

FREEDOM OF INFORMATION COMMISSION
OF THE STATE OF CONNECTICUT

In the Matter of a Complaint by

FINAL DECISION

Sandra Cady,

Complainant

against

Docket #FIC 2017-0483

President and Chief Executive Officer,
Connecticut Lottery Corporation; and
Connecticut Lottery Corporation,

Respondents

April 11, 2018

The above-captioned matter was heard as a contested case on October 24, 2017, at which time the complainant and the respondents appeared and presented testimony, exhibits and argument on the complaint. The case caption originally identified the “executive director” of the Connecticut Lottery Corporation (“CLC”), as the head of the agency; however, at the hearing, the hearing officer confirmed with counsel for the respondents that the head of the CLC is the president and chief executive officer. Without objection from the parties, the case caption has been amended accordingly.

A Report of Hearing Officer, dated January 24, 2018 was issued to the parties and scheduled to be heard by the Commission at its regular meeting of February 28, 2018. The respondents filed a Brief and Exceptions to Report of Hearing Officer, dated February 5, 2018. After review of the respondents’ brief, the hearing officer requested that the Report of Hearing Officer be withdrawn from the agenda, and the Report was withdrawn prior to the meeting.

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 July 26, 2017, the complainant requested from the respondents a copy of: (a) “the letter of engagement/contract for Tony Molica with the CLC;” (b) “and any and all report/documentation/file/results of his engagement;” and (c) “any information/communication/documents/file/notes regarding the VP of Marketing and Sales (Diane Patterson) and her status/removal/separation.” Such email was received by the respondents on July 31, 2017.
3. It is found that, by email dated August 1, 2017, the respondents acknowledged the request, described in paragraph 2, above, and by separate email, also dated August 1, 2017,

provided copies of certain responsive records. However, the respondents did not provide a copy of the report prepared by Mr. Molica for the CLC, described in paragraph 2(b), above (“report”).

4. It is found that, by email dated August 18, 2017, at 7:33 a.m., the complainant reiterated her request for the report.

5. It is found that, by email dated August 18, 2017, at 10:55 a.m., the respondents replied: “Only the records identified in my August 17th email...will be available for review.” It is found that the records identified in the August 17th email pertained to a separate records request made by the complainant, and did not include the report.

6. It is found that, by email dated August 18, 2017, at 11:00 a.m., the complainant asked the respondents to “[p]lease explain why a request for a final consultant report would not be available after a three week period.”

7. It is found that, by email dated August 18, 2017, at 12:07 p.m., the respondents replied: “We are still gathering and evaluating records responsive to your request. To answer your question, there is no final consultant report. The document we have is a draft report and we are in the process of making a determination concerning its release. In addition to performing our regular work during a month filled with staff vacations, your FOIA request is still at the top of my list.”

8. It is found that, by email dated August 19, 2017, the complainant informed the respondents that she disputed their characterization of the report as a “draft” and again, requested that they produce it.

9. It is found that, by email dated August 21, 2017, the respondents replied that they had “not yet made a determination concerning the release of the draft report,” and referred the complainant to their earlier response, described in paragraph 6, above.

10. Thereafter, by email dated and filed August 21, 2017, the complainant appealed to this Commission, alleging that the respondents violated the Freedom of Information (“FOI”) Act by failing to provide her with a copy of the report.

11. 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.

12. 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 inspect such records promptly during regular office or business hours...or (3) receive a copy of such records in accordance with section 1-212.

13. 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.”

14. It is concluded that the report is a public record within the meaning of §§1-200(5) and 1-210(a), G.S.

15. Section 1-206(b)(1), G.S., provides that “any person denied the right to inspect or copy records under section 1-210... may appeal therefrom to the Freedom of Information Commission, by filing a notice of appeal with said commission. A notice of appeal shall be filed not later than thirty days after such denial....”

16. At the hearing in this matter, and in their brief at pages 3-4, the respondents contended that no denial of the request for the report “ever” occurred, either “explicitly” or “implicitly,” and that therefore the Commission lacks jurisdiction to adjudicate the complaint. However, as of the date of the hearing in this matter, the respondents still had not provided a copy of the report to the complainant and, in fact, claimed such report is exempt from disclosure, pursuant to §1-210(b)(1), G.S.

17. Under the respondents’ reasoning, a public agency could indefinitely, and perhaps forever, withhold records from a requestor, repeatedly claim that they had not yet made a decision regarding whether or not to disclose the records, and no denial of the request would have occurred. If no denial occurred, the requester would not have the right to file a complaint with the Commission. Such result clearly is at odds with “the overarching legislative policy of the act...that favors the open conduct of government and free public access to government records.” See Pane v. Danbury, 267 Conn. 669, 679-80 (2004).

