

FREEDOM OF INFORMATION COMMISSION
OF THE STATE OF CONNECTICUT

In the Matter of a Complaint by

FINAL DECISION

Jason Milligan,

Complainant

against

Docket #FIC 2020-0284

Office of Corporation Counsel, City of
Norwalk; and City of Norwalk,

Respondents

March 22, 2023

The above-captioned matter was heard as a contested case on July 23, 2021, and September 7, 2021, at which times the complainants and the respondents appeared, stipulated to certain facts and presented testimony, exhibits and argument on the complaint. Due to the COVID-19 pandemic and the state's response to it, the hearings were conducted through the use of electronic equipment (remotely) pursuant to §149 of Public Act 21-2 (June Special Session), as amended by §1 of Public Act 22-3.

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 email dated May 7, 2020, the complainant requested that the respondents provide him with copies of the following records:

...any and all documentation and communication ... sent and or received between anyone working at or for city hall and any[one] working for or representing Citibank, Municipal Holdings, JHM Group. Include communication between any and all vendors or contractors, consultants, attorneys, engineers, etc. representing Citibank or the City.

3. It is found that the complainant indicated that he was seeking copies of the documentation and communications described in paragraph 2, above, that occurred between January 1, 2020 and "the date of the search."¹

¹ Although the plaintiff requested records maintained as of the date of the search, a public agency's obligation under the FOI Act is to provide records it maintains as of the date of the request. Accordingly, the end date of the instant request is May 7, 2020.

4. It is found that, by email dated June 3, 2020, the respondents acknowledged the complainant's request.

5. It is found that, on June 19, 2020, the respondents provided the complainant with 178 pages of responsive records. It is found that many of the records were redacted.

6. By email dated June 29, 2020,² the complainant appealed to this Commission, alleging that the respondents violated the Freedom of Information ("FOI") Act by improperly redacting the requested records, described in paragraph 2, above.

7. 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.³

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

9. 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."

10. It is found that the records described in paragraph 2, above, are public records within the meaning of §§1-200(5) and 1-210(a), G.S.

11. It is found that, in or about 2018, a dispute arose between the City of Norwalk and the Redevelopment Agency of the City of Norwalk ("RDA"), on the one hand, and Citi Corp USA Inc., Citibank, N. A., Municipal Holdings LLC (a subsidiary of Citibank, N.A.), and JHM

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, through June 30, 2021. Consequently, the Commission retains jurisdiction over this matter.

³ 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".

Financial Group LLC (Citibank's designated agent) (together the "Citibank Entities"), on the other. This dispute (the "Citibank Dispute") concerned a land disposition agreement ("LDA") involving the redevelopment of Wall Street Place in Norwalk.

12. It is found that the dispute resolution clause within the LDA required that disputes related to the LDA first be submitted to mediation and, if not resolved in mediation, be submitted to binding arbitration. It is found that, pursuant to the LDA, the City of Norwalk and the RDA submitted a request for mediation to the American Arbitration Association ("AAA") regarding the Citibank Dispute.

13. It is found that the mediation regarding the Citibank Dispute occurred in the winter of 2018, but did not result in an agreement at that time. It is further found that, before commencing the next step in the LDA dispute resolution process, namely binding arbitration, the parties continued to attempt to negotiate their claims.

14. It is found that the Citibank Dispute was ultimately settled and culminated in an amended land distribution and development agreement that was formally approved by the Norwalk Common Council on July 14, 2020.

15. It is found that the respondents provided full, unredacted copies of all of the 178 responsive records referenced in paragraph 5, above, to the complainant on or about July 8, 2021, prior to the commencement of the contested case hearing in this matter. Nonetheless, the plaintiff did not withdraw the instant complaint, but rather elected to challenge the redactions that were contained in the records disclosed to him on June 19, 2020.⁴

16. At the hearing, the respondents contended that, on the date of the request described in paragraph 2, above, the mediation of the Citibank Dispute, the subsequent negotiations, and the contemplation of binding arbitration, described in paragraphs 11 through 13, above, constituted "pending litigation" within the meaning of §1-210(b)(4), G.S. The respondents further contended that the redacted portions of the records disclosed on June 19, 2020 constituted "strategy or negotiations" with respect to the pending litigation.

17. Section 1-210(b)(4), G.S., provides that disclosure is not required of "records pertaining to strategy and negotiations with respect to pending claims or pending litigation to which the public agency is a party until such litigation or claim has been finally adjudicated or otherwise settled."

