

FREEDOM OF INFORMATION COMMISSION
OF THE STATE OF CONNECTICUT

In The Matter of a Complaint by

FINAL DECISION

Christina Orsi-Lirot,

Complainant

against

Docket #FIC 2018-0584

First Selectman, Town of Darien;
and Town of Darien,

Respondents

August 14, 2019

The above-captioned matter was heard as a contested case on January 2, 2019 and March 29, 2019, at which times the complainant 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. It is found that, by email dated October 1, 2018, the complainant requested that the respondents provide her with copies of the following records:

Any and all documents and surveys related to the town's boundary survey for Selleck Woods, as well as partial surveys, modified surveys, title work and surveyors' work product shared with the town. This also includes all emails and letters between the land surveyor and the Town of Darien.

3. It is found that, by letter dated October 2, 2018, the respondents acknowledged the complainant's request and indicated that they would respond in accordance with the Freedom of Information ("FOI") statutes.

4. By email dated and filed October 18, 2018, the complainant appealed to the Commission, alleging that the respondents violated the FOI Act by failing to provide her

with the requested records.

5. 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.

6. Section 1-210(a), G.S., provides in relevant part that:

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.

7. 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.”

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

9. At the first contested case hearing, the complainant explained that previously she had been informed by the town’s Planning and Zoning Department that a particular strip of land called Fairmead Avenue, which abuts both her property and Selleck Woods, a park located in the town (the “park”), was a private road. She explained that, through the request for records in this case, she was attempting to understand why the respondents now contend that Fairmead Road is not a private road, but rather part of the park itself. The complainant informed the hearing officer that the town’s installation of fence bordering Fairmead Road and her property resulted in civil litigation, which was commenced by the Lirots against the town.

10. It is found that, in response to the request set forth in paragraph 2, above, and under cover letter dated October 22, 2018, the respondents disclosed the following records to the complainant:

- a. A copy of the Redniss & Mead¹ Perimeter Survey of the southern end of Fairmead Road and the adjacent entrance of Selleck Woods, dated 9/21/2017;
- b. A copy of the Redniss & Mead Perimeter Survey at the southern end of Fairmead Road and the adjacent entrance of Selleck Woods, dated 6/20/2018;
- c. A copy of the title report entitled, "Ownership of Fairmead Avenue (sic), Darien, Connecticut," dated 3/20/2017 and prepared by George R. Blanks of County Search, Ltd.; and
- d. A copy of the title report entitled, Gregory John Lirot and Anita Christina Orsi-Lirot, 23 Fairmead Road, Darien, Connecticut, dated 1/23/2018 and prepared by George R. Blanks of County Search, Ltd.

11. It is found that, in the October 22nd correspondence, the respondents informed the complainant that the origin of the title rights held by the owners of 1 Fairmead Road was contained in the records referred in paragraph 10, c, above. The respondents further informed the complainant that the Planning & Zoning office did not have any additional documents that referenced the origins of the title to 1 Fairmead Road, although it did have the file relating to a 2015 land use application for that property. The respondents informed the complainant that, if she desired the entire land use application file, copies of the records contained in the file would cost \$73.00.

12. The respondents contended that, other than the records that were disclosed to the complainant and the records in the 2015 land use application file, the remainder of the responsive records are exempt from disclosure pursuant to §1-210(b)(1), G.S., (preliminary drafts), §1-210(b)(4), G.S., (pending litigation), or §1-210(b)(10), G.S., (attorney client privileged communications).

13. At the conclusion of the second contested case hearing, the hearing officer ordered the respondents to submit the records at issue to the Commission for an in camera inspection.

14. On April 26, 2019, the respondents submitted the records to the Commission. The in camera records total 41 pages and will be referred to as IC-2018-0584-1 through IC-2018-0584-41.²

¹ Redniss & Mead is a civil engineering company located in Stamford, Connecticut.

