

STATE OF CONNECTICUT  
FREEDOM OF INFORMATION COMMISSION

In the Matter of a Complaint by

FINAL DECISION

Brian Smith,

Complainant

against

Docket # FIC 2023-0024

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

Respondents

January 10, 2024

The above-captioned matter was heard as a contested case on May 12, 2023, at which time the complainant and respondents appeared, stipulated to certain exhibits, and presented argument on the complaint. The complainant testified during the hearing; however, the respondents did not bring a witness and provided no testimony. The hearing was continued to allow the respondents to present witness testimony and afford the complainant an opportunity to conduct cross examination.

On August 18, 2023, the Commission issued a Notice of Continued In-Person Hearing for a hearing on September 29, 2023. On August 24, 2023, the Hearing Officer ordered the respondents to submit records for in camera inspection.

By separate emails received on September 27, 2023, the parties informed the Commission that they wished to forgo the September 29<sup>th</sup> second hearing and rely solely on the evidence of the May 12<sup>th</sup> hearing as well as the in camera records that are the subject of the complaint and subsequently delivered to the Commission. Such emails have been marked as after-filed Joint Exhibit 1.

On September 28, 2023, the Hearing Officer notified the parties that the September 29<sup>th</sup> hearing had been marked off and the contested case hearing in Docket #FIC 2023-0024 was concluded per the parties' request.

On November 16, 2023, pursuant to an order of the Hearing Officer issued on October 26, 2023, the respondents filed an after-filed exhibit, which has been marked without objection as Respondents' Exhibit 5 (after-filed): Supplemental Affidavit of Ulysses B. Hammond, Interim Executive Director of the Connecticut Port Authority.

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 January 19, 2023, the complainant made a request for “any communications between the [Connecticut Port Authority (CPA)] and AECOM and or KIEWIT or BOTH showing updated project estimates or what additional costs will have to be incurred to bring this project [i.e., the State Pier Infrastructure Improvements Project] home.”

3. It is found that, by email dated January 20, 2023, the respondents acknowledged the complainant’s request, described in paragraph 2, above.

4. It is found that, by email dated January 26, 2023, the respondents denied the complainant’s request, indicating that the records “relate to contracts that are still under negotiation and in preliminary form[,]” citing to §§1-210(b)(1) and 1-210(b)(24), G.S.<sup>1</sup>

5. By email dated and filed with the Commission on January 26, 2023, the complainant appealed to this Commission alleging that the respondents violated the Freedom of Information (“FOI”) Act by denying the request described in paragraph 2, above.

6. 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, videotaped, printed, photostated, photographed or recorded by any other method.

7. 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.

8. 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.”

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<sup>1</sup> The respondents January 26, 2023 email to the complainant cited “Sections 1-200(b)(1) and 1-200(b)(24);” however, it is clear from the record and the respondents’ post-hearing brief, that the respondents intended to cite to §§1-210(b)(1) and (24) respectively.

9. It is concluded that the requested records are public records within the meaning of §§1-200(5) and 1-210(a), G.S.

10. It is found that the CPA has been involved in the management of and has overseen the State Pier Infrastructure Improvements Project (the “Project”), which involves the redevelopment of the State Pier Terminal in the Port of New London.

11. It is found that, as part of the Project, the CPA has contracted with two entities relevant to the complainant’s records request, AECOM and Kiewit. It is found that AECOM is an infrastructure consulting firm that has managed and overseen the design and construction of the Project, and Kiewit is a construction and engineering organization that is serving as the “Construction Manager At-Risk” for the Project.

12. It is found that AECOM and Kiewit were awarded contracts with the CPA via a competitive bidding process.

13. It is found that on July 21, 2020, the CPA issued a Request for Qualifications for Construction Management Services for Infrastructure Improvements to Connecticut State Pier – New London, CT (the “RFQ”). It is further found that the purpose of this RFQ was to award the “Construction Manager At-Risk” contract for the Project.

14. It is found that the scope of services outlined in the RFQ included pre-construction services, trade contractor selection and procurement services, construction oversight services, construction scheduler services, and close-out services.

15. It is found that in addition to the scope of services described in paragraph 14, above, the RFQ indicated that the Construction Manager At-Risk would be responsible for ensuring that all costs related to the Project were at or below the Guaranteed Maximum Price (the “GMP”). It is further found the RFQ provided that the “Final GMP” would be negotiated and approved by the CPA and the selected Construction Manager At-Risk after substantial work on the Project was completed.

