

FREEDOM OF INFORMATION COMMISSION
OF THE STATE OF CONNECTICUT

In the Matter of a Complaint by

FINAL DECISION

Fuel Cell Energy, Inc., and
Joseph Szerejko,

Complainants

Docket # FIC 2021-0377

against

Office of the Tax Assessor,
City of Bridgeport; and City
of Bridgeport,

Respondents

June 22, 2022

The above-captioned matter was heard as a contested case on December 23, 2021, March 25, 2022, and May 6, 2022, at which times the complainants and respondents appeared, stipulated to certain facts and presented testimony, exhibits and argument on the complaint. The complainants and respondents appeared remotely, pursuant to §149 of Public Act 21-2 (June Sp. Sess.), as amended by §1 of Public Act 22-3. The case caption has been amended to reflect the correct office within the City of Bridgeport which maintains the records at issue.

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 letter dated March 5, 2020, addressed to the Bridgeport City Clerk, the complainants requested that the respondent City of Bridgeport provide them with copies of: all documents concerning fuel cells and whether they are taxable, all communications between the Tax Assessor for the City of Bridgeport and the Assessor for the Town of Groton, and all documents from the Connecticut Association of Assessing Officers concerning fuel cells and whether they are taxable.
3. It is found that by communication dated March 9, 2020, the Bridgeport City Attorney acknowledged the request described in paragraph 2, above, on behalf of the respondent City, provided the complainants with a tracking number for such request, and informed the complainants that the City would search for the requested records. It is found that, shortly thereafter, in March 2020, the worldwide Covid-19 pandemic caused the shutdown of government offices, including municipal offices in Bridgeport, for an extended period.

4. It is found that, one year later, by letter to the respondents dated March 26, 2021, the complainants referenced the tracking number described in paragraph 3, above, noted that the City of Bridgeport's on-line tracking system showed at that time that the request was "in progress," and that the Freedom of Information ("FOI") Act requires prompt provision of requested records. The complainants also demanded that the respondents provide either copies of the requested records or an opportunity to inspect them. In such letter, the complainants further specified that the records should include communications between the City's Tax Assessor and any other person regarding the fuel cell owned by Fuel Cell Energy, Inc., located at the Pfizer campus in Groton.

5. It is found that the respondents acknowledged the complainants' letter of March 26, 2021, by return communication dated March 26, 2021, and provided a separate tracking number to correspond with such request. In such acknowledgement, the respondents informed the complainants that they were reviewing the request and would contact the complainants when the requested records were available.

6. It is also found that on June 16, 2021, the complainants sent the respondents another letter, referencing the tracking numbers described in paragraphs 3 and 5, above, and again noting that, according to the City of Bridgeport's on-line tracking system, the requests were "in-progress." The complainants also noted that requested records must be provided promptly under law, and demanded that the respondents provide copies of, or an opportunity to inspect, the requested records.

7. Having received no response to the letter described in paragraph 6, above, by letter dated and postmarked July 13, 2021, and filed with the Commission on July 14, 2021, the complainants alleged that the respondents violated the FOI Act by denying them copies of the requested records.

8. On December 6, 2021, the Commission issued a Notice of Hearing and Order to Show Cause in this matter, notifying the parties of the December 23, 2021, evidentiary hearing in this case.

9. It is found that, by letter dated December 23, 2021, the respondents provided the complainants with nine pages of records responsive to the request described in paragraph 2, above, and informed the complainants that such request would remain open while they conducted an additional search. It is found that, by separate letter dated December 23, 2021, the respondents informed the complainants that they had reviewed records responsive to the request described in paragraph 4, above, and that 38 records were being withheld based on §§12-41(c), 1-210(b)(5)(B), and 1-210(b)(10), G.S. The respondents also informed the complainants that such request would remain open while they conducted an additional search.

10. At the December 23, 2021, hearing in this matter, the parties informed the hearing officer that the respondents were searching for additional records and requested a continuance in order for the complainants to have an opportunity to inspect such records to see if further proceedings at the Commission were required. Based on that representation, the hearing officer

informed the parties that a continued hearing would be scheduled, and that, in the interim, if the parties settled the matter, they should so notify the Commission.

11. By notice dated January 25, 2022, the Commission informed the parties of a February 16, 2022, continued hearing in this matter. Without objection from the complainants, such matter was postponed at the request of the respondents. A second continued hearing was scheduled for March 25, 2022, and was conducted on that date.

12. At the March 25, 2022, hearing, counsel for the respondents stated that approximately 50 additional responsive pages of records, some of which might be duplicative, had been located and were being reviewed, but that such records had not been provided to the complainants.

