

FREEDOM OF INFORMATION COMMISSION
OF THE STATE OF CONNECTICUT

In The Matter of a Complaint by

FINAL DECISION

Attorney Brian K. Estep,
and Town of Salem,

Complainants

against

Docket #FIC 2019-0715

President, Gardner Lake Volunteer
Fire Company; and Gardner Lake
Volunteer Fire Company, Inc.

Respondents

August 25, 2021

The above-captioned matter was heard as a contested case on February 28, 2020 and September 2, 2020, at which times the complainants and the respondents appeared, stipulated to certain facts and presented testimony, exhibits and argument on the complaint. The February 28, 2020 contested case hearing was an in-person hearing, conducted at the Commission's Hartford office. However, due to the COVID-19 pandemic and the state's response to it, the September 2, 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. Section 7-314(b), G.S., provides:

[t]he records and meetings of a volunteer fire department which is established by municipal charter or constituted as a not-for-profit Connecticut corporation shall not be subject to the provisions of the Freedom of Information Act, as defined in section 1-200, if such records and meetings concern fraternal or social matters. Records and meetings concerning matters of public safety, expenditures of public funds or other public business shall be subject to disclosure under said sections.

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

2. It is found that, by letter dated October 18, 2019, the complainants requested that the respondents provide them with copies of the following records:

- a. All meeting agendas from January 1, 2019, through today's date;
- b. All minutes of meetings from January 1, 2019, through today's date;
- c. All financial records from meetings from January 1, 2019, through today's date;
- d. All documents from meetings from January 1, 2019, through today's date; and
- e. All correspondence or emails from January 1, 2019, through today's date regarding the issues related to Gardner Lake Fire Company, Inc.'s relationship with the Town of Salem and volunteers receiving payment from the Town of Salem.

3. It is found that, by cover letter dated November 15, 2019, the respondents provided the complainants with 33 pages of responsive records, most of which were redacted. It is further found that the respondents informed the complainants that, although they were disclosing records, they were not conceding that the respondent fire company was a public agency subject to the provisions of the Freedom of Information ("FOI") Act.²

4. It is found that, by letter dated November 19, 2019, the complainants renewed their request for records, indicating that they believed that the respondent fire company was required to comply with the FOI Act. It is further found that the complainants requested that the respondents outline the exemptions to disclosure that they were claiming.

5. By letter dated November 27, 2019 and filed December 2, 2019,³ the complainants appealed to this Commission, alleging that the respondents violated the FOI Act by failing to provide them with access to the requested records. In addition, the complainants requested that the Commission issue an order voiding all actions taken at meetings of the respondent fire company that were not properly noticed and require the respondents to undergo a FOI training

² By the time of the second contested case hearing, the respondents conceded that the respondent fire company's records concerning matters of public safety, expenditures of public funds or other public business were subject to disclosure, pursuant to the FOI Act.

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.

session.

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, 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.”

9. It is found that the records requested by the complainants are public records within the meaning of §§1-200(5), 1-210(a), 1-212(a), G.S., and, to the extent such records concern matters of public safety, expenditures of public funds or other public business, within the meaning of §7-314(b), G.S., must be disclosed unless they are exempt from disclosure.

10. It is found that, at the start of the February 28, 2020 hearing, Attorney Brian Estep requested that the case caption be amended to remove his name as a complainant. It is further found that, while Attorney Estep issued the request for records set forth in paragraph 2, above, he had done so as counsel for the Town of Salem.

11. Section 1-206(b)(1), G.S., states, in relevant part, that “[a]ny person denied the right to inspect or copy records under section 1-210 or wrongfully denied the right to attend any meeting of a public agency or denied any other right conferred by the Freedom of Information Act may appeal therefrom to the Freedom of Information Commission. . . .”

12. Section 1-200(4), G.S., defines “person” as any “natural person, partnership, corporation, limited liability company, association or society.”