16. It is found that the CPA awarded the Construction Manager At-Risk contract to Kiewit and the parties executed a written agreement to that effect on April 16, 2021 (the “Awarded Contract”).

17. It is found that, per the RFQ, the contract between the CPA and Kiewit established a “Target Price” for the Project and the Final GMP would be subject to future negotiations by the parties.

18. It is found that starting in late 2022, the CPA and Kiewit engaged in a series of negotiations regarding the Final GMP. It is further found that such negotiations concluded on July 18, 2023, culminating in an amendment to the Awarded Contract, establishing a Final GMP of \$272,850,000.00 for the Project.

19. On September 29, 2023, the respondents submitted the records at issue (hereinafter, the “in camera records”) along with an in camera index to the Commission for in camera

inspection. On the in camera index, the respondents claimed that such records were exempt pursuant to §§1-210(b)(1) and 1-210(b)(24), G.S.

20. After reviewing the in camera records, the Hearing Officer determined that additional information was needed to consider the respondents' claimed exemptions. On October 26, 2023, the Hearing Officer ordered the respondents to submit an affidavit attesting to certain information regarding the bid solicitation and contract award process for both AECOM and Kiewit.

21. On November 16, 2023, in response to the Hearing Officer's October 26, 2023 Order, the respondents submitted a supplemental affidavit of the Interim Executive Director of the CPA – Respondents' Exhibit 5 (after filed). It is found that this supplemental affidavit contained only information pertaining to the Kiewit RFQ and contract award, and contained no information regarding AECOM.

22. In their post hearing brief, the respondents contend for the first time that the records provided to the Commission for in camera inspection are not responsive to the complainant's request described in paragraph 2, above. The respondents assert that the complainant seeks records that did not exist at the time the request was made, none of the in camera records reflect the estimates or actual costs to complete the project, and that the CPA did not know what costs "would [be] need[ed] to be 'incurred to bring the project home' . . ." Respondents Post Hearing Brief, pp. 3-4.<sup>2</sup>

23. It is found that the complainant's request, as described in paragraph 2, above, clearly seeks project estimates and additional costs to complete the Project. Furthermore, the complainant testified that, even if the respondents did not have final figures for the total costs to complete the Project, they should have estimates that could be provided. As found in paragraph 15, above, the Final GMP is the cost at which the Kiewit guarantees the Project to be at or below upon completion. Accordingly, it is found that estimates relating to the Final GMP, or that include other additional costs, are reasonably within the scope of the complainant's request.

24. Based on a careful inspection of the in camera records, it is found that the in camera records contain information related to either the GMP or other projected costs associated with the completion of the Project. In either case, it is found that such records concern estimates or additional costs to complete the Project. Accordingly, it is found that the in camera records are responsive to the complainant's request as described in paragraph 2, above.

25. Next, the respondents claim that to the extent that the in camera records are responsive, such records are exempt from disclosure under §§1-210(b)(1) and 1-210(b)(24), G.S.

26. With respect to the respondents' claim that the in camera records are exempt from disclosure pursuant to §1-210(b)(1), G.S., such section provides that disclosure is not required of

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<sup>2</sup> Despite the contentions in their post-hearing brief, the respondents, in submitting their "Index to Records Submitted For In Camera Inspection" did not indicate that they consider the in camera records to be nonresponsive to the complainant's request. Furthermore, on that same form, the respondents certified that the records submitted for in camera inspection and identified on the index were "true copies of the *records at issue*. . . ."

“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. The Connecticut Supreme Court ruled in Wilson v. Freedom of Information Commission, 181 Conn. 324, 332 (1980) (“Wilson”), that:

[w]e do not think the concept of preliminary, as opposed to final, should depend upon who generates the notes or drafts, or upon whether the actual documents are subject to further alteration. . . .

Instead the term ‘preliminary drafts or notes’ relates to advisory opinions, recommendations, and deliberations comprising part of the process by which government decisions and policies are formulated. . . .

. . . [p]reliminary drafts or notes reflect that aspect of an agency’s function that precedes formal and informal decision making. We believe that the legislature sought to protect the free and candid exchange of ideas, the uninhibited proposition and criticism of options that often precedes, and usually improves the quality of, governmental decisions. It is records of this preliminary, deliberative, and predecisional process the exemption was meant to encompass.

28. The year following Wilson, the Connecticut General Assembly passed Public Act 81-431, which added to the FOI Act the language now codified in §1-210(e)(1), G.S. That provision, which narrowed the exemption for preliminary drafts or notes, provides in relevant part:

[n]otwithstanding [§1-210(b)(1)], disclosure shall be required of:

[i]nteragency 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 that disclosure shall not be required of a preliminary draft of a memorandum, prepared by a member of staff of a public agency, which is subject to revision prior to submission to or discussion among the members of such agency. . . . (emphasis added).