² The Commission notes that the in camera records were originally numbered as 23 separate documents. The hearing officer reviewed the documents and then consecutively numbered each page contained in the 23 documents for a total of 41 pages in camera records.

15. Kathleen Buch, the respondents' Town Administrator, appeared and testified at the contested case hearing.

16. First, the respondents contended that IC-2018-0584-16 is exempt from disclosure pursuant to §1-210(b)(1), G.S.

17. Section 1-210(b)(1), G.S., provides that disclosure shall not be required of “[p]reliminary drafts or notes provided the public agency has determined that the public interest in withholding such documents clearly outweighs the public interest in disclosure.”

18. Section 1-210(b)(1), G.S., requires the respondents to prove that they determined that the public interest in withholding records clearly outweighs the public interest in disclosure. “The statute’s language strongly suggests that 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.” Van Norstrand v. Freedom of Info. Comm’n, 211 Conn. 339, 345 (1989).

19. In 1980, the Connecticut Supreme Court interpreted the phrase “preliminary drafts and notes” in the FOI Act. See Wilson v. FOIC, 181 Conn. 324 (1980) (“Wilson”). The Wilson court ruled that “preliminary drafts or notes reflect that aspect of an agency’s function that precedes formal and informal decision making. . . . It is records of this preliminary, deliberative and predecisional process that . . . the exemption was meant to encompass.” Wilson, 181 Conn. at 332. In addition, the Wilson court interpreted the phrase “preliminary drafts and 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, with the exception 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 Wilson, 181 Conn. at 333-340.

20. The year following Wilson, the Connecticut legislature adopted Public Act 81-431, which added to the FOI Act the language now codified in §1-210(e)(1), G.S. See ¶ 21, below.

21. It is concluded that with adoption of Public Act 81-431, the Connecticut Legislature made clear that the Connecticut FOI Act required more robust disclosure than is required by the deliberative process privilege permitted at the federal level.

22. Accordingly, §1-210(b)(1), G.S., must be read in conjunction with §1-210(e)(1), G.S., which provides, in relevant part, as follows:

Notwithstanding the provisions of [§1-210(b)(1), G.S.],
disclosure shall be required of:

(1) 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.

23. After a careful review of the in camera records, it is found that IC-2018-0584-16 is a draft survey of Fairmead Road and the surrounding properties prepared by Jorge Pereira, a senior surveyor at Redniss & Mead. It is found that Mr. Pereira sent this document to Ms. Buch and the Parks and Recreation Director Pam Gery on September 7, 2017 to show them the progress he was making on the survey. It is found that the survey had not been completed on September 7, 2019, had not been signed by Mr. Pereira, was stamped draft, and had not been publically disclosed.

24. It is found that IC-2018-0584-16 is a preliminary draft, within the meaning of §1-210(b)(1), G.S.

25. It is further found that the respondents determined that the public interest in withholding the draft survey clearly outweighed the public interest in disclosure.³

26. Finally, it is found that IC-2018-0584-16 is not interagency or intra-agency memoranda, letters, advisory opinions, recommendations or reports, within the meaning of §1-210(e)(1), G.S.

27. Accordingly, it is concluded that the respondents did not violate the FOI Act when they refused to disclose IC-2018-0584-16 to the complainant.

28. Second, the respondents contended that the following records are exempt pursuant to §1-210(b)(4), G.S.: IC-2018-0584-1 through IC-2018-0584-15, and IC-2018-0584-17 through IC-2018-0584-40.

29. Section 1-210(b)(4), G.S., provides that nothing in the FOI Act shall require the disclosure of:

Records pertaining to strategy or negotiations with respect to pending claims or pending litigation to which the public agency is a party until such litigation or claim has been finally adjudicated or otherwise settled.

³ In this regard, it is found that the respondents determined that disclosing an incomplete land survey would be equivalent to disclosing a land record that is missing key information and/or relevant landmarks.