18. Section 1-200(9), G.S., defines "pending litigation" as:

(A) a written notice to an agency which sets forth a demand for legal relief or which asserts a legal right stating the intention to institute an action before a court if such relief or right is not granted by the agency; (B) the service of a complaint against an agency returnable to a

⁴ At the July 23, 2021 hearing, the complainant conceded that he was not contending that the initial disclosure was not prompt.

court which seeks to enforce or implement legal relief or a legal right; or (C) the agency's consideration of action to enforce or implement legal relief or a legal right. (Emphasis added).

19. Our Supreme Court has determined, relying on Webster's Third New International Dictionary, that "strategy" is defined as "the art of devising or employing plans or strategems." City of Stamford v. FOI Comm'n, 241 Conn. 310, 318 (1997). Further, the court stated that "negotiation is defined as the action or process of negotiating," and "negotiate is variously defined as: to communicate or confer with another so as to arrive at the settlement of some matter: meet with another so as to arrive through discussion at some kind of agreement or compromise about something; to arrange for or bring about through conference and discussion: work out or arrive at or settle upon by meetings or agreements or compromises; and to influence successfully in a desired way by discussion and agreements or compromises." (Internal quotations omitted). Id.

20. It is found that, at the time of the complainant's request, the respondents were considering taking legal action against the Citibank Entities, within the meaning §1-200(9)(C), G.S., to enforce or implement legal relief or a legal right with respect to the Citibank Dispute, as the parties had engaged in mediation, were still negotiating, and, if negotiations had failed, the next step would have been to submit the dispute to binding arbitration.

21. After the hearing on this matter, the respondents were ordered to submit an unredacted copy of the records that were originally disclosed to the complainant on June 19, 2020, highlighting in yellow those portions of the records that had been redacted. See ¶ 5, above. The respondents complied with such order on January 24, 2023. The records, consisting of 178 pages, were marked as respondents' post-hearing exhibit 8.

22. Upon careful examination of the records, which are emails and attachments largely between the Citibank Entities and the respondents, it is found that, except for the minimal information described in paragraph 23, below, the redactions pertain to strategy or negotiations with respect to the Citibank Dispute and the respondents' consideration of taking legal action, as described in paragraph 20, above.⁵

23. It is found that, in a few of the responsive records, the respondents redacted cell phone numbers, communications regarding scheduling meetings, and subject lines that did not reveal strategy or negotiations with respect to pending litigation, within the meaning of §1-210(b)(4), G.S.

24. It is further found that more than ninety pages of the records the respondents provided to the complainant were emails created after the date of the complainant's request described in paragraphs 2-3, above. It is concluded that the respondents had no legal obligation

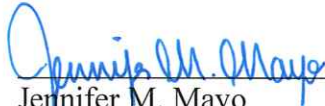
⁵ It is found that four emails related to strategy or negotiation pertaining to pending litigation between the respondents and the complainant, two of which relate to a settlement offer to the complainant that were sent to the complainant's attorney. The other two emails were disclosed to the complainant without redactions on July 8, 2021. Given the circumstances in this case, these emails will not be addressed further.

“to provide the complainant with records not yet in existence at the time of [his] request.” See, e.g. Stephen Whitaker v. Boris Hutorin, Director, Department of Information Technology, Town of Greenwich, Docket #FIC 2005-332 (June 28, 2006); Rita M. Pacheco v. Parks and Recreation Commission, City of Torrington, Docket #FIC 1996-221 (Jan. 8, 1997).

25. It is concluded that the respondents violated the disclosure provisions of §§1-210(a) and 1-212(a), G.S., by withholding the minimal information described in paragraph 23, above; however, such violation was de minimis and, by the time of the contested case hearing, all records had been disclosed to the complainant without redactions.

Based on the facts and circumstances of this case, no order by the Commission is recommended.

Approved by Order of the Freedom of Information Commission at its regular meeting of March 22, 2023.



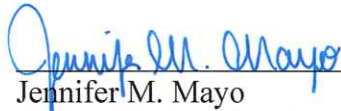
Jennifer M. Mayo
Acting Clerk of the Commission

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:

JASON MILLIGAN, c/o Attorney David W. Rubin, Law Offices of David W. Rubin, 600 Summer Street, Suite 201, Stamford, CT 06901

OFFICE OF CORPORATION COUNSEL, CITY OF NORWALK; AND CITY OF NORWALK, c/o Attorney Jeffry M. Spahr, Office of the Corporation Counsel, 125 East Avenue, PO Box 5125, Norwalk, CT 06856-5125



Jennifer M. Mayo
Acting Clerk of the Commission