

FREEDOM OF INFORMATION COMMISSION
OF THE STATE OF CONNECTICUT

In the Matter of a Complaint by

FINAL DECISION

Ross Garber,

Complainant

against

Docket #FIC 2019-0159

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

Respondents

March 11, 2020

The above-captioned matter was heard as a contested case on November 25, 2019, at which time the complainant and the respondents appeared, stipulated to certain facts, and presented testimony, exhibits and argument on the complaint.

Prior to the contested case hearing, the respondents filed a motion to dismiss this matter on September 30, 2019. The respondents contended that the complainant's appeal was not timely filed and therefore beyond the jurisdiction of the Commission. The respondents cited the Commission's initial response to the complainant's appeal on April 17, 2019 when the Commission informed the complainant that his appeal would not be scheduled for hearing because he had not filed his complaint within thirty days of an alleged FOI Act violation. The complainant was given two weeks to respond to the Commission's letter if he wanted to proceed with his appeal.

On May 2, 2019 the complainant replied to the Commission and requested that the Commission proceed with his appeal. The appeal was docketed and a contested case hearing was scheduled for November 1, 2019. Such hearing was subsequently rescheduled to November 25, 2019.

In response to the respondents' motion to dismiss, the hearing officer ordered the complainant to produce any exhibits that demonstrated that his appeal had been timely filed. The complainant complied with the order and provided a compilation of no less than thirty-seven email messages exchanged between the parties beginning with the date of his initial request through the date of his March 19, 2019 appeal. Such messages demonstrated ongoing communication with the respondents relative to the complainant's request for records. Such correspondence provided by the complainant showed communication between the parties occurred in August, September, October, and November of 2018 and continued through January,

February and March of 2019. The last email exchange prior to the filing of the appeal occurred on March 14, 2019, five days before the complainant's appeal.

Because the Freedom of Information Act does not bar successive requests or successive denials, there is no requirement that an appeal to the FOIC, pursuant to §1-206(b), [formerly §1-21i(b), G.S.] be taken from the denial of the first request or any particular request. Board of Education v. Freedom of Information Commission, 208 Conn. 442, 451, 545 A.2d 1064 (1988). Such a rigid requirement “would frustrate the ‘strong legislative policy in favor of the open conduct of government and free public access to government records.’ Wilson v. Freedom of Information Commission, [181 Conn. 324, 328, 435 A.2d 353 (1980)].” Id.

The complainant's motion to dismiss was denied on October 29, 2019.

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 filed March 19, 2019, the complainant appealed to the Commission, alleging that the respondents violated the Freedom of Information (“FOI”) Act by failing to provide all records responsive to his requests for certain records maintained by the respondents. Such requests are as follows:
 3. It is found that on August 30, 2018, the complainant requested:
 - a. All correspondence and communications, in electronic or paper form (aside from that with the undersigned [Garber]) sent or received by or copied to Carmine Costa, Stacey Serrano, Daniel Landini, Beata Zuber or any other personnel of the Department of Banking relating in any way to 1st Alliance Lending, which correspondence has been sent or received during the past 24 months.
 - b. All correspondence and communications, in electronic or paper form sent or received by or copied to Carmine Costa, Stacey Serrano, Daniel Landini, Beata Zuber or any other personnel of the Department of Banking relating in any way to Total Mortgage Services LLC or any of its current or former employees, which correspondence has been sent or received during the past 24 months.
 4. It is found that in an email to the respondents dated September 29, 2018, the complainant increased the scope of his request increasing the time period covered to include the period from August 30, 2018 to September 29, 2018.
 5. It is found that in a series of subsequent emails between the complainant and the respondents, the scope and specifics of the complainant's request were continuously negotiated. Such negotiations included discussions regarding the spelling of names, entities, and the use of

alternate search terms.