13. Because a public agency (like the Town of Salem) does not fall within the definition of “person” set forth in §1-200(4), G.S., and because Attorney Estep issued the underlying request for records in this case, Attorney Estep’s name must remain in the case caption to allow this matter to proceed. Accordingly, while Attorney Estep’s unopposed motion at the February 28, 2020 hearing was originally granted, such ruling is hereby reversed and the case caption remains as originally designated.

14. At the second contested case hearing, the respondents contended that, because they had erroneously believed that their records were not subject to the FOI Act, they inadvertently included attorney-client privileged information in their meeting minutes. Thus, it is found that, initially, the respondents disclosed meeting minutes to the complainants that were redacted pursuant to §§1-210(b)(10), G.S. (the attorney-client privilege). In addition, the respondents contended that they maintained other records that were exempt in their entirety pursuant to §1-210(b)(10), G.S. Finally, the respondents contended that some of their agendas were also exempt, in part, pursuant to §1-210(b)(1), G.S. (preliminary drafts and notes), because they contained hand-written notes in the margins.

15. At the conclusion of the second contested case hearing, the hearing officer ordered the respondents to submit all of the records claimed to be exempt to the Commission for in camera inspection. On September 28, 2020, the respondents submitted some of the records at issue to the Commission. These records shall be referred to as IC-2019-0715-1 through IC-2019-0715-158.

16. In the index that accompanied IC-2019-0715-1 through IC-2019-0715-158, the respondents claimed that all records were exempt pursuant to §1-210(b)(10), G.S. (the attorney-client privilege) and that certain records were also exempt from disclosure pursuant to §1-210(b)(1), G.S. (preliminary drafts and notes). The respondents also claimed, for the first time, that some of the records were exempt pursuant to §1-210(b)(8), G.S. (statements of personal worth or financial data), and that other records were exempt pursuant to §1-210(b)(9), G.S. (records, reports and statements of strategy or negotiation with respect to collective bargaining).

17. On May 24, 2021, the respondents submitted the remaining records at issue to the Commission for in camera inspection. These records shall be referred to as IC#2-2019-0715-1 through IC#2-2019-0715-13. It is found that such records consist of the meeting agendas of the respondent fire company, which contain handwritten notes in the margins. On the index that accompanied IC#2-2019-0715-1 through IC#2-2019-0715-13, the respondents claimed that the handwritten notes on these records are exempt from disclosure pursuant to §1-210(b)(1), G.S. (preliminary drafts and notes).

18. With regard to the claim that certain meeting minutes had to be redacted because the respondents had inadvertently included attorney-client privileged information in such minutes, see ¶ 15, above, it is found that the respondents ultimately withdrew this claim and disclosed such meeting minutes to the complainants without redactions. Accordingly, such records and

contention will not be further addressed herein.

19. The respondents contended that IC-2019-0715-109 and lines 1-23 of IC-2019-0715-112⁴, as well as the handwritten notes contained in the margins of IC#2-2019-0715-1 through IC#2-2019-0715-13, are exempt pursuant to §1-210(b)(1), G.S. 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.”

20. 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).

21. 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.

22. 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 ¶ 29, below.

23. It is found 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.

24. 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:

[n]otwithstanding 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

⁴ The remaining lines contained in IC-2019-0715-112 are addressed in paragraphs 34-39, below.

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.

25. Cheryl Philopena, President of the Gardner Lake Volunteer Fire Company, appeared at the second contested case hearing and testified on behalf of the respondents.

26. After careful in camera inspection, it is found that IC-2019-0715-109 and lines 1 through 23 of IC-2019-0715-112 are not “preliminary drafts or notes,” within the meaning of §1-210(b)(1), G.S. Rather, it is found that both of these records are emails which refer to and/or attach another document. Specifically, it is found that IC-2019-0715-109 attaches a two-page letter, which is found to be exempt pursuant to the attorney-client privilege, while lines 1 through 23 of 2019-0715-112 also refer to a two-page letter which is found to be exempt pursuant to the attorney-client privilege. See ¶¶ 38-39, below.

27. It is concluded that the respondents did not violate the FOI Act when they declined to disclose the attachments referred to in paragraph 26, above, to the complainants.