29. In Van Norstrand v. Freedom of Information Commission, 211 Conn. 339, 343 (1989) (“Van Norstrand”), the Supreme Court provided further guidance regarding “preliminary drafts”. Citing the dictionary definition, the court stated that the term “preliminary” means “something that precedes or is introductory or preparatory”, and “describes something that is preceding the main discourse or business.” Id. According to the Court, “[b]y using the nearly synonymous words ‘preliminary’ and ‘draft’, the legislation makes it very evident that preparatory materials are not required to be disclosed”. Id.

30. Accordingly, §§1-210(b)(1) and 1-210(e)(1), G.S., together, permit nondisclosure of records of an agency's preliminary, predecisional, deliberative process, provided that the agency has determined that the public interest in withholding the records clearly outweighs the public interest in disclosing them and provided further that such records are not interagency or intra-agency memoranda or letters, advisory opinions, recommendations, or reports. See Shew v. Freedom of Information Commission, 245 Conn. 149, 164-166 (1998).

31. The respondents assert that the in camera records are exempt under §1-210(b)(1), G.S., as preliminary drafts and notes, because they relate to the respondents' "preliminary negotiations regarding the Final GMP."

32. In an affidavit, dated May 11, 2023, of the Interim Executive Director of the CPA, the respondents attest that the in camera records reveal negotiations between the CPA and AECOM and/or Kiewit, contain proposals, responses, and counterproposals, and that some records *may* include draft language or proposed contract terms that are in preliminary form.

33. In support of their argument, the respondents cite to Coalition to Save Horsebarn Hill v. Freedom of Information Commission, 73 Conn. App. 89 (2002) (hereinafter, "Coalition"), Boster v. Freedom of Information Commission, Superior Court, judicial district of New Britain, CV-19-6052569, 2021 WL 6426774 (December 13, 2021) (hereinafter, "Boster"), and Docket #FIC 1998-204, Ronald J. Cohen v. Corporation Counsel, Office of Corporation Counsel, City of New Haven, et al (February 10, 1999) (hereinafter, "Cohen"). These cases, however, do not stand for the premise that because a record is created during a negotiation process, it is automatically exempt as a preliminary draft or note under §1-210(b)(1), G.S.

34. The records at issue in Coalition and Cohen, were actual draft versions of agreements. Similarly, the record at issue in Boster was a draft version of a collective bargaining agreement; the draft of the agreement also contained handwritten notes that were created during the negotiation of the agreement. The court in Boster determined that the records were exempt, because "[t]he draft shows how the agreement changed through the negotiation . . . . The withheld record contains cross-outs and edits of the agreement evidencing the preliminary nature of the negotiation process itself." Boster, supra, 2021 WL 6426774, \*3. Significantly, Boster also involved the negotiation of a collective bargaining agreement, the records of which are expressly exempt from disclosure under §1-210(b)(9), G.S.

35. It is found that unlike Boster, Coalition, and Cohen, the in camera records submitted by the respondents are not clearly preliminary in nature. It is found that the respondents support their claim for exemption under §1-210(b)(1), G.S., with affidavits containing only conclusory language and offered no testimonial evidence to provide further context regarding the nature of the in camera records. See New Haven v. FOIC, 205 Conn. 767, 775 (1987). As noted above, the respondents did not proffer a witness during the May 12, 2023 hearing. Furthermore, the respondents forewent an additional hearing, choosing instead to rely on the administrative record created at the initial hearing.

36. It is also found that the in camera records, on their face, do not provide sufficient information to establish that they were preliminary, predecisional, or preparatory in nature.

37. It is found that the administrative record does not establish that the in camera records in fact contain draft language or proposed contract terms.

38. It is further found that the administrative record does not clearly establish that any proposals, offers, responses, and counterproposals made between the parties were preliminary, predecisional or preparatory in nature. The fact that the in camera records may contain proposals, offers, and responses between the CPA, AECOM, and/or Kiewit does not, in and of itself, mean that those records are preliminary within the meaning of §1-210(b)(1), G.S.

39. Accordingly, it is found that the respondents failed to prove that the in camera records identified in paragraph 19, above, were preliminary drafts or notes within the meaning of §1-210(b)(1), G.S.