6. It is found that on October 5, 2018, the complainant filed an appeal with the Commission stating that he had not received any documents responsive to his August 30, 2018 request. Such appeal was assigned docket #FIC2018-0556. On November 7, 2018, the commission notified the complainant that absent the submission of further information, it appeared that his complaint was not timely. The complainant was informed that he should submit further information if he wanted to proceed with his appeal. It is further found that the complainant did not respond to the Commission and the appeal was never scheduled for a contested case hearing.

7. It is found that when the respondents became aware of the complainant's October 5, 2018 appeal submitted to the Commission, the respondents sent a three page letter to the complainant describing the status of their search for records and discussing search terms and anticipated exemptions. The respondents vowed to keep the complainant informed as the search continued.

8. It is found that on November 26, 2018, the respondents emailed the complainant the respondents' "first production of public records." The correspondence assured the complainant that this was only the first production and that the respondents would continue to search for additional responsive documents.

9. It is found that on January 3, 2019, the complainant sent the respondents an email inquiring as to the status of his request. It is further found that on January 7, 2019, the respondents sent an email to the complainant stating that the records custodian was continuing to work on productions for the complainant and that it was expected that additional records would be ready "this week."

10. It is found that on January 11, 2019, the complainant made an additional request as follows:

- a. All communications between Matt Smith and Dan Haar within the past 60 days.
- b. All communications between Matt Smith and Commissioner Perez related to 1st Alliance Lending LLC, mortgage loan originator licensing, John DiIorio, or the Banking Department's investigatory or examination powers within the past 60 days.

11. It is found that on February 1, 2019, the complainant sent an email to the respondents again asking for a status update on his requests. It is further found that on February 6, 2019, the respondents replied in an email to the complainant that substantial work on his request had been completed and the records would be forwarded as soon as they were ready.

12. It is found that on February 18, 2019, the complainant again emailed the respondents seeking the status of his requests. It is further found that on February 20, 2019, the respondents replied to the complainant's query writing that work was continuing on the requests and that

“rolling production” of records would be appropriate.

13. It is found that on March 14, 2019, the complainant and the respondents again exchanged emails regarding the progress of the search and production of records responsive to the complainant’s requests. Thereafter, on March 19, 2019, the complainant filed this appeal.

14. It is found that as of March 19, 2019, the only records received by the complainant in response to his August 30, 2018 request were the records provided to him on November 26, 2018. The complainant had not received any records responsive to his January 11, 2019 request. It is found that additional records including records responsive to the January 11, 2019 request, were provided to the complainant on or about April 3, 2019.

15. 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.

16. 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.

17. 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.”

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

19. The respondents contended that the Banking Law of Connecticut as codified in Chapter 664a, G.S., provides for the confidentiality of certain records and that such records are not subject to release pursuant to the FOI Act. The respondents further contended that the statutes that provide for the confidentiality of such records fall within the FOI Act’s “except as otherwise provided” provision of §1-210(a), G.S., because the language of the applicable statutes specifically provides for the confidentiality of such records.

20. It is found that the respondents withheld 19,645 pages of records from disclosure and that such records were broken into 1,244 groups. The respondents contended that the withheld records were exempt from release as such records included confidential records of the

Department of Banking exempt from disclosure pursuant to §§36a-21(a)(1), 36a-21(a)(2), 36a-21(a)(3) and 36a-21(d), G.S., records deemed to be preliminary drafts exempt from disclosure pursuant to §1-210(b)(1), G.S., records pertaining to strategy and negotiations with respect to pending claims or pending litigation exempt from disclosure pursuant to §1-210(b)(4), G.S., and communications privileged by the attorney-client relationship exempt from disclosure pursuant to §1-210(b)(10), G.S.

21. With regard to the records contended to be confidential records of the Department of Banking, §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, 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

(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.

22. On December 3, 2019, the hearing officer ordered the respondents to submit the withheld records for an in camera review. On January 15, 2020 the respondents complied with the order and submitted to the Commission 19,645 pages of records for in camera review.

23. After a careful examination of the in camera records, it is found that the submitted records the respondents contended to be exempt pursuant to §36a-21, G.S., 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; personal or financial information, including account or loan information; 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 the §§36a-21(a)(1), 36a-21(a)(2), 36a-21(a)(3)(A), 36a-21(a)(3)(B), and 36a-21(d), 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.

