FREEDOM OF INFORMATION COMMISSION
OF THE STATE OF CONNECTICUT

In the Matter of a Complaint by | FINAL DECISION

Kevin Rennie,

Complainant

against | Docket #FIC 2019-0750

Deputy General Counsel,
Office of Governor Ned Lamont,

Respondent | June 23, 2021

The above-captioned matter was heard as a contested case on November 17, 2020, and February 3, 2021, at which times the complainant and the respondent appeared and presented testimony, exhibits and argument on the complaint. Due to the COVID-19 pandemic and the state's response to it, the hearing was conducted telephonically.[1]

After consideration of the entire record, the following facts are found and conclusions of law are reached:

1. The respondent is a public agency, within the meaning of §1-200(1), G.S.

2. It is found that, by email dated August 13, 2019, the complainant requested "all documents, including but not limited to emails, text messages, letters, and telephone messages, sent to or received from Ann Huntress Lamont between January 9, 2019, and the date of compliance with this request, and the following individuals in your office: Ryan Drajewicz and Jonathan Dach. This includes emails and texts exchanged on accounts that may not have been sent to or from state email accounts or mobile phones."

3. It is found that the respondent acknowledged the request the same day and informed the complainant that a search for responsive records would be conducted. It is found that, after several email inquiries by the complainant were made over the ensuing months as to the status of the search, on November 27, 2019, the respondent provided some responsive records, and withheld others. It is found that some of the records that were provided were redacted.

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

4. By email dated December 23, 2019,[2] the complainant appealed to this Commission, alleging that the respondent violated the Freedom of Information ("FOI") Act by over-redacting the records that were provided and by failing to provide him with copies of all records responsive to the request, described in paragraph 2, above.

5. 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.

6. 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 or . . . (3) receive a copy of such records in accordance with section 1-212. Any agency rule or regulation, or part thereof, that conflicts with the provisions of this subsection or diminishes or curtails in any way the rights granted by the subsection shall be void.

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) and 1-210(a), G.S.

9. The respondent claimed that the records, or portions thereof, withheld from the complainant are exempt from disclosure pursuant to §§1-210(b)(1), 1-213(b), and 1-210(b)(5)(B), G.S.

---

[2] 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. Accordingly, the Commission retains jurisdiction over this appeal.

10. The hearing officer ordered the respondent to submit the records claimed to be exempt from disclosure to the Commission for in camera inspection. Such records, consisting of 190 pages, were submitted on February 3, 2021. The references to the in camera records herein correspond to the record references listed on the in camera index.

11. The respondent claimed that Record Ref #s 4-99 through 4-101, 4-121 through 4-123, 4-125 through 4-129, 4-131 through 4-135, 4-139 through 4-140, and DGC001 through DGC094, or portions thereof, are exempt from disclosure pursuant to §1-210(b)(1), G.S.[3]

12. Section 1-210(b)(1), G.S., provides 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."

13. 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.

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

---

[3] The respondent also redacted the information in the "From", "To", "CC", "Subject", and "Date" lines on many of the records at issue. At the hearing in this matter, the respondent agreed to provide this information to the complainant, except for the personal email address of Indra K. Nooyi, to which the complainant did not object. Accordingly, the Commission need not address such redactions.

> [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 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.... (emphasis added).

15. 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.

16. Accordingly, Conn. Gen. Stat. §§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).

17. With regard to the "balancing test" required by §1-210(b)(1), G.S., it is well established that the responsibility for making the determination as to what is in the public interest is on the agency that maintains the records. See Van Norstrand at 345. The agency must have considered in good faith the effect of disclosure, and indicated the reasons for its determination to withhold disclosure, which reasons may not be frivolous or patently unfounded. Id., citing Wilson at 339. See also People for Ethical Treatment of Animals, Inc. v. Freedom of Information Commission, 321 Conn. 805, 816-817 (2016). Thus, the only determination for the FOIC to make is whether the reasons for nondisclosure given by the agency are frivolous or patently unfounded. See Lewin v. Freedom of Information Commission, 91 Conn. App. 521, 522-523 (2005); Coalition to Save Horsebarn Hill v. Freedom of Information Commission, 73 Conn. App. 89, 99 (2002).