40. Therefore, it is concluded that the in camera records are not exempt from disclosure pursuant to §1-210(b)(1), G.S.

41. With respect to the respondents' claim that the in camera records are exempt from disclosure under §1-210(b)(24), G.S., such section provides, in relevant part, that nothing in the FOI Act shall be construed to require the disclosure of:

*any record or file made by a public agency in connection with the contract award process, until such contract is executed or negotiations for the award of such contract have ended, whichever occurs earlier, provided that the chief executive officer of such public agency certifies that the public interest in the disclosure of such responses, record or file is outweighed by the public interest in confidentiality of such responses, record or file. (Emphasis added).*

42. The respondents claim that the in camera records are exempt from disclosure under §1-210(b)(24), G.S., because they consist of communications and spreadsheets regarding costs for the Project. The respondents allege that these records constitute contract award documents related to the Final GMP, which remained subject to negotiation at the time of the complainant's request. Respondents' Post Hearing Brief, pp. 7-10.

43. As already found in paragraph 13, above, the respondents issued a RFQ for construction management services on July 21, 2020. In addition, as found in paragraph 16, above, by April 16, 2021, the respondents had selected Kiewit as the Construction Manager At-Risk for the Project and executed a contract to that effect.

44. It is also found that, at the time of the complainant's request, Kiewit served as Construction Manager At-Risk for the Project and performed the services set forth in the respondents' RFQ.

45. It is found that by virtue of the respondents and Kiewit negotiating the Final GMP, substantial work had been completed on the Project at the time of the complainant's request.

46. It is found that the respondents did not provide any testimonial or documentary evidence showing that any other entity, besides Kiewit, would (or even could) be awarded the contract as a result of those on-going negotiations.

47. It is therefore found that the “contract award process” ended on April 16, 2021, when the respondents executed the Awarded Contract with Kiewit.

48. After a careful inspection of the in camera records identified in paragraph 19, above, it is found that each record post-dates the execution of the Awarded Contract and the end of the “contract award process.” Accordingly, it is found that such records were not made in connection with the “contract award process” as contemplated by §1-210(b)(24), G.S.

49. The respondents rely on Docket #FIC 2019-0042, JP Hernandez et al. v. Commissioner, State of Connecticut, Department of Administrative Services et al. (hereinafter, “JP Hernandez”) (October 28, 2019) and Docket #FIC 2015-382, Schulman v. Commissioner, State of Connecticut, Department of Correction et al. (March 23, 2016) (hereinafter, “Schulman”), wherein the Commission determined that the requested records were exempt under §1-210(b)(24), G.S., because the complainants made their request before the agency executed a contract with a selected vendor.

50. However, unlike in JP Hernandez and Schulman, the complainant in this case made his request well after the Awarded Contract was executed and any negotiations *for the award of such contract* had ended. Any negotiations that were on-going at the time of the complainant’s request were not in connection with the contract award process within the meaning of §1-210(b)(24), G.S.

51. Finally, to the extent that the respondents assert that the in camera records are exempt from disclosure under §1-210(b)(24), G.S., because they involve communications with AECOM, it is found that the respondents have failed to prove that the exemption applies. Despite the hearing officer’s October 26, 2023 order for a supplemental affidavit addressing contracts awarded to AECOM and Kiewit, it is found that the respondents only provided information pertaining to the Kiewit contract.

52. Therefore, it is concluded that the in camera records are not exempt from disclosure pursuant to §1-210(b)(24), G.S.

53. Accordingly, it is concluded that the respondents violated the §§1-210(a) and 1-212(a), G.S., by failing to disclose the requested records to the complainant.


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

1. Within 45 days of the Notice of Final Decision in this matter, the respondents shall provide the complainant with an unredacted copy of the records identified in paragraph 2 of the findings above, free of charge.

2. 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 January 10, 2024.

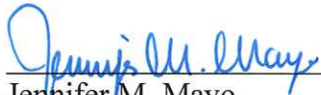
  
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Jennifer M. Mayo  
Acting Clerk of the Commission

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:

**BRIAN SMITH**, 40 Pilgrim Road, Quaker Hill, CT 06375

**CHAIRMAN, BOARD OF DIRECTORS, STATE OF CONNECTICUT, CONNECTICUT PORT AUTHORITY; AND BOARD OF DIRECTORS, STATE OF CONNECTICUT, CONNECTICUT PORT AUTHORITY**, c/o Andrew A DePeau, Robinson & Cole LLP, 280 Trumbull Street, Hartford, CT 06103



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Jennifer M. Mayo  
Acting Clerk of the Commission