24. It is found that the respondents contended 382 groups of the 1,244 groups of in camera records were exempt from release pursuant to other statutory provisions as described in paragraph 20, above, in addition to §36a-21, G.S. However, after careful inspection of such records it is found that such records are confidential records of the Department of Banking as described in paragraph 23, above, and therefore exempt from disclosure pursuant to §36a-21, G.S., as contended by the respondents. An analysis of the additional claimed exemptions for such records is not necessary. It is concluded that the respondents did not violate the FOI Act when they denied the complainant access to such records.

25. It is found that the submitted records included records the respondents contended 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. Such records are identified as IC000013-IC000053; IC000174; IC00208-IC000210; IC000778-IC000783;

IC000797-000798; IC000854-IC000856; and IC001059-IC001062.

26. Section 1-210(b), G.S., state 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;

27. 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.

28. 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.

29. 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.

30. Based upon careful in camera inspection, it is found that the records described in paragraph 25, above, constitute preliminary drafts or notes within the meaning of §1-210(b)(1), G.S.

31. It is found that the in camera records cited in paragraph 25, above, are identical to a set of records examined in FIC Docket#2019-0244, DiIorio v. Commissioner, State of Connecticut Department Banking. Pursuant to §1-21j-37(d) of the Regulations of Connecticut State Agencies, the Commission takes administrative notice of the affidavit in that matter dated January 6, 2020 and attested to by Attorney Paul Bobruff of the Department of Banking. 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).

32. It is further found that such records 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.

33. Therefore, it is concluded that the in camera records identified in paragraph 25, above, are exempt from disclosure pursuant to §1-210(b)(1), G.S. Accordingly, it is concluded that the respondents did not violate the FOI Act by denying the complainant access to such records.

34. Additionally, it is found that the respondents contended that the records identified as IC007220-IC007239 were also 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. However, after careful examination of such records, it is found that IC007220-IC007228 and IC007236-IC007239 are not preliminary drafts as contended by the respondents, but instead contain information contained in or derived from examination or investigative reports of the respondents and are therefore exempt from release pursuant to §36a-21(a)(1), G.S. Accordingly, it is concluded that the respondents did not violate the FOI Act by denying the complainant access to such records.

35. It is found that the respondents failed to prove that the records identified as IC007229-IC007235 are preliminary drafts as contended, nor are they confidential banking records exempt pursuant to §36a-21, G.S. Therefore, it is found that the respondents violated the FOI Act when they refused to release such records.

36. It is found that the submitted records included records the respondents contended were exempt from disclosure solely because such records constituted communications privileged by the attorney-client relationship pursuant to §1-210(b)(10), G.S. Such records are identified as IC002311-IC002312, IC007446-IC007448, IC007867-IC007868, IC009405-IC009406, and IC009448.

37. 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....

38. 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.

39. 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. . . .

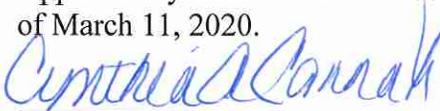
40. The Supreme Court has also stated that, “both the common-law and statutory privileges protect those communications between a public official or employee and an attorney that are confidential, made in the course of the professional relationship that exists between the attorney and his or her public agency client, and relate to legal advice sought by the agency from the attorney.” Maxwell, supra at 149.

41. Based upon careful in camera inspection, it is found that the records described in paragraph 36, above, are communications between the respondents and their attorney(s) and that such communications sought legal advice or related to such legal advice. It is found that 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 denying the complainant access to such records.

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 paragraph 35, of the findings above, at no cost to the complainant.
2. Henceforth, the respondents shall strictly comply with 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 March 11, 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:

ROSS GARBER, 100 Pearl Street, 14th Floor, Hartford, CT 06109

**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, 55 Elm Street , PO Box
120, Hartford, CT 06141-0120



Cynthia A. Cannata
Acting Clerk of the Commission