

FREEDOM OF INFORMATION COMMISSION  
OF THE STATE OF CONNECTICUT

In the Matter of a Complaint by

FINAL DECISION

Elliot Kaiman,

Complainant

against

Docket # FIC 2022-0347

First Selectwoman, Office of the Selectman,  
Town of Darien; Office of the Selectman,  
Town of Darien; and Town of Darien,

Respondents

April 12, 2023

The above-captioned matter was heard as a contested case on December 13, 2022, at which time the complainant and the respondents appeared 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 letter dated July 21, 2022 (sent via email), the complainant requested from the respondent first selectwoman a copy of:
  - (a) the fully executed purchase and sale agreement (PSA) between the Town of Darien and the current owner/s of the property commonly known as Great Island, Darien (Map 58/ Lot 1, Map 58/ Lot 1-A, and Map 58 /Lot 1-AA); and
  - (b) all fully executed amendments to the PSA.(hereinafter “requested records”).
3. It is found that by letter dated July 26, 2022 (sent via email), the respondent first selectwoman acknowledged receipt of the request, described in paragraphs 2, above.
4. It is found that by email dated August 3, 2022, the complainant followed up with the respondents’ attorney and again asked to be provided with the requested records, described in paragraph 2, above.

5. By letter of complaint, dated August 6, 2022, and filed with the Freedom of Information (FOI) Commission (Commission) on August 8, 2022, the complainant appealed, alleging that the respondents violated the FOI Act by failing to provide him with a copy of the requested records, described in paragraph 2, above.

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, videotaped, printed, photostated, photographed or recorded by any other method.

7. 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.

8. Section 1-212(a), G.S., in relevant part, further provides: “[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 concluded that the requested records are “public records” within the meaning of §§ 1-200(5) and 1-210(a), G.S.

10. It is found that by letter dated October 19, 2022, the respondents informed the complainants that the requested records were being temporarily denied during the due diligence period that would last until the town either decided to consummate the transaction, or until March 6, 2023, whichever occurred first.

11. It is found that by email dated October 21, 2022, the complainant informed the respondents that he viewed the October 19, 2022 letter, described in paragraph 10, above, as a continuation of the denial of his request and that he intended to continue to pursue his complaint in this matter.

12. At the hearing in this matter, the respondents claimed that the requested records are exempt from disclosure pursuant to §§1-200(6)(D) and 1-210(b)(5)(B), G.S.

13. On December 20, 2022, the respondents submitted the requested records to the Commission for an in camera review, however, in addition to such records, the respondents

submitted 10 pages of email communications, which they identified on the in camera Index as Record # 3, and claimed that such communications are attorney-client privileged, exempt from disclosure, pursuant to §1-210(b)(10), G.S.

14. Based on an in camera inspection of the 10 pages of email communications comprising Record # 3, as described in paragraph 13, above, it is found that such communications are not responsive to the complainant's request for the PSA and amendments, described in paragraph 2, above, and therefore, will not be further addressed herein.

15. It is found that the in camera records that are responsive to the complainant's request for the PSA and amendments, described in paragraph 2, above, consist of 3 Records, which will be referenced herein as:

(a) IC 2022-0347- Record # 1 (PSA, consisting of 37 pages);

(b) IC 2022-0347- Record # 2 (PSA first amendment, with PSA marked "confidential" attached, consisting of 47 pages)<sup>1</sup>; and

(c) IC 2022-0347- Record # 4 (PSA, marked "confidential" consisting of 37 pages).

16. It is found that IC 2022-0347- Record # 1, and IC 2022-0347- Record # 4, appear to be identical, except that 7 pages of IC 2022-0347 - Record # 4, have not been marked "confidential".

17. With respect to the respondents' §1-200(6)(D), G.S., claim of exemption, such provision permits a public agency to convene in executive session and discuss:

[t]he selection of a site or the lease, sale or purchase of real estate by ... a political subdivision of the state when publicity regarding such site, lease, sale, purchase or construction would adversely impact the price of such site, lease, sale, purchase or construction until such time as all of the property has been acquired or all proceedings or transactions concerning same have been terminated or abandoned. [Emphasis added.]

18. The respondents' reliance on §1-200(6)(D), G.S., is misplaced because such provision does not provide an exemption to permit the withholding of a public record. Rather, it permits a public agency (for a limited period of time) to discuss in an executive session, the purchase of property, when to have the discussion in public would adversely impact the price. (See e.g., Docket #FIC 2020-0531, Robert Clarke Castelle v. Town Manager, Town of Newington and Town of Newington, (Nov. 16, 2022)).

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<sup>1</sup> On the in camera Index the respondents described Record # 2 as First Amendment to PSA, consisting of 10 pages. However, upon review by the hearing officer, Record # 2 consists of 47 pages, the first 10 pages are the First Amendment to the PSA, and the remaining 37 pages are IC 2022-0347 - Record # 4, i.e., PSA, marked "confidential", described herein at paragraphs 15(c) and 16.

