above, are records of the Connecticut Department of Banking. Additionally, it is found that such records constitute examination and investigation reports and information contained in or derived from such reports; confidential supervisory or investigative information and records obtained or collected by a state, federal or foreign regulatory or law enforcement agency; information obtained, collected or prepared in connection with examinations, inspections or investigations, and complaints from the public received by the Department of Banking; investigative information the disclosure of which would be prejudicial to such investigation; and information received through agreement with the Conference of State Bank Supervisors (CSBS), the American Association of Residential Mortgage Regulators (AARMR), as well as other associations representing governmental agencies. It is concluded that such records are exempt from release in accordance with §§36a-21(a)(1), 36a-21(a)(2), 36a-21(a)(3)(A), and 36a-21(d), G.S., as contended by the respondents. Accordingly, it is concluded that the respondents did not violate the FOI Act by denying the complainant access to such records.

20. The respondents contended that in addition to being exempt as confidential records of the Connecticut Department of Banking, ICFOI00122-ICFOI00139 were also exempt from disclosure pursuant to §1-210(b)(5), G.S., also known as the trade secrets exemption. However, because such records have been determined to be exempt pursuant to §36a-21(a)(2), G.S., an analysis of the additional exemption is not necessary.

21. The respondents contended that the in camera records identified as ICFOI00053-ICFOI00061 and ICFOI00102 were exempt from disclosure solely because such records constituted preliminary drafts of records which were prepared by staff members and subject to revision prior to submission to or discussion among the members of the agency pursuant to §1-210(b)(1), G.S.

22. Section 1-210(b)(1), G.S., provides:

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

(1) Preliminary drafts or notes provided the public agency has determined that the public interest in withholding such documents clearly outweighs the public interest in disclosure;

23. In 1980, the Connecticut Supreme Court interpreted the phrase “preliminary drafts or notes.” Wilson v. Freedom of Information Commission, 181 Conn. 324 (1980). In Wilson, the Court ruled that “preliminary drafts or notes reflect that aspect of an agency’s function that precedes formal and informed decision making . . . It is records of this preliminary, deliberative and predecisional process that . . . the exemption was meant to encompass.” Id. at 332-33. In addition, the FOI Act also requires the public agency to determine that “the public interest in withholding such document clearly outweighs the public interest in disclosure.” Id. at 338-39. In conducting the balancing test, “the agency may not abuse its discretion in making the decision to withhold disclosure. The agency must, therefore, indicate the reasons for its determination to withhold disclosure and those reasons must not be frivolous or patently unfounded.” Id. at 339.

24. The year following Wilson, the Connecticut legislature adopted Public Act 81-431, and added to the FOI Act the language now codified in §1-210(e)(1), G.S. Accordingly, §1-210(b)(1), G.S., must be read in conjunction with §1-210(e)(1), G.S.

25. Section 1-210(e)(1), G.S., provides, in relevant part, that “[n]otwithstanding the provisions of subdivisions (1) . . . of subsection (b) of this section, disclosure shall be required of:

Interagency or intra-agency memoranda or letters, advisory opinions, recommendations or any report comprising part of the process by which governmental decisions and policies are formulated, except disclosure shall not be required of a preliminary draft of a memorandum, prepared by a member of the staff of a public agency, which is subject to revision prior to submission to or discussion among the members of such agency.

26. Based upon careful in camera inspection, it is found that the records identified in paragraph 21, above, constitute preliminary drafts of a statement being prepared for public release and being shared among agency members for comment or revision. It is found that the respondents conducted a proper balancing test in making their determination that the public interest in withholding such records outweighs the public interest in disclosing such records. Additionally, it is found that such determination was reasonable and not frivolous or patently unfounded, and that the respondents did not abuse their discretion when they made such determination. See Van Norstrand v. Freedom of Information Commission, 211 Conn. 339, 344 (1989) (so long as agency does not abuse its discretion in making the necessary determination, the Commission shall not substitute its judgment in this regard).

