

FREEDOM OF INFORMATION COMMISSION
OF THE STATE OF CONNECTICUT

In The Matter of a Complaint by

FINAL DECISION

Jason McCoy,

Complainant

against

Docket #FIC 2019-0449

Lydia N. Martinez, City Clerk,
City of Bridgeport; and
City of Bridgeport,

Respondents

August 25, 2021

The above-captioned matter was heard as a contested case on March 6, 2020 and September 17, 2020, at which times the complainant and the respondents appeared, stipulated to certain facts and presented testimony, exhibits and argument on the complaint. The March 6, 2020 contested case hearing was an in-person hearing, conducted at the Commission's Hartford offices. However, due to the COVID-19 pandemic and the state's response to it, the September 17, 2020 contested case hearing was conducted telephonically.¹

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 letter dated January 4, 2019², the complainant requested that the respondents provide him with an opportunity to inspect or obtain copies of the following records:
 - a. . . any communications and or documents related to any contract licensing agreement, request for proposal (“RFP”), proposal and/or bid involving and/or in any way related to Webster Bank Arena (formerly The Arena at Harbor Yard) and Ticketmaster, and/or Live Nation, and/or Harbor Yard Sports and/or

¹ On March 14, 2020, the Governor issued Executive Order 7B, which suspended the requirement to conduct public meetings in person.

² While the actual request letter is dated “January 4, 2018,” the parties clarified that the actual date of the letter should have been “January 4, 2019.”

Entertainment and/or Webster Bank;

- b. . . any contract involving Webster Bank Arena (formerly The Arena at Harbor Yard) with Ticketmaster, and/or Live Nation, and/or Harbor Yard Sports and/or Entertainment and/or Webster Bank;
- c. . . any licensing documents involving Webster Bank Arena (formerly The Arena at Harbor Yard) with Ticketmaster, and/or Live Nation, and/or Harbor Yard Sports and/or Entertainment and/or Webster Bank;
- d. . . any Request for Proposal (“RFP”) related to the Webster Bank Arena (formerly The Arena at Harbor Yard) sent to Ticketmaster, and/or Live Nation, and/or Harbor Yard Sports and/or Entertainment and/or Webster Bank;
- e. . . any proposal from Ticketmaster, and/or Live Nation, and/or Harbor Yard Sports and/or Entertainment and/or Webster Bank related in any way. . . to the Webster Bank Arena (formerly The Arena at Harbor Yard);
- f. . . any Request for Proposal (“RFP”) involving or referring to the Webster Bank Arena (formerly The Arena at Harbor Yard).

3. It is found that, by email dated January 15, 2019, the respondent city’s automated response system acknowledged the request, indicating that the request had been given the tracking number W001451-011519 and that the complainant would be contacted when the requested records were ready for disclosure.

4. It is found that, by email dated April 1, 2019, the complainant inquired with the respondents into the status of his request.

5. It is found that, by email dated April 1, 2019, the respondent city’s automated response system treated the complainant’s status request, referred to in paragraph 4, above, as a new request. It is found that the respondents acknowledged the request, indicating the request had been given the tracking number W001688-040119 and that the complainant would be contacted when the requested records were ready for disclosure.

6. Thereafter, it is found that the respondents realized the complainant had not made a new request, but rather had inquired into the status of his January 4, 2019 request. It is further found that, by email dated April 2, 2019, the respondents informed the complainant that the Office of the City Attorney was still in the process of obtaining and reviewing responsive

records.

7. It is found that, by letter dated July 16, 2019, the complainant again inquired into the status of his request.

8. By letter dated July 21, 2019 and filed July 29, 2019,³ the complainant appealed to this Commission, alleging that the respondents violated the Freedom of Information ("FOI") Act by failing to provide him with access to the requested records.

9. 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.

10. 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 (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.

11. 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."

12. 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), 1-212(a), G.S., and must be disclosed unless they are exempt from disclosure.

³ On March 25, 2020, the Governor issued Executive Order 7M, thereby suspending the provisions of Conn. Gen. Stat. §1-206(b)(1), which requires the Freedom of Information Commission to hear and decide an appeal within one year after the filing of such appeal. Executive Order 7M is applicable to any appeal pending with the Commission on the issuance date and to any appeal filed on or after such date, for the duration of the current public health and civil preparedness emergency. Consequently, the Commission retains jurisdiction over this matter.

13. While the complainant received some records responsive to the request, he contended that the respondents should maintain additional responsive records.