19. Here, as was the case in Docket #FIC 2020-0531, no executive session discussion was at issue. Further, the purchase price of the property had already been publicly disclosed at the time of the request.<sup>2</sup>

20. It is therefore concluded that §1-200(6)(D), G.S., is inapplicable to the requested records.

21. With respect to the respondents' §1-210(b)(5)(B), G.S., claim of exemption, such provision provides that nothing in the FOI Act shall be construed to require disclosure of “[c]ommercial or financial information given in confidence not required by statute.”

22. The general rule under the FOI Act is disclosure: exceptions to this rule must be narrowly construed; and the burden of establishing the applicability of an exemption clearly rests upon the party claiming the exemption. New Haven v. FOI Comm’n, 205 Conn. 767, 775 (1988); Ottochian v. FOI Comm’n, 221 Conn. 393, 398 (1992). “This burden requires the claimant of the exemption to provide more than conclusory language, generalized allegations or mere arguments of counsel. Rather, a sufficiently detailed record must reflect the reasons why an exemption applies to the materials requested.” Director, Retirement & Benefits Service v. FOI Commission, 256 Conn. 764, 773 (2001), citing New Haven, supra.

23. 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 Jason McCoy v. Freedom of Information Commission, et al. Superior Court, Judicial District of New Britain, Docket #CV21-6069278 (Aug. 26, 2022) (the provisions of §1-210(b)(5)(B), G.S., are meant to provide protection to “legitimately confidential commercial and financial information”, and “commercial information” refers to records that reveal basic commercial operations such as sales, profits, inventories, or relate to the income producing aspects of a business).

24. With regard to the first element of the exemption, at the hearing in this matter, the respondents offered no evidence to prove that the requested records, or information contained therein, constitutes “commercial or financial information”, within the meaning of §1-210(b)(5)(B), G.S. In their post hearing brief, the respondents argued that the PSA is a commercial document and an agreement to engage in commercial activity.<sup>3</sup> Based upon careful inspection of the records described in paragraph 15, above, it is found that the information therein does not reveal basic commercial operations such as sales, profits, inventories, or relate to the income producing aspects of a business; therefore, such information is not commercial information, within the meaning of §1-210(b)(5)(B), G.S.

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<sup>2</sup> Complainant’s Exhibit A, and Respondents’ post hearing brief at pg. 8, stating that the final dollar figure of the purchase price had already been publicized.

<sup>3</sup> At the hearing in this matter, and in their post hearing brief, the respondents made no claim that the requested records constitute “financial” information, within the meaning of §1-210(b)(5)(B), G.S.

25. 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 information in confidence, 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.

26. At the hearing in this matter, the respondents offered no evidence to prove that the requested records, or information contained therein, was given in confidence, within the meaning of §1-210(b)(5)(B), G.S. Based upon careful inspection of the records described in paragraph 15, above, it is found that the respondents failed to prove that the information contained therein was given in confidence, within the meaning of §1-210(b)(5)(B), G.S.

27. With regard to the third element of the exemption, at the hearing in this matter, the respondents offered no evidence to prove that the requested records, or information contained therein, was not required by statute, within the meaning of §1-210(b)(5)(B), G.S. Based upon careful inspection of the records described in paragraph 15, 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.

28. Consequently, it is found that the respondents failed to prove that the in camera records described in paragraph 15, above, are exempt from disclosure, pursuant to §1-210(b)(5)(B), G.S.

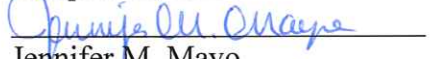
29. It is therefore concluded that the respondents violated §§1-210(a) and 1-212(a), G.S., by failing to promptly provide a copy of the in camera records, described in paragraph 15, above, to the complainant.

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 to the complainant a copy of the records identified in paragraph 15, above, free of charge.

2. Henceforth, the respondents shall strictly comply with the promptness and disclosure provisions of §§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.

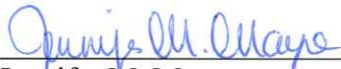
  
Jennifer M. Mayo  
Acting Clerk of the Commission

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:

**ELLIOT KAIMAN**, c/o Attorney Aaron S. Bayer, Wiggin and Dana LLP, 20 Church Street, Hartford, CT 06103

**FIRST SELECTWOMAN, OFFICE OF THE SELECTMAN, TOWN OF DARIEN; OFFICE OF THE SELECTMAN, TOWN OF DARIEN; AND TOWN OF DARIEN**, c/o Attorney John Wayne Fox, Curtis, Brinckerhoff & Barrett, P.C., 666 Summer Street, Stamford, CT 06901



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Jennifer M. Mayo  
Acting Clerk of the Commission