18. Although the respondents did not use the word “no” when responding to the complainant’s request, it is undisputed that, at the time the complainant filed her complaint in this matter, the respondents had not provided a copy of, or access to, the report. It is found that the respondents denied the request for the report on August 18, and again on August 21, 2017, after the complainant reiterated her request for such record. It is found that the complainant filed her complaint not later than 30 days after such denials. Accordingly, it is concluded that the Commission has jurisdiction to adjudicate the complaint in this matter.

19. With regard to the respondents' claim that the report is exempt from disclosure pursuant to §1-210(b)(1), G.S., that provision states that disclosure is not required of "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."

20. In 1980, the Connecticut Supreme Court interpreted the phrase "preliminary drafts or notes." See Wilson v. FOIC, 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 333. In addition, the Wilson Court interpreted the phrase "preliminary drafts or notes" in the FOI Act as identical to the deliberative process privilege found in 5 U.S.C. §552(b)(5) of the federal Freedom of Information Act, but noted that, under Connecticut's FOI Act, the public agency carried the additional burden to show that "the public interest in withholding such document clearly outweighs the public interest in disclosure." See *id.*, at 333-340.

21. The year following Wilson, however, the Connecticut legislature amended the FOI Act (see Public Act 81-431), to include the language now codified in §1-210(e)(1), G.S., which provides that, "[n]otwithstanding the provisions of [§1-210(b)(1), G.S.], 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 have been 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.

22. It is found that the CLC and Anthony Molica & Associates ("Molica") entered into a contract, effective February 27, 2017, whereby Molica agreed to conduct an audit, over a period of five days, of the CLC's sales and marketing operations, and to provide a written report, by March 31, 2017, for the CLC's interim president and CEO, identifying findings and recommendations for improvement. It is found that the total contract amount was \$20,000.

23. It is found that, pursuant to the contract, Tony Molica traveled to Connecticut and interviewed CLC staff, the sales director and sales representatives; reviewed operations; and provided a written report to the interim president and CEO on March 15, 2017.

24. It is found that the report was not provided to any person at the CLC, other than the interim president and CEO; the report was not thereafter edited or amended; and no section of the report was left blank. *Cf. Shew v. Freedom of Information Commission*, 245 Conn. 149, 165 (1998) ("with its 'conclusion' section left completely blank, [the report] can be nothing but a 'preliminary draft or note' under any definition of those terms."). It is also found that the respondents offered no evidence that the findings and recommendations contained in the report were discussed by anyone at the CLC for the purpose of proposing changes or improvements to

the CLC's sales or marketing operations or that the CLC, in fact, instituted any changes or modifications to its sales or marketing operations based on the report.

25. The respondents argued that the report is a "preliminary draft," because, in essence, the report was not a thorough report, but rather, was a " cursory overview," containing only "preliminary findings." However, it is found that whether or not the report was " cursory" and contained only "preliminary findings" is not relevant to the determination regarding whether the report is a "preliminary draft or note" under §1-210(b)(1), G.S.

26. The respondents submitted the report to the Commission for in camera inspection. It is found that such report consists of four pages.¹

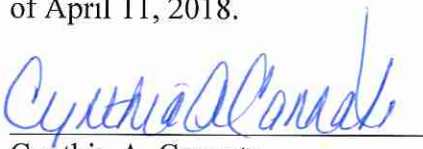
27. Based upon careful in camera inspection of the report, and the evidence offered at the hearing in this matter, it is found that the respondents failed to prove that the report preceded any formal and informed decision making, and that the report was part of a deliberative and predecisional process.

28. Accordingly, it is concluded that the report is not a "preliminary draft," under §1-210(b)(1), G.S. Because the report is not a preliminary draft, the Commission need not consider whether the respondents determined that the public interest in withholding the report clearly outweighed the public interest in disclosure. The Commission also need not consider §1-210(e), G.S.

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 an unredacted copy of the report to the complainant, free of charge.

Approved by Order of the Freedom of Information Commission at its regular meeting of April 11, 2018.



Cynthia A. Cannata
Acting Clerk of the Commission

¹ Although the respondents indicated on the index to the in camera records that the report consists of five pages, one of the pages is blank; the report is, in fact, only four pages.

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:

SANDRA CADY, 5 Gregory Lane, Simsbury, CT 06070

PRESIDENT AND CHIEF EXECUTIVE OFFICER, CONNECTICUT LOTTERY CORPORATION; AND CONNECTICUT LOTTERY CORPORATION, c/o Attorney Jeffrey S. Yue, Connecticut Lottery Corporation, 777 Brook Street, Rocky Hill, CT 06067 and Attorney Matthew Stone, Connecticut Lottery Corporation, 777 Brook Street, Rocky Hill, CT 06067



Cynthia A. Cannata
Acting Clerk of the Commission