18. After careful in camera inspection of the records identified in paragraph 11, above, and as indicated on the in camera index, it is found that such records consist of draft legislation, emails discussing draft legislation, drafts of a budget address including comments thereon, and a draft press release, including revisions thereto.

19. The respondent Deputy General Counsel Doug Dalena testified that the draft documents contain input and feedback from various individuals regarding certain legislative proposals, and that such input and feedback informs the legislative process. Attorney Dalena further testified that disclosure of such input and feedback could have a chilling effect on individuals' willingness to contribute their ideas and comments. In addition, he testified that disclosure could harm the Governor's negotiating position vis à vis certain stakeholders with regard to future legislative proposals.

20. It is found that the records identified in paragraph 11, above, are "preliminary drafts" within the meaning of §1-210(b)(1), G.S., in that they were part of the deliberative process by which government decisions and policies were formulated.

21. Attorney Dalena further testified, and it is found, that he conducted the required balancing test and determined that the public interest in withholding the records clearly outweighed the public interest in disclosure of the records in order to avoid a chilling effect on the candid discussion of legislative proposals and the Governor's ability to receive advice from informal advisors, and also, to protect the Governor's negotiating position with respect to legislation that might be proposed in the future.

22. It is found that the balancing test was undertaken in good faith, and that the reasons for nondisclosure are not frivolous or patently unfounded.

23. It is also found that the records, identified in paragraph 11, above, are not "[i]nteragency or intra-agency memoranda or letters, advisory opinions, recommendations or any report" that are required to be disclosed pursuant to §1-210(e), G.S.

24. Based on upon the foregoing, it concluded that records, or portions thereof, identified in paragraph 11, above, are exempt from disclosure pursuant to §1-210(b)(1), G.S.

25. Next, the respondent claimed that the names/identifying information of candidates for executive level employment contained in the in camera records are exempt from disclosure pursuant to §1-213(b), G.S.: Record Ref #s 1-88, 3-33, T-11 through T-13, DGC095 through DGC152.[4]

26. Section 1-213(b), G.S., provides, in relevant part:

> [n]othing in the Freedom of Information Act shall be deemed in any manner to:
>
> (2) [r]equire disclosure of any record of a personnel search committee which, because of name or other identifying information, would reveal the identity of an executive level

[4] In Record Ref #T-13, the respondent redacted personal medical information about a particular individual. At the hearing in this matter, the complainant stated that he was not seeking such information and therefore, the Commission need not address such redaction.

> employment candidate without the consent of such candidate...

27. Section 1-200(7), G.S., defines "personnel search committee" as "a body appointed by a public agency, whose sole purpose is to recommend to the appointing agency a candidate or candidates for an executive-level employment position." (Emphasis added).

28. It is found that the respondent failed to prove that the Office of the Governor had appointed a "body" whose sole purpose was to recommend to the Governor a candidate or candidates for an executive level employment position.

29. Moreover, it is found, after careful in camera inspection of the records identified in paragraph 25, above, that the records themselves do not reflect the existence of a personnel search committee.

30. Because the respondents failed to prove that a personnel search committee had been appointed, it is found that the in camera records identified in paragraph 25, above, therefore are not records of a personnel search committee, and are not exempt from disclosure pursuant to §1-213(b), G.S. See Bristol Housing Authority v. Freedom of Information Commission, 1994 WL 715821, superior court, judicial district of New Britain, CV 94-0460621-S (December 8, 1994) (rejecting housing authority's claim that a gathering of its members was a non-meeting of a personnel search committee because agency failed to prove that a personnel search committee had been created prior to such gathering).

31. Based upon the foregoing, it is concluded that the respondents violated §§1-210(a) and 1-212(a), G.S., by withholding the records, or portions thereof, identified in paragraph 25, above.