13. At the March 25, 2022, hearing, the respondents for the first time contended that they were unclear as to the parameters of the complaint in this matter, and further contended that the Commission lacked jurisdiction to adjudicate the exemptions being claimed, because the complainants had not specifically argued in their complaint that such exemptions were inapplicable. The respondents suggested that the complainants file an amended complaint in order for the Commission to have jurisdiction to adjudicate the claims of exemption. Although such argument is without merit, the complainants did not object to filing an amended complaint. Therefore, the hearing officer granted the complainants an opportunity to file an amended complaint, and the parties agreed on the record that the amended complaint and any issues raised therein would be decided under the instant docket number.

14. The complainants filed an amended complaint with the Commission on March 29, 2022, which incorporated the original complaint, alleged that the requested records had not been provided promptly, and challenged the respondents' contentions that §§12-41(c), 1-210(b)(5)(B), and 1-210(b)(10), G.S., operate to exempt any of the withheld records. The complainants requested an in camera inspection of the withheld documents.

15. A third evidentiary hearing was conducted on May 6, 2022. At such time, the respondents again stated that they had located the 50 additional pages of records described in paragraph 12, above, and that they still had not completed their review of such records.

16. On May 12, 2022, the respondents submitted for in camera inspection the 38 records claimed to be exempt from disclosure, as described in paragraph 9, above. Such records, consisting of 102 pages, shall herein be identified as IC-2021-0377-01 through IC-2021-0377-102.

17. At the time of the request, §1-200(5), G.S., provided:

“[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.¹

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

[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...receive a copy of such records in accordance with section 1-212.

19. It is found that the respondents maintain the requested records, and that such records are public records within the meaning of §§1-200(5) and 1-210(a), G.S., and must be disclosed, unless they are exempt from disclosure.

20. The respondents contended that the following records are exempt from disclosure pursuant to §12-41(c), G.S.: IC-2021-0377-1 through IC2021-0377-36, IC-2021-0377-38 (lines 18, 24, 29, 34), IC-2021-0377-39 (lines 3, 8), IC-2021-0377-40 through IC-2021-0377-98, IC-2021-0377-101 (lines 6-7, 12, 15-17) and IC-2021-0377-102.

21. Section 12-41(c), G.S., requires that each owner of tangible personal property file a declaration listing their taxable personal property with the tax assessor of the municipality in which that property is located. Further, the statute provides that: “. . . commercial or financial information in any declaration filed under this section shall not be open for public inspection but may be disclosed to municipal officers for tax collections purposes.”

22. In Docket # 2004-389; Nancy Rossi v. Department of Finance, City of West Haven (June 8, 2005), the Commission concluded that §12-41(c), G.S., provides a statutory basis to withhold commercial and financial information in personal property declarations and supporting documentation.² However, in that case, the Commission did not address whether §12-41(c), G.S., also exempts from disclosure aggregate declaration figures and the signatures of the filers.

23. It is concluded, however, that although §12-41(c), G.S., provides a statutory basis to withhold that part of a personal property declaration and supporting documentation which constitute commercial or financial information, that such provision by its plain language does not encompass the entire declaration.

24. Upon careful in camera inspection of the records described in paragraph 20, above, it is found that the portions of such records which identify the filers and which set forth the

¹ Section 147 of Public Act 21-2 (June Sp. Sess.) amended the definition of “public records or files” to also include data or information that is “videotaped”.

² On brief, the complainants cited to an advisory opinion and final decision of the Commission related to property tax declarations and supporting documentation. In the Matter of a Request for An Advisory Opinion for Connecticut Association of Assessing Officers, Advisory Opinion 69, (1987); Docket # FIC 1986-96; James Connery v. Mayor, City of Shelton (June 3, 1986). However, such precedents predate the current confidentiality provision in §12-41(c), G.S.

aggregate declaration figures are not exempt from mandatory disclosure pursuant to §12-41(c), G.S. Accordingly, it is concluded that the respondents violated §§1-210(a) and 1-212(a), by withholding such portions of such records from the complainants.

25. However, it is also found that the remaining portions of the records identified in paragraph 20, above, constitute commercial or financial information within the meaning of §12-41(c), G.S. Accordingly, it is found that such remaining portions are exempt from mandatory disclosure pursuant to that statute. It is therefore concluded that the respondents did not violate §§1-210(a) and 1-212(a), by denying the complainants copies of such remaining portions of such records.

26. Next, the respondents contended that the following in camera records are exempt from disclosure pursuant to §1-210(b)(10), G.S.: IC-2021-0377-37 (lines 1-7), IC-2021-0377-99, IC-2021-0377-100 (lines 5-23), and IC-2021-0377-101 (lines 6-7, 12, 15-17).

27. Section 1-210(b)(10), G.S., provides, in relevant part, that disclosure is not required of “communications privileged by the attorney-client relationship”

28. 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. Freedom of Information Commission, 260 Conn. 143 (2002). In that case, our 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.*, 149.

29. 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. . . .

