

FREEDOM OF INFORMATION COMMISSION
OF THE STATE OF CONNECTICUT

In the Matter of a Complaint by

FINAL DECISION

Christopher Peak and New Haven
Independent,

Complainants

against

Docket # FIC 2019-0572

Director, Office of Labor Relations, City of
New Haven; and City of New Haven,

Respondents

July 22, 2020

The above-captioned matter was heard as a contested case on December 6, 2019, at which time the complainants and the respondents appeared, stipulated to certain facts 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 September 16, 2019, the complainants appealed to the Commission, alleging that the respondents violated the Freedom of Information ("FOI") Act by denying a request for certain records pertaining to a 2019 personnel investigation.
3. Section 1-200(5), G.S., provides:

"Public 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.

4. 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 ... or (3) receive a copy of such records in accordance with the provisions of section 1-212.

5. 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."

6. It is found that the respondents maintained records regarding complaints made against the respondents' former Environmental Health Director, Paul Kowalski. It is further found that the respondents were in the preliminary stages of investigating such complaints when Mr. Kowalski retired from his position.

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

8. It is found that on August 6, 2019, the complainants requested that the respondents provide him with a copy of all records maintained by the Office of Labor Relations involving the 2019 investigations into Paul Kowalski, the city's former environmental health director. The complainants asked for all interview recordings, notes or other materials that detailed allegations, responses, conclusions and recommendations. The complainants specifically sought records from a June 12, 2019 meeting with a vendor, a June 21, 2019 follow up meeting regarding the vendor complaint, as well as the July 3, 2019 preparation for a pre-termination meeting.

9. It is found that on August 7, 2019, the respondents acknowledged receipt of the complainants' request. Additionally, it is found that on August 15, 2019, the respondents replied to the complainants' request and provided them with some documents responsive to their request. The respondents contended that other documents responsive to the complainants' request were exempt from disclosure as such records constituted preliminary drafts pursuant to §1-210(b)(1), G.S., and confidential attorney-client communications pursuant to §1-210(b)(10), G.S.

10. The respondents were ordered to submit copies of the records claimed to be exempt from disclosure for an in camera inspection along with an in camera inspection index referencing each record, and each item within each record, claimed to be exempt from disclosure. The respondents complied with the order immediately following the hearing on this matter. The in camera records are hereinafter referred to as IC2019-0572-001 through IC2019-0572-004.

11. The respondents contended that IC2019-0572-001, IC2019-0572-003 and IC2019-0572-004 were exempt from disclosure because such records constituted communications privileged by the attorney-client relationship pursuant to §1-210(b)(10), G.S.

12. 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....

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, supra at 149.

16. After careful examination of the records described in paragraph 11, above, it is found that IC2019-0572-001 is a memorandum written by an attorney and directed to the respondents’ director of labor relations. At the hearing on this matter, there was no testimony offered that explained in what capacity the attorney was engaged with the respondents. Additionally, there was no testimony offered that the writer was an attorney from whom the respondents sought legal advice, nor does the memorandum contain any legal advice. Therefore, it is concluded that the respondents failed to prove that IC2019-0572-001 is a record protected by the attorney-client privilege pursuant to §1-210(b)(10), G.S. Accordingly, it is found that the respondents violated the FOI Act when they refused to disclose such record.

17. It is found that IC2019-0572-003 and IC2019-0572-004 are different versions of a memorandum written by the respondents’ deputy corporation counsel addressed solely to the respondents’ director of labor relations. It is found that such records provide legal advice by an attorney acting in her official capacity as corporation counsel. Therefore, it is concluded that such records are protected by the attorney-client privilege and are exempt from disclosure pursuant to §1-210(b)(10), G.S. Accordingly, it is found that the respondents did not violate the FOI Act as alleged by the complainant when they refused to disclose such records.

18. The respondents contended that the records identified in paragraph 17, above, were also exempt from disclosure because such records constituted preliminary drafts. However, it is not necessary to analyze such exemption because the records have been found to be exempt from disclosure as confidential records subject to the attorney-client privilege.

19. The respondents contended that IC2019-0572-002 was exempt from disclosure solely because such record constituted a preliminary draft pursuant to §1-210(b)(1), G.S.

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

(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;

21. 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.

22. 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.

23. Section 1-210(e)(1), G.S., provides, in relevant part, that 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.

24. After careful inspection of IC2019-0572-002, it is found that the respondents failed to provide evidence that they determined that the public interest in withholding such record outweighed the public interest in disclosing such record. Additionally, the respondents failed to produce evidence it was subject to further revision prior to submission. Therefore, it is concluded that the respondents failed to prove that such record is a preliminary draft and not

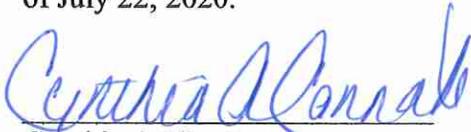
subject to disclosure pursuant to §1-210(b)(1), G.S. Accordingly, it is found that the respondents violated the FOI Act when they refused to disclose such record.

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

1. The respondents shall forthwith provide copies of IC2019-0572-001 and IC2019-0572-002 to the complainant, free of charge.

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

Approved by Order of the Freedom of Information Commission at its regular meeting of July 22, 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:

CHRISTOPHER PEAK AND NEW HAVEN INDEPENDENT, 51 Elm Street, Suite 307,
New Haven, CT 06510

DIRECTOR, OFFICE OF LABOR RELATIONS, CITY OF NEW HAVEN; AND CITY OF NEW HAVEN, c/o Attorney Catherine E. LaMarr, Office of the Corporation Counsel, City Hall, 165 Church Street, 4th Floor, New Haven, CT 06510



Cynthia A. Cannata
Acting Clerk of the Commission