14. William John Coleman, Deputy Director of the Office of Planning and Economic Development (“OPED”), appeared and testified at the second contested case hearing on behalf of the respondents.

15. It is found that the City of Bridgeport acts in the capacity of a landlord with regard to the Webster Bank Arena, in that the city owns the facility and, through an operating agreement, allows another entity to run the facility. It is found that Webster Bank Arena is currently operated by Harbor Yards Sports & Entertainment, LLC.

16. It is found that Deputy Director Coleman met with the staff at OPED, including Director Thomas F. Gil; Director of Business Development Max Perez; and Senior Economic Development Associate Frank Croke, to discuss the request at issue in this case. It is found that Deputy Director Coleman and the OPED staff searched for responsive records maintained by OPED dating back to July 2000, including searching OPED’s electronic computer drives, email records and hardcopy records.

17. It is further found that the respondents also searched for the responsive records in the city’s Purchasing Department and in the Office of the Corporation Counsel. Finally, it is found that the city’s IT professionals conducted an independent search for responsive electronic mail.

18. With regard to the request set forth in paragraph 2.a, above, the respondents contended that they do not maintain any responsive records. In this regard, it is found that the respondents read the request literally, searching for communication records and other documents in their possession that issued by and between “Webster Bank Arena and Ticketmaster”; “Webster Bank Arena and Live Nation”; “Webster Bank Arena and Harbor Yard Sports” and “Webster Bank Arena and Entertainment” and “Webster Bank Arena and Webster Bank.” It is found that the respondents do not maintain any such records.⁴

19. With regard to the requests set forth in paragraphs 2.d and 2.e, above, it is found that the respondents do not maintain such records, as these requests seek RFPs and other documents that have been issued by and between the operator of the Webster Bank Arena and the operator’s third party vendors.

20. With regard to the records requested in paragraph 2.f, above, the respondents inquired with the complainant as to whether he was interested in RFPs related to the construction or leasing of the arena itself. It is found that the complainant indicated that he was

⁴ Based on the complainant’s representation at the hearing that the intended scope of the request set forth in paragraph 2.a, above, was meant to capture communication records and other documents between the respondents and the listed entities, the respondents represented that their IT department was in the process of conducting another, broader search for records responsive to request 2.a, above.

not interested in RFPs related to construction or leasing, but rather sought “operational” RFPs. It is found that the respondents do not maintain RFPs relating to the operation of Webster Bank Arena.

21. Accordingly, it is concluded that the respondents did not violate the FOI Act with respect to the requests described in paragraphs 2.a, d, e and f, above.

22. With regard to the request set forth in paragraph 2.c, above, the respondents located one responsive document, which they claimed is exempt from disclosure. The respondents submitted the document to the Commission for in camera inspection. The document is fairly described as a 16-page Naming Rights Agreement that attaches 25 pages of exhibits.

23. The respondents contended that the document referred to in paragraph 22 is exempt pursuant to §1-210(b)(5)(B), G.S., which section permits an agency to withhold from disclosure records containing “[c]ommercial or financial information given in confidence, not required by statute.”

24. It is concluded that §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; and (3) not required by statute. See Craven, et al. v. Governor, State of Connecticut, et al., Docket #FIC 2011-152 (Mar. 14, 2012).

25. The Connecticut Supreme Court has recognized that, “[a]lthough our Freedom of information Act does not derive from any model act or the federal Freedom of Information Act, other similar acts, because they are in pari materia,⁵ are interpretatively helpful, especially in understanding the necessary accommodation of the competing interests involved.” Wilson v. FOI Comm'n, 181 Conn. 324, 333 (1980).

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).

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 Comm'n, 975 F.2d 871, 878-79 (D.C.Cir. 1992) (en banc), cert. denied, 507 U.S. 984 (1993). See also Thomas Melone and Allco Renewable Energy Limited v. Comm'r, State of Connecticut, Dep't of Energy and Envtl. Protection, et al., Docket #FIC 2017-0101 (Jan. 24, 2018), appeal dismissed, Allco Renewable Energy Limited, et al. v. FOI Comm'n, et al., HHC-CV-18-6043138-S, 2019 WL 1875508 (Conn. Super. Ct. Mar. 18, 2019), aff'd, 205 Conn. App. 144 (June 8, 2021).

⁵ In pari materia: “on the same subject; relating to the same matter.” Black’s Law Dictionary, 8th Ed. (1994).

