

FREEDOM OF INFORMATION COMMISSION
OF THE STATE OF CONNECTICUT

In the Matter of a Complaint by

FINAL DECISION

Marc Lemcke,

Complainant

against

Docket #FIC 2022-0530

First Selectwoman, Town of Westport;
and Town of Westport,

Respondents

October 25, 2023

The above-captioned matter was heard as a contested case on May 23, 2023, at which time the complainant and the respondents appeared and presented testimony, exhibits, and argument on the complaint. Upon order of the hearing officer, a continued contested case took place on October 4, 2023, at which time the respondents appeared and presented testimony and argument on the complaint; however, the complainant did not appear at the continued hearing.

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 October 31, 2022, the complainant sent the following request for access to records to the First Selectwoman for the Town of Westport (“First Selectwoman”):

Today, allow me to repeat a request I made many months ago with the Assistant Town Attorney. I sent a Freedom of Information (“FOI”) request for documents relating to Aquarion since 2017. While some Town departments have provided document access fully and promptly, several departments have not complied, especially:

- your office, the Office of the First Selectwoman, including documents of your predecessor, Selectman Jim Marpe;
- the Town’s Operation manager Sarah Harris;
- the former fire department leadership, Mr. Yost and Mr. Gibbons (I received some documents only last week);
- the P&Z Director, Ms. Young...;
- the Town Attorney and Assistant Town Attorney.

Please also ensure that the documents include the following:

- a. All documents relating to the Fire Marshal proposal for a tank height reduction in 2018;
- b. All documents relating to a potential conflict of interest clearance of the Town Attorney; his firm received significant money from Aquarion in 2017 and 2018; and
- c. All documents regarding the neighborhood meeting referenced by the Fire Marshall after the PURA decision in December 2018.

3. It is found that, by email dated November 4, 2022, the respondents acknowledged the complainant's request.

4. It is found that, in response to the request, the First Selectwoman disclosed batches of responsive records to the complainant on January 13, 2023, January 17, 2023, and February 1, 2023, totaling 253 pages. It is found that the First Selectwoman initially withheld 10 pages of her records, claiming that they were exempt from disclosure pursuant to §§1-210(b)(1), and 1-210(b)(10), G.S. See ¶ 8, below.

5. In addition to her own records, it is found that the First Selectwoman also disclosed the following records to the complainant:

- a. 284 pages of emails on November 21, 2022, from the Town Attorney; no records were claimed exempt from disclosure;
- b. 298 pages of emails on December 12, 2022, from the Planning and Zoning Director; no records were claimed exempt from disclosure;
- c. 150 emails on November 21, 2022, and 237 emails on December 21, 2022, from the former Fire Marshal; 29 additional records were claimed exempt from disclosure;
- d. 186 emails on February 22, 2023, and 25 emails on March 24, 2023, from the former First Selectman; 42¹ additional records were claimed exempt from disclosure;

¹ While the respondents contended at the first contested case hearing that 44 records of the former First Selectman were exempt from disclosure, the respondents ultimately only withheld 19 records from the complainant. See ¶ 14, below.

- e. 134 emails on March 24, 2023, and 27 emails on April 14, 2023, from the former Fire Chief; 29 additional records were claimed exempt from disclosure;
- f. 18 emails on December 5, 2022, and 213 emails on April 28, 2023, from the Assistant Town Attorney; 116 additional emails were claimed exempt from disclosure; and
- g. 250 emails on May 15, 2023, and 240 emails on May 17, 2023, from the former Operations Director; no records were claimed exempt from disclosure.

6. At the first hearing, the complainant challenged the claims of exemption raised by the First Selectwoman. See ¶ 4. The complainant also challenged the claims of exemption raised regarding the former Fire Marshal's records, see ¶ 5.c, above, the claims of exemption raised regarding the former First Selectman's records, see ¶ 5.d, above, the claims of exemption raised regarding the former Fire Chief's records, see ¶ 5.e, above, and the claims of exemption raised regarding the Assistant Town Attorney's records, see ¶ 5.f, above.

7. At the conclusion of the first hearing, the hearing officer ordered the respondents to submit the ten pages withheld by the First Selectwoman to the Commission for in camera inspection.

8. By emails dated June 12 and June 14, 2023, the parties informed the hearing officer, and it is found, that, subsequent to the first contested case hearing, the respondents provided the complainant with either access to or copies of the 10 pages of records initially withheld by the respondent First Selectwoman. Such emails have been marked as Respondents' Post-hearing Ex. 4. Based on Post-hearing Ex. 4, the hearing officer rescinded the in camera order regarding the current First Selectwoman's records.

9. The complainant contends that the respondents in this case should also be required to submit the records withheld by the other public agencies to the Commission for in camera inspection.

10. In response to the complainant's argument, the hearing officer ordered the respondents to submit an affidavit attesting to whether the First Selectwoman maintains the records of the former First Selectman.

11. On July 11, 2023, the respondents submitted the affidavit of Assistant Town Attorney Eileen Lavigne Flug. Such affidavit has been marked as Respondents' Post-hearing Ex. 5.

12. Based on Post-hearing Ex. 5, it is found that the former First Selectman's records are maintained by the Information Technology Department ("IT Department") within the Town of Westport. It is found that the IT Department supports the various agencies within the town. Finally, it is further found that the current First Selectwoman may request the former First Selectman's records from the IT Department.

13. On July 18, 2023, the hearing officer issued an order directing the respondents to submit the records of the former First Selectman claimed exempt from disclosure to the Commission for in camera inspection. See ¶ 5.d, above.