32. Finally, the respondents claimed that the name/identifying information of certain companies the state was attempting to attract to Connecticut as part of the Governor's economic development plan, contained in the following in camera records, or portions thereof, is exempt from disclosure pursuant to §1-210(b)(5)(B), G.S.: Record Ref.#1-65, 3-33, 5-4, 5-189 through 5-190, 6-1, 6-44, 6-48, 6-53, 6-58, 6-63, 6-64, and 6-80 through 6-83.

33. Section 1-210(b)(5)(B) provides that disclosure is not required of "commercial or financial information given in confidence, not required by statute". For the exemption to apply, all three elements must be proven, i.e., the information must be: (1) commercial or financial information; (2) given in confidence; and (3) not required by statute. See Dept. of Public Utilities v. FOI Comm'n, Superior Court, judicial district of New Britain, Docket #CV99-0498510 (Jan. 12, 2001), 2001 WL 79833.

34. In James Craven and the Norwich Bulletin v. Governor, State of Connecticut; and State of Connecticut, Office of the Governor, Docket #FIC 2011-152 (March 14, 2012), the Office of the Governor withheld from disclosure the names of certain companies that had contacted the state concerning possible participation in the First Five economic development

initiative.[5] In that case, the Commission found, with regard to the first element of the exemption, that a company's "commercially recorded name" is information related to such company's business or trade, and therefore is "commercial information" as that phrase is used in §1-210(b)(5)(B), G.S.

35. Accordingly, it is found that the names/identities of the companies contained in the in camera records, described in paragraph 32, above, are "commercial information." Thus, it is found that the first element of the exemption has been satisfied.

36. With regard to the second element of the exemption, commercial information is "given in confidence" if provided by a person under an express or implied assurance of confidentiality. See Dept. of Public Utilities, supra; Chief of Staff, Office of the Mayor, City of Hartford v. Connecticut Freedom of Information Comm'n, Superior Court, judicial district of New Britain, Docket #CV-980492654-S (Aug. 12, 1999).

37. In Craven, the Commission found that the companies provided their names to the Office of the Governor under an implied assurance of confidentiality. Accordingly, the Commission concluded in that case that the second element of the exemption was satisfied.

38. The facts of the instant case, however, are unlike the facts in Craven, wherein the companies had applied for certain economic benefits and therefore provided their names to the state in order to be considered for participation in the First Five initiative. It is found that there was no testimony or other evidence presented in the instant case from which it could be determined that the companies provided their names or other information to the state at all, in confidence or otherwise. Attorney Dalena testified only that he redacted the names of companies that "the state was pursing" as part of an economic development plan. It is also found, after careful in camera inspection of the records identified in paragraph 32, above, that such records themselves do not lend support to the position that the companies provided their names or other information to the state.

39. Accordingly, it is found that the respondent failed to prove that the second element of §1-210(b)(5)(B), was satisfied.

40. Because the second element of the exemption has not been satisfied, the Commission need not consider whether the third element of the exemption was satisfied.

41. It is therefore found that the records, or portions thereof, described in paragraph 32, above, are not exempt from disclosure pursuant to §1-210(b)(5)(B), G.S.

42. Based upon the foregoing, it is concluded that the respondent violated §§1-210(a) and 1-212(a), G.S., by withholding the records, or portions thereof, identified in paragraph 32, above.

[5] Under the First Five economic development initiative, the first five companies that agreed to create 200 new jobs in the state would, in return, receive special tax incentives and other financial benefits.

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

1. Forthwith, the respondent shall provide an unredacted copy of the records described in paragraphs 25 and 32, above, to the complainant, free of charge.

2. In complying with paragraph 1 of the order, the respondent may redact the personal email address of Indra K. Nooyi, and the personal medical information in Record Ref #T-13.

3. Henceforth, the respondent 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 June 23, 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:

KEVIN RENNIE, 1708 Ellington Road, South Windsor, CT 06074

DEPUTY GENERAL COUNSEL, OFFICE OF GOVERNOR NED LAMONT, c/o Assistant Attorney General Phillip Miller, Office of the Attorney General, 165 Capitol Avenue, Hartford, CT 06106

Cynthia A. Cannata
Acting Clerk of the Commission

FIC 2019-0750/FD/CAC/6/23/2021