

FREEDOM OF INFORMATION COMMISSION
OF THE STATE OF CONNECTICUT

In the Matter of a Complaint by

FINAL DECISION

Martin and Lillian Haener,

Complainants

against

Docket #FIC 2022-0157

First Selectman, Town of Greenwich; Law
Department, Town of Greenwich; and
Town of Greenwich,

Respondents

April 12, 2023

The above-captioned matter was heard as a contested case on August 17, 2022, at which time the complainants and the respondents 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 through the use of electronic equipment (remotely) pursuant to §149 of Public Act 21-2 (June Sp. Sess.), as amended by §1 of Public Act No. 22-3, and as codified in §1-225a, G.S.

After the hearing, the complainants submitted an after-filed exhibit, which has been admitted into evidence, without objection, and marked as follows: Complainants' Exhibit 1 (after-filed): Correspondence to and from Attorney Weiss, dated December 27, 2021 and May 19, 2022.

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 form dated March 30, 2022, the complainants requested a copy of "the memo from John Wayne Fox's office..." relating to their underlying zoning dispute.
3. It is found that, by email dated April 13, 2022, the respondent Law Department denied the complainant's request, claiming the requested record was exempt from disclosure pursuant to the attorney-client privilege.
4. By letter of complaint, dated April 28, 2022, the complainant appealed to this Commission, alleging that the respondents violated the Freedom of Information ("FOI") Act by failing to provide the record, 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 1-218, whether such data or information be handwritten, typed, tape-recorded, videotaped, printed, photostated, photographed or recorded by any other method.

6. 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 ... (3) receive a copy of such records in accordance with section 1-212.

7. Section 1-212(a), G.S., provides, in relevant part: “[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 record is a public record within the meaning of §§1-200(5) and 1-210(a), G.S.

9. At the hearing in this matter, the respondents contended that the record described in paragraph 2, above, is exempt from disclosure in its entirety, pursuant to §1-210(b)(10), G.S.

10. On August 23, 2022, pursuant to an order of the hearing officer, the respondents submitted the requested record for in camera inspection, along with an in camera index. It is found that the in camera record consists of one page and is identified on the index as “Internal Law Department Memo” (“in camera record”). On the index, the respondents contended that lines 5 through 16 of the in camera record are exempt from disclosure pursuant to §1-210(b)(10), G.S.

11. Section 1-210(b)(10), G.S., permits a public agency to withhold from disclosure records of “communications privileged by the attorney-client relationship.”

12. 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.

13. 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. . . .

14. A four-part test must be applied to determine whether communications are privileged: “(1) the attorney must be acting in a professional capacity for the agency, (2) the communications must be made to the attorney by current employees or officials of the agency, (3) the communications must relate to the legal advice sought by the agency from the attorney, and (4) the communications must be made in confidence.” Lash v. Freedom of Information Commission, 300 Conn. 511, 516 (2011), citing Shew v. Freedom of Information Commission, 245 Conn. 149, 159 (1998).

15. The respondents offered no testimony at the hearing in support of their claim of exemption. However, in Lash, the Court also held that in instances wherein the applicability of an exemption is clear from the face of the record in question, extrinsic evidence is not required to prove such exemption. See id. at 515-516.

16. After a careful inspection of the in camera record, it is found that lines 5 through 16 of the in camera record constitute a written communication between attorneys acting in their professional capacities for the agency related to legal advice sought by the public agency from such attorneys. It is also found that no evidence was provided by the complainants to rebut the presumption that such communication was made in confidence. See Blumenthal v. Kimber Mfg., Inc., 265 Conn. 1, 15 (2003).

17. It is therefore found that lines 5 through 16 of the in camera record are exempt from disclosure pursuant to §1-210(b)(10), G.S., as a record of communication privileged by the attorney-client relationship.

18. It is concluded, however, that the respondents violated §§1-210(a) and 1-212(a), G.S., by failing to disclose lines 1 through 4 of the in camera record, for which no exemption was claimed.

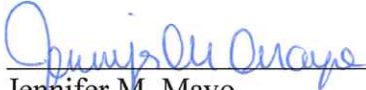
The following order by the Commission is hereby recommended on the basis of the record concerning the above-captioned complaint:

1. Forthwith, the respondents shall provide a copy of the in camera record to the complainants, free of charge.

2. In complying with paragraph 1 of the Order, above, the respondents may redact the information contained in lines 5 through 16 of such record, as described in paragraph 17 of findings, above.

3. Henceforth, the respondents 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 April 12, 2023.



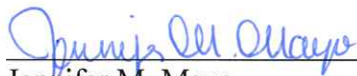
Jennifer M. Mayo
Acting Clerk of the Commission

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:

MARTIN AND LILLIAN HAENER, 143 East Elm Street, Greenwich, CT 06830

FIRST SELECTMAN, TOWN OF GREENWICH; LAW DEPARTMENT, TOWN OF GREENWICH; AND TOWN OF GREENWICH, c/o Attorney Abby Wadler, Greenwich Town Attorney's Office, 101 Field Point Road, Greenwich, CT 06830 and John Wayne Fox, Esq., Town of Greenwich Law Department, Greenwich Town Hall, 101 Field Point Road, Greenwich, CT 06830, CT 06830



Jennifer M. Mayo
Acting Clerk of the Commission