14. On July 31, 2023, the respondents submitted the records referenced in paragraph 13, above, to the Commission. The in camera records shall be referred to as IC-2022-0530-1 through IC-2022-0530-116. The in camera records are fairly described as nineteen emails, some of which contain attachments.

15. The respondents initially claimed that all of the in camera records are exempt from disclosure in their entirety pursuant to the provisions of §1-210(b)(10), G.S., which section permits an agency to withhold from disclosure records of “communications privileged by the attorney-client relationship.” See ¶ 22, below.

16. Section 52-146r(b), G.S., provides that “[i]n any civil or criminal case or proceeding or in any legislative or administrative proceeding, all confidential communications shall be privileged, and a government attorney shall not disclose any such communications unless an authorized representative of the public agency consents to waive the privilege and allow disclosure.”

17. Section 52-146r(a)(2), G.S., defines “confidential communications” to mean:

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.

18. In Maxwell v. Freedom of Info. Comm’n, 260 Conn. 143, 149 (2002), the Connecticut Supreme Court held that §52-146r, G.S., “merely condif[ies] the common law attorney-client privilege as this court previously defined it.” The Court further 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.” Id.

19. The Supreme Court has adopted a four part test to determine whether communications are subject to the attorney client privilege: “(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.” Shew v. Freedom of Info. Comm’n, 245 Conn. 149, 159 (1998). “The burden of establishing the applicability of the privilege rests with the party invoking it.” Harrington v.

Freedom of Info. Comm'n, 323 Conn. 1, 12, (2016). If it is clear from the face of the records, extrinsic evidence is not required to prove the existence of the attorney-client privilege.” Lash v. Freedom of Info. Comm'n, 300 Conn. 511, 516-17 (2011).

20. Upon careful in camera inspection, it is found that IC-2022-0530-1 through IC-2022-0530-10; IC-2022-0530-11 (lines 1 through 11); IC-2022-0530-22 through IC-2022-0530-25; IC-2022-0530-26 (lines 1 through 7); IC-2022-0530-76 through IC-2022-0530-79; IC-2022-0530- 80 (lines 1 through 6); and IC-2022-0530-83 through IC-2022-0530-116 are “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,” within the meaning of §52-146r(a)(2), G.S. It is further found that such records “relate to legal advice” sought by the public agency client from the attorney, within the meaning of §52-146r(a)(2), G.S. It is further found that such records, or portions thereof, have not been disclosed to a third party. Accordingly, it is found that the privilege has not been waived.

21. Accordingly, it is concluded that the records, or portions thereof, identified in paragraph 20, above, are communications privileged by the attorney-client relationship, within the meaning of §1-210(b)(10), G.S. It is further concluded that the respondents did not violate the disclosure provisions of §§1-210(a) and 1-212(a), G.S., when they declined to disclose a copy of such records to the complainant.

22. As to the remaining in camera records, at the second contested case hearing, the respondents agreed to disclose such records, or portions thereof, to the complainant.

23. With regard the complainant’s argument that this Commission should conduct an in camera inspection of the records withheld by public agencies that are not parties in the instant matter, in Lash, the Appellate Court held that a public agency has the duty to maintain and disclose, upon request, the records in its possession, but that a public agency does not have a duty to maintain or make available the records of another public agency. See Lash v. Freedom of Info. Comm’n, 116 Conn. App. 171, 187 (2009) (“[the first selectman] has no duty to maintain or make available the records of the law department, just as the law department has no duty to maintain or disclose the records of the first selectman”), affirmed in part and reversed in part, 300 Conn. 511 (2011) (appellate court’s order remanding the case to the Commission for further evidence was reversed).

24. It is found that the current First Selectwoman does not maintain the records of the Fire Marshal, the former Fire Chief, or the Assistant Town Attorney. See ¶5.c, e, and f, above.

25. It is found that, while the First Selectwoman reached out to the other public agencies, informed them of the instant request, and thereafter facilitated the provision of some of those agencies’ responsive records to the complainant, she did so as a courtesy. It is further found that such other agencies, not the First Selectwoman, raised exemptions with respect to certain records in their possession.

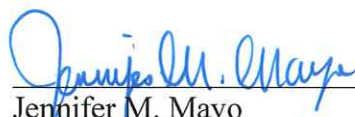
26. Pursuant to Lash, it is concluded that the Commission may not adjudicate in this case claims of exemption raised by public agencies that are not parties to the instant matter.

27. It is further concluded that, under the facts of this case, the respondents did not violate the disclosure provisions of §§1-210(a) and 1-212(a), G.S.

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

1. The complaint is dismissed.

Approved by Order of the Freedom of Information Commission at its regular meeting of October 25, 2023.



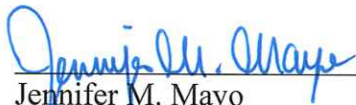
Jennifer M. Mayo
Acting Clerk of the Commission

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:

MARC LEMCKE, 66 North Avenue, Westport, CT 06880

FIRST SELECTWOMAN, TOWN OF WESTPORT, c/o Attorney Eileen L. Flug, Berchem Moses P.C., 1221 Post Road East, Westport, CT 06880 and Attorney Nicholas R. Bamonte, Berchem Moses PC, 1221 Post Road East, Westport, CT 06880; **AND TOWN OF WESTPORT**, c/o Attorney Ira W. Bloom, Berchem Moses P.C., 1221 Post Road East, Westport, CT 06880 and Attorney Nicholas R. Bamonte, Berchem Moses PC, 1221 Post Road East, Westport, CT 06880



Jennifer M. Mayo
Acting Clerk of the Commission