27. Finally, it is found that the records identified in paragraph 21, above, are not interagency or intra-agency memoranda or letters, advisory opinions, recommendations or any report comprising part of the process by which governmental decisions and policies are formulated, within the meaning of §1-210(e)(1), G.S. Accordingly, it is found that the respondents did not violate the FOI Act by denying the complainant access to such records.

28. The respondents contended that the in camera records identified as ICFOI00043-ICFOI00049; ICFOI00062-ICFOI00079; ICFOI00090-ICFOI00121; ICFOI00140-ICFOI00143, were exempt from disclosure because such records or parts thereof constituted confidential attorney-client communications and as such are exempt from disclosure pursuant to §1-

210(b)(10), G.S.

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

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

(10) Records, tax returns, reports and statements exempted by federal law or the general statutes or communications privileged by the attorney-client relationship....

30. 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 Connecticut 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.

31. 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. . . .

32. The Connecticut 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, supra at 149.

33. Based upon careful in camera inspection of the records identified in paragraph 28, above, it is found that such records, with the exception of the records identified in paragraph 34, below, are communications between the respondents and their attorney(s) and that such communications sought legal advice or related to such legal advice. Therefore, such records are exempt from release pursuant to §1-210(b)(10), G.S. Accordingly, it is concluded that the respondents did not violate the FOI Act by withholding such records from disclosure.

34. It is found that the in camera records identified as ICFOI00096, ICFOI00102, ICFOI00105, ICFOI00140, ICFOI00142 are not confidential communications protected by the attorney-client privilege as contended by the respondents. It is found that such records do not contain legal advice, nor do they pertain to any legal advice sought by the respondents.

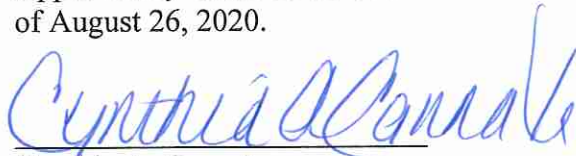
Accordingly, it is concluded that the respondents violated the FOI Act when they failed to disclose such records.

35. It is found that in addition to being claimed exempt from disclosure pursuant to the attorney-client privilege, the respondents also contended that the in camera records identified as ICFOI00046-ICFOI00075, ICFOI00078-ICFOI00098 and ICFOI00109-ICFOI00121 were preliminary drafts exempt from disclosure pursuant to §1-210(b)(1), G.S. However, because such records were found to be confidential attorney-client communications exempt from disclosure pursuant to §1-210(b)(10), G.S., an analysis of the preliminary draft exemption is not necessary.

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 a copy of the records described in paragraphs 34, above, at no cost to the complainant.
2. Henceforth, the respondents shall strictly comply with the disclosure requirements of §§1-210(a) and 1-212(a), G.S.

Approved by Order of the Freedom of Information Commission at its regular meeting of August 26, 2020.



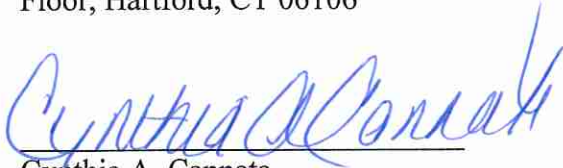
Cynthia A. Cannata
Acting Clerk of the Commission

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:

JOHN DILORIO, c/o Attorney Ann Rubin and Attorney James Robertson, Carmody Torrance Sandak & Hennessey, 50 Leavenworth Street, P.O. Box 1110, Waterbury, CT 06702

**COMMISSIONER, STATE OF CONNECTICUT, DEPARTMENT OF BANKING;
AND STATE OF CONNECTICUT, DEPARTMENT OF BANKING**, c/o Assistant Attorney General John Langmaid, Office of the Attorney General, 165 Capitol Avenue, 5th Floor, Hartford, CT 06106



Cynthia A. Cannata
Acting Clerk of the Commission