28. “The exemption does not apply if identical information is otherwise in the public domain.” Inner City Press/Community on the Move v. Bd. 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 of City of Norwich v. FOI Comm’n, 55 Conn. App. 527, 531-32 (1999); Chief of Staff v. Connecticut Freedom of Info. Comm’n, No. CV 980492654S, 1999 WL 643373, at *3 (Conn. Super. Ct. Aug. 12, 1999) (“Whether the circumstances show an implied assurance of confidentiality is ordinarily a question of fact.”).

30. Two years after the Superior Court decisions referenced in paragraph 29, above, the Connecticut Supreme Court in Lash v. FOI Commission, 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.

31. 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.

32. 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.”).

33. 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.”); FOI Comm’n Advisory Opinion #69 (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’....”); FOI Comm’n Advisory Opinion #82 (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.”).

34. After careful in camera inspection, it is found that the Naming Rights Agreement referred to in paragraph 22, above, is a commercial or financial record between two third parties.

35. It is found that the Naming Rights Agreement was given to the respondent city pursuant to an express assurance of confidentiality. In this regard, it is found that the Operating Agreement provides, in relevant part as follows:

7.6 Confidentiality

All Records and other financial information pertaining to the Operator to which the City may have access hereunder shall be held by the City in the strictest of confidence and not disclosed to third parties without the prior, written consent of the Operator . . .

36. Accordingly, it is found that such record was given in confidence with meaning of §1-210(b)(5)(B), G.S.

37. It is further found that the current operator of the Webster Bank Arena does not consent to the release of the Naming Rights Agreement.

38. Finally, it is found that there is no statute requiring the operator to provide the respondents with the Naming Rights Agreement.

39. It is therefore concluded that the Naming Rights Agreement described in paragraph 22, above, and requested in paragraph 2.c, above, is permissibly exempt from public disclosure pursuant to §1-210(b)(5)(B), G.S., and that the respondents did not violate the FOI Act when they declined to disclose such document to the complainant.

40. With regard to the request set forth in paragraph 2.b, above, it is found that, on September 19, 2019, the respondents provided the complainant with a copy of an operating agreement dated July 25, 2000. It is found that the respondents do not maintain any other records responsive to this request.

41. The complainant contended that the operating agreement was not provided to him promptly.

42. The Commission has previously opined that the word "promptly" in §1-210, G.S., means "quickly and without undue delay, taking into account all of the factors presented by a particular request . . . [including] the volume of statements requested; the amount of personnel time necessary to comply with the request; the time by which the requester needs the information contained in the statements; the time constraints under which the agency must complete its other work; the importance of the records to the requester, if ascertainable; and the

importance to the public of completing the other agency business without loss of the personnel time involved in complying with the request." FOI Comm'n Advisory Opinion #51. The Commission also recommended in Advisory Opinion #51 that, if immediate compliance is not possible, the agency should explain the circumstances to the requester.

43. It is found that, in addition to processing FOI requests, OPED is responsible for real estate development within the city. It found that, at the time the request for records was received, OPED was working on thirty active real estate development projects. It is found that OPED handles grant management, property acquisitions and property dispositions. It is also found that OPED also works closely with the City Council and the Planning and Zoning Commission. It is found that OPED works on the city's downtown and waterfront development projects as well as conservation issues. It is also found that, at the time the respondents received the instant request, it was working with reduced staffing levels. Finally, it is found that the complainant did not indicate there was a date by which he needed the requested records.

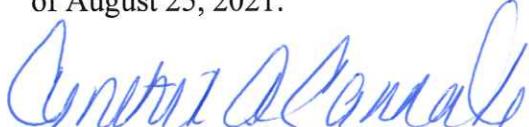
44. Based on the facts and circumstances of this case, including the complexity of the request itself and the extensive search for records undertaken in this case, the Commission finds that the respondents conducted a thorough search for records and disclosed the non-exempt records to the complainant in a timely fashion.

45. It is concluded that the respondents did not violate the FOI Act, as alleged in paragraph 41, above, with regard to the record provided in response to the request set forth paragraph 2.b, above.

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 August 25, 2021.



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:

JASON MCCOY, c/o Attorney Jason L. McCoy, Law Offices of Jason L. McCoy, LLC, 280 Talcottville Road, Second Floor, Vernon, CT 06066

LYDIA N. MARTINEZ, CITY CLERK, CITY OF BRIDGEPORT; AND CITY OF BRIDGEPORT, c/o Attorney Dina A. Scalo, Office of the City Attorney, 999 Broad Street, Bridgeport, CT 06604



Cynthia A. Cannata
Acting Clerk of the Commission