28. However, it is concluded that the respondents violated the FOI Act when they declined to disclose IC-2019-0715-109 and lines 1 through 23 of IC-2019-0715-112 to the complainants.

29. With respect to IC#2-2019-0715-1 through IC#2-2019-0715-13, it is found that Ms. Philopena’s handwritten notes are contained in the margins of the meeting agendas. It is found that these records were disclosed to the complainants with Ms. Philopena’s handwritten notes redacted. It is found that Ms. Philopena takes such notes during the public meetings of the respondent fire company’s and of the fire company’s board of director’s meetings as a personal memory aide and that such notes are not completed documents. It is found that Ms. Philopena is not charged with the responsibility of taking notes during or creating minutes for the respondents’ public meetings. It is further found that Ms. Philopena does not share her notes with anyone.

30. It is found that Ms. Philopena’s handwritten notes are preliminary “notes,” within the meaning of §1-210(b)(1), G.S.

31. It is further found that the respondents determined that the public interest in withholding Ms. Philopena’s notes clearly outweighs the public interest in disclosure.⁵ It is further found that the respondents’ reasoning for withholding these records was not frivolous or patently unfounded.

32. Finally, it is found that Ms. Philopena’s handwritten notes are not interagency or intra-agency memoranda, letters, advisory opinions, recommendations or reports, within the

⁵ In this regard, it is found that disclosing Ms. Philopena’s notes might have a chilling effect on how Ms. Philopena conducts her duties as President of the Gardner Lake Volunteer Fire Company, including inhibiting her from taking notes during public meetings, which could result in Ms. Philopena being less prepared when performing her duties for the fire company.

meaning of §1-210(e)(1), G.S.

33. Accordingly, it is concluded that the respondents did not violate the FOI Act when they declined to disclose Ms. Philopena's handwritten notes to the complainants.

34. Next, the respondents contended that IC-2019-0715-1 through IC-2019-0715-158 are exempt in their entirety pursuant to §1-210(b)(10), G.S., which permits an agency to withhold from disclosure records of "communications privileged by the attorney-client relationship."

35. 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.

36. 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. . . .

37. 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.

38. After careful inspection of the in camera records, it is found that the following records are exempt in their entirety from disclosure pursuant to the attorney-client privilege: IC-2019-0715-1 through IC-2019-715-6; IC-2019-715-9; IC-2019-715-11; IC-2019-715-12; IC-2019-715-14; IC-2019-715-17; IC-2019-715-20 through IC-2019-715-36; IC-2019-715-41; IC-2019-715-42; IC-2019-715-45 through IC-2019-715-76; IC-2019-715-85 through IC-2019-715-88; IC-2019-715-110; IC-2019-715-111; IC-2019-715-113; IC-2019-715-116; IC-2019-715-117; IC-2019-715-122 through IC-2019-715-128; IC-2019-715-134; IC-2019-715-140 through IC-2019-715-146; IC-2019-715-148; and IC-2019-715-150 through IC-2019-715-154.

39. In addition, it is further found that portions of the following records are exempt from disclosure pursuant to the attorney-client privilege:

- a. IC-2019-715-7 (lines 1 through 22);
- b. IC-2019-715-15 (top of page through the words "Forwarded Message");
- c. IC-2019-715-18 (top of page through the words "Forwarded Message");
- d. IC-2019-715-37 (lines 1 through 3);
- e. IC-2019-715-40 (lines 10 through 30);
- f. IC-2019-715-43 15 (top of page through the words "Forwarded Message");
- g. IC-2019-715-112 (from the words "Original Message" to the bottom of the page); and
- h. IC-2019-715-121 (from the words "Original Message" to the bottom of the page).

40. It is further found that the records identified in paragraph 38, above, and the portions of records identified in paragraph 39, above, contain the legal advice that the respondents sought and/or received from their attorneys. It is further found that the respondents were acting within the scope of their duties with regard to current agency business when they sought and/or received this advice. It is further found that the communications were made in confidence. It is further found that the respondents did not waive their attorney-client privilege. Accordingly, it is concluded that the respondents did not violate the FOI Act when they denied the complainants copies of the records identified in paragraph 38, above, or those portions of the records identified in paragraph 39, above.