30. Section 1-200(9), G.S., defines pending litigation as follows:

(A) a written notice to an agency which sets forth a demand for legal relief or which asserts a legal right stating the intention to institute an action before a court if such relief or right is not granted by the agency; (B) the service of a complaint against an agency returnable to a court which seeks to enforce or implement legal relief or a legal right; or (C) the agency's consideration of action to enforce or implement legal relief or a legal right.

31. It is found that, as early as January 2017, the town through its attorney gave the complainant notice that, by placing various items of personal property on Fairmead Road and in the park itself, she was encroaching on town property and creating dangerous conditions by which someone could be harmed. It is found that, on January 27, 2017, the town sent the complainant a letter that stated, in relevant part, "... the town hereby reserves any and all rights, including but not limited to surveying the encroachments, filing a Notice of Encroachments on Darien Land Records and removing as necessary any encroachments that impede or interfere with access to Town property." It is found that, by the summer of 2017, with the encroachments still remaining on Fairmead Road and in the park, the respondents engaged Redniss & Mead to assist them with formally surveying the park's boundaries, as well as the boundaries for all of the other residential properties surrounding the park.

32. It is found that, in early June 2018, the Lirots filed suit against the respondents in the Stamford Superior Court.

33. After a careful review of the in camera records identified in paragraph 28, above, it is found that such records pertain to strategy and negotiation with respect to pending litigation between the Lirots and the respondents. In this regard, it is found that the in camera records pertain to the respondents' initial attempts to avoid litigation with the Lirots, their subsequent considerations of whether to commence an action to enforce their legal rights, and finally their management of litigation once it had commenced. It is further found that, at the time the request for records in this case was issued through the date of the second contested case hearing, the litigation between the parties had not been finally adjudicated or otherwise settled.

34. Accordingly, it is concluded that the records identified in paragraph 28, above, are exempt pursuant to §1-210(b)(4), G.S. It is further concluded that the respondents did not violate the FOI Act when they refused to disclose the records identified in paragraph 28, above, to the complainant.

35. Finally, the respondents contended that IC-2018-0584-41 is exempt from disclosure pursuant to §1-210(b)(10), G.S.

36. In relevant part, §1-210(b)(10), G.S., permits the nondisclosure of “communications privileged by the attorney-client relationship....”

37. 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.

38. 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. . . .

39. The Supreme Court has 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.

40. The Supreme Court has further stated that, “[i]n Connecticut, the attorney-client privilege protects both the confidential giving of professional advice by an attorney acting in the capacity of a legal advisor to those who can act on it, as well as the giving of information to the lawyer to enable counsel to give sound and informed advice. Olson v. Accessory Controls and Equipment Corp., et al., 254 Conn. 145, 157 (2000).

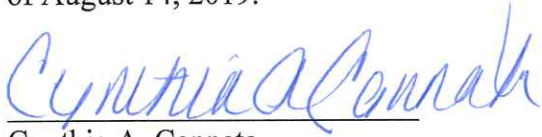
41. After a careful in camera inspection of IC-2018-0584-41 it is found that such document is exempt in its entirety pursuant to the attorney-client privilege. Specifically, it is found that such document contains a request for legal advice from the respondents to their attorneys. It is found that the respondents were acting within the scope of their duties with regard to current agency business when they sought this advice. It is further found that the communications were made in confidence. Finally, it is found that the respondents did not waive their attorney-client privilege.

42. Accordingly, it is concluded that the respondents did not violate the FOI Act when they refused to disclose IC-2018-0584-41 to the complainant.

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 14, 2019.



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:

CRISTINA ORSI-LIROT, c/o Attorney John R. Harness, 1111 Summer Street,
Stamford, CT 06905

FIRST SELECTMAN, TOWN OF DARIEN; AND TOWN OF DARIEN, c/o
Attorney Patricia Gaug, Curtis, Brinkerhoff & Barrett, P.C., 666 Summer Street,
Stamford, CT 06901



Cynthia A. Cannata
Acting Clerk of the Commission