30. Our 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 v. Freedom of Information Commission, *supra*, 260 Conn. 149.

31. The Commission recognizes that “[w]here legal advice of any kind is sought from a professional legal adviser in his capacity as such, the communications relating to that purpose, made in confidence by the client, are at his instance permanently protected from disclosure by

himself or by the legal adviser, except the protection be waived.” Rienzo v. Santangelo, 160 Conn. 391, 395 (1971). Moreover, in 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. . . . The privilege fosters full and frank communications between attorneys and their clients and thereby promote[s] the broader public interests in the observation of law and [the] administration of justice.” PSE Consulting, Inc. v. Frank Mercede & Sons, Inc., 267 Conn. 279, 329-30 (2004). However, the privilege only applies when necessary to achieve its purpose; it is not a blanket privilege. Harrington v. Freedom of Information Commission, 323 Conn. 1, 12 (2016). Further, a party can establish that a document is privileged by showing that the document itself is the record or memorialization of a communication between the client and the attorney; by showing that the document was created with the intent to communicate the contents to an attorney, and the client actually communicated the contents to the attorney; or by showing that the document were somehow transformed for the purpose of seeking legal advice and communicated or intended to be communicated to an attorney. State v. Kosuda-Bigazzi, 335 Conn. 327 (2020). If it is clear from the face of the records, extrinsic evidence is not always required to prove the existence of the attorney-client privilege. Lash v. Freedom of Information Commission, 300 Conn. 511, 516 (2011).

32. Based upon careful in camera inspection of the records identified in paragraph 26, above, it is found that IC-2021-0377-99 and IC-2021-0377-100 constitute written communications, transmitted in confidence, between a public official or employee of a public agency, acting within the scope of their employment, and their attorney(s), and that such communications are related to legal advice sought. In addition, it is found that the respondents did not waive the attorney-client privilege. Therefore, it is found that such records are exempt from disclosure pursuant to §1-210(b)(10), G.S. It is thus concluded that the respondents did not violate the FOI Act by withholding such records from disclosure.

33. With respect to IC-2021-0377-37 and IC-2021-0377-101, it is not clear from the face of the records that the privilege applies. Based upon the testimony and exhibits in this matter, and an in camera inspection of such records, it is found that the respondents failed to prove that IC-2021-0377-37 and IC-2021-0377-101 constitute written communications, transmitted in confidence, between a public official or employee of a public agency, acting within the scope of their employment, and their attorney(s), and that such communications are related to legal advice sought. Therefore, it is found that such records are not exempt from disclosure pursuant to §1-210(b)(10), G.S.

34. Next, the respondents contended that the following in camera records are exempt from disclosure pursuant to §1-210(b)(5)(B), G.S.: IC-2021-0377-37 (lines 1-7); and IC-2021-0377-101 (lines 6-7, 12, 15-17).

35. Section 1-210(b)(5)(B), G.S., provides that nothing in the FOI Act shall be construed to require disclosure of “[c]ommerical or financial information given in confidence not required by statute.”

36. For the exemption at §1-210(b)(5)(B), G.S., 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.

37. With regard to the first element of the exemption, Connecticut appellate courts have not had occasion to interpret the phrase “commercial or financial information”, as used in §1-210(b)(5)(B), G.S. Thus, the Commission has looked to Exemption 4 in the federal FOI Act, which protects “commercial or financial information obtained from a person [that is] privileged and confidential”. See e.g., John Scott v. Chief, Poquonock Bridge Fire District, et al., Docket #FIC 2015-727 (March 8, 2016); DatabaseUSA LLC v. Commissioner, State of Connecticut, Department of Administrative Services, Docket #FIC 2015-209 (February 10, 2016). The terms “commercial” and “financial” as used in the federal FOI Act, 5 U.S.C. 552, should be given their ordinary meanings. Public Citizen Health Research Group v. Food and Drug Admin., 704 F.2d 1280, 1290 (D.C. Cir. 1983). More recently, the federal courts have affirmed that “commercial information” as used in Exemption 4 means “records that actually reveal basic commercial operations such as sales statistics, profits and losses, and inventories, or relate to the income-producing aspects of a business.” See e.g., Judicial Watch, Inc. v. U.S. Department of Health and Human Services, 525 F.Supp.3d 90, 96, 2021 WL 930350 (D.C. Cir. 2021); New York Times Company and John T. Ewing, Jr. v. U.S. Department of Justice et al., (slip op.) 2021 WL 371784 (S.D.N.Y. 2021). The Commission adopts the federal courts’ interpretation of “commercial or financial information”.

38. Based upon careful inspection of the records described in paragraph 34, above, it is found that the information therein is not “commercial or financial” information in the ordinary sense, within the meaning of §1-210(b)(5)(B), G.S.