41. However, it is found that the respondents failed to prove that the remaining in camera records or portions thereof constitute records containing communications written in confidence between a public agency and a government attorney relating to legal advice sought by the public agency, or records prepared by the government attorney in furtherance of the rendition of such legal advice, within the meaning of §52-146r (2), G.S. It is therefore concluded that the respondents violated the FOI Act when they failed to disclose such records or portions of records to the complainants.

42. Next, the respondents contended that lines 23 through 39 of IC-2019-715-7; IC-2019-715-8; IC-2019-715-10; IC-2019-715-13 and IC-2019-715-149 are exempt pursuant to §1-210(b)(8), G.S.

43. Section 1-210(b)(8), G.S., provides that disclosure shall not be required of:

[s]tatements of personal worth or personal financial data required by a licensing agency and filed by an applicant with such licensing agency to establish the applicant's personal qualification for the license, certificate or permit applied for.

44. After a careful inspection of the in camera records, it is found that none of the records or portions thereof identified in paragraph 42, above, contain information within the meaning of §1-210(b)(8), G.S. It is therefore concluded that the respondents violated the FOI Act when they failed to disclose such records or portions of records to the complainants.

45. Next, the respondents contended that lines 23 through 39 of IC-2019-715-7; IC-2019-715-8; IC-2019-715-10; IC-2019-715-13 and IC-2019-715-149 are exempt pursuant to §1-210(b)(9), G.S.

46. Section 1-210(b)(9), G.S., provides that disclosure shall not be required of, “[r]ecords, reports and statement of strategy or negotiations with respect to collective bargaining.”

47. After careful inspection of the in camera records, it is found that none of the records or portions thereof identified in paragraph 45, above, contain information within the meaning of §1-210(b)(9), G.S. It is therefore concluded that the respondents violated the FOI Act when they failed to disclose such records or portions thereof to the complainants.

48. Finally, with regard to the complainants’ request that Commission issue an order voiding all actions taken at meetings of the respondent fire company that were not properly noticed, it is found that there was no evidence presented at the hearing to substantiate that the respondents conducted unnoticed meetings. However, based on the initial confusion with regard to the applicability of the FOI Act to the respondent fire company’s records and meetings, it is found that the respondents would benefit from a FOI training session and one is so ordered.

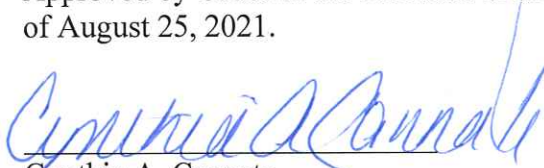
The following order by the Commission is hereby recommended on the basis of the record concerning the above-captioned complaint.

1. Other than the records or portions thereof specifically identified in paragraphs 29, 38 and 39, above, the respondents shall forthwith provide the complainants with a copy of the requested records, free of charge.

2. Henceforth, the respondents shall strictly comply with the disclosure provisions of §§1-210(a) and 1-212(a), G.S.

3. Forthwith, the respondents, or their designee, shall arrange for a FOI Act training session to be conducted by the staff of the FOI Commission. The respondents, or their designee, shall forthwith contact the FOI Commission to schedule such training session.

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:

BRIAN K. ESTEP, AND TOWN OF SALEM, Conway, Londregan, Sheehan & Monaco, P.C.,
38 Huntington Street, P.O. Box 1351, New London, CT 06320-1351

**PRESIDENT, GARDNER LAKE VOLUNTEER FIRE COMPANY INC.; AND
GARDNER LAKE VOLUNTEER FIRE COMPANY, INC.**, c/o Attorney Claire M. Howard,
Madsen, Prestley & Parenteau, LLC, 402 Asylum Street, Hartford, CT 06103



Cynthia A. Cannata
Acting Clerk of the Commission