39. With regard to the second element of the exemption, the Connecticut Appellate Court in Allco Renewable Energy Limited v. Freedom of Information Commission, 205 Conn. App. 144 (2021), affirmed the Commission’s interpretation of the phrase “given in confidence” as used in §1-210(b)(5)(B), G.S. In that case, the Commission concluded, and the court agreed, that “given in confidence” within the meaning of §1-210(b)(5)(B), G.S., requires an intent to give confidential information, based on context or inference, such as where there is an express or implied assurance of confidentiality, where the information is not available to the public from any other source or where the information is such that it would not customarily be disclosed by the person who provided it.

40. Based upon careful inspection of the records described in paragraph 34, above, it is found that the respondents failed to prove that the information therein was given in confidence, within the meaning of §1-210(b)(5)(B), G.S.

41. Based upon careful inspection of the records described in paragraph 34, above, it is found that the respondents failed to prove that the information therein was not required by statute, within the meaning of §1-210(b)(5)(B), G.S.

42. Accordingly, it is found that the respondents failed to prove that such in camera records are exempt from disclosure pursuant to §1-210(b)(5)(B), G.S. It is therefore concluded that the respondents violated §§1-210(a)(5) and 1-212(a), G.S., by withholding the requested records described in paragraph 34, above, from the complainants.

43. With regard to the complainants' allegation that the respondents failed to provide the requested records promptly, the Commission has held that the meaning of the word "promptly" is a particularly fact-based question. In Advisory Opinion #51, In the Matter of a Request for Declaratory Ruling, Third Taxing District of the City of Norwalk, Applicant (Notice of Final Decision dated January 11, 1982), the Commission advised that the word "promptly," as used in §1-210(a), G.S., means quickly and without undue delay, taking into consideration all of the factors presented by a particular request.

44. The advisory opinion goes on to describe some of the factors that should be considered in weighing a request for records against other priorities: the volume of records requested; the time and personnel required to comply with a request; the time by which the person requesting records needs them; the time constraints under which the agency must complete its other work; the importance of the records to the requester, if ascertainable; and the importance to the public of completing the other agency business without the loss of the personnel time involved in complying with the request.

45. The respondents contended that disclosure was delayed due to the government shutdown resulting from the worldwide pandemic and the need to meet other work-related deadlines, such those surrounding compilation of the grand list. Even taking such reasons into consideration, it is found that a delay of 21 months from date of request to the date that the first nine records were provided, was not prompt, based on the facts and circumstances of this case. Accordingly, it is found that the respondents violated the promptness provisions of the FOI Act in this matter.

46. With respect to the additional 50 pages identified by the respondents at the March 25, and May 6, 2022, hearings, to the extent such records are indeed duplicates of records otherwise discussed herein, the findings and conclusions herein shall apply to such duplicates. To the extent that such records constitute records not specifically addressed herein, it is found that the respondents violated the promptness and disclosure provisions of §§1-210(a) and 1-212(a), G.S., by not providing copies of such records to the complainants, more than 2 years after they were requested.

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

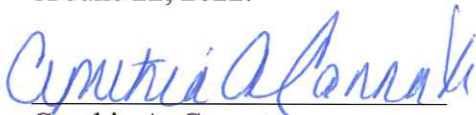
1. Within fourteen days of the Notice of Final Decision in this case, the respondents shall provide the complainant with a copy of the records described in paragraph 24 of the findings, above, at no charge.

2. Within fourteen days of the Notice of Final Decision in this case, the respondents shall provide the complainant with copies of the records described in paragraph 34 of the findings, above, at no charge.

3. Within fourteen days of the Notice of Final Decision in this case, the respondents shall provide the complainant with copies of the records described in paragraph 46 of the findings, above, to the extent that they are not duplicates of the records described in previous findings, herein, at no charge.

4. Henceforth, the respondents shall strictly comply with the promptness provisions of the FOI Act.

Approved by Order of the Freedom of Information Commission at its regular meeting of June 22, 2022.



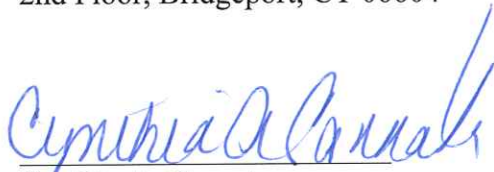
Cynthia A. Cannata
Acting Clerk of the Commission

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:

FUEL CELL ENERGY, INC. AND JOSEPH SZEREJKO, c/o Attorney Joseph D. Szerejko, Murtha Cullina LLP, 280 Trumbull Street, 12th Floor, Hartford, CT 06103

OFFICE OF THE TAX ASSESSOR, CITY OF BRIDGEPORT; AND CITY OF BRIDGEPORT, c/o Attorney Dina A. Scalò, Office of the City Attorney, 999 Broad Street, 2nd Floor, Bridgeport, CT 06604



Cynthia A. Cannata
Acting Clerk of the Commission