STATE OF CONNECTICUT
FREEDOM OF INFORMATION COMMISSION

In the Matter of a Complaint by

FINAL DECISION

USA Waste and Recycling, Inc.,

Complainant

against

Docket # FIC 2022-0488

Commissioner, State of Connecticut, Department of Energy and Environmental Protection; and State of Connecticut, Department of Energy and Environmental Protection,

Respondents

September 27, 2023

The above-captioned matter was heard as a contested case on March 3, 2023, at which time the complainant and the respondents appeared, stipulated to certain facts, and presented testimony, exhibits, and argument on the complaint.

On August 24, 2023, pursuant to the order of the Hearing Officer, the respondents submitted an affidavit of Jennifer Perry, which has been marked as Respondents' Exhibit 1 (after-filed).

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 on June 13, 2022, the complainant submitted a request to the respondents for copies of "[a]ll completed applications for phase 1 of the SMM [Sustainable Materials Management] grant program, and phase two of the SMM grant applications."

3. It is found that, by email dated June 13, 2022, the respondents acknowledged the complainant's request, and notified the complainant that "[i]t may take approximately 10-12 weeks or more" for the respondents to comply with the request.

4. It is found that, by letters dated July 15, 2022, August 5, 2022, and September 23, 2022, the complainant requested updates on the status of the request.

5. It is found that, by email dated September 30, 2022, the respondents notified the complainant that it would take approximately three more weeks to comply with the request.

6. By letter of complaint filed October 19, 2022, the complainant appealed to the Commission, alleging that the respondents violated the Freedom of Information ("FOI") Act by failing to comply with the request described in paragraph 2, above.

7. 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.

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 concluded 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, on or around September 21, 2021, the respondents issued a Request for Applications ("RFA") for the SMM Grant program, which "invite[d] proposals seeking grant funds to help municipalities and regional waste authorities initiate and scale up Unit-Based Pricing (UBP) and food scrap collection efforts." It is found that the purpose of the SMM Grant program was to incentivize municipalities to develop and implement pilot programs that would reduce the amount of solid waste disposed of at landfills and waste-to-energy facilities.

12. It is found that the respondents issued the RFA pursuant to §308(b)(33) of Public Act 21-2, which authorized the respondents to make available up to $5 million "to establish and administer a program to support solid waste reduction strategies." It is found that, in May 2022, pursuant to §12(b)(72) of Public Act 22-118, the General Assembly approved $5 million in additional funding "to support the SMM Grant Program."

13. It is found that the application process for the RFA proceeded in two phases. It is found that the RFA required interested applicants first to submit a Phase 1 Expression of Interest Form ("Phase 1 Application") by October 29, 2021, outlining basic information about their

proposals. It is further found that applicants chosen to proceed to Phase 2 were required to submit a more detailed application ("Phase 2 Application") by March 31, 2022. It is found that the RFA provided that, following the respondents' review of the Phase 2 applications, the respondents would notify each applicant whether their application was approved, deferred, denied, or required additional information.

14. It is found that the respondents received 55 Phase 1 Applications. It is further found that, on January 25, 2022, the respondents announced that 35 of the 55 Phase 1 applicants were invited to proceed to Phase 2 of the process.

15. It is found that, on October 25, 2022, the respondents announced that they had selected 18 Phase 2 applicants to receive the "first round of grant awards" under the RFA, and that such applicants had "been notified of the [respondents'] intent to award funds for their [pilot programs]."

16. It is found that on November 17, 2022, and January 27, 2023, the respondents provided the complainant with copies of all 55 Phase 1 Applications, and the Phase 2 Applications from applicants with whom the respondents had fully executed contracts. It is further found that the respondents denied the complainant's request for the remaining Phase 2 Applications. It is found that the respondents claimed that such records were exempt from disclosure pursuant to §1-210(b)(24), G.S., because they were "made in connection with a [Department of Energy and Environmental Protection ("DEEP")] request for proposals (RFP) which is still subject to further negotiation prior to a final contract execution," and that they "[did] not intend to publicly disclose any of the documents until contracts are fully executed."

17. It is found that, on December 15, 2022, the Commissioner of DEEP ("Commissioner") certified in writing that the public interest in the disclosure of the responses to the RFA, and "all records or files made in connection with the contract award process of such [RFA]," was outweighed by the public interest in the confidentiality of such records.

18. It is found that, as of the date of the hearing in this matter, the respondents had provided the complainant with copies of the following records:

(a) All 55 Phase 1 Applications

(b) Phase 2 Applications for the following 11 applicants that were selected to receive the first round of grant awards: Ansonia; Deep River; Guilford; Madison; Meriden; Middletown; Seymour; South Central Regional Council of Governments; Stonington; West Haven; and Woodbury.

19. It is further found that, as of the date of the hearing, the respondents maintained their denial of the complainant's request for copies of the following records:

(a) Phase 2 Applications for the following 7 applicants that were selected to receive funding in the first round of grant awards: Bethany; Newtown; Rocky Hill; West Hartford; Woodbridge; Housatonic Resources Regional Authority; and Naugatuck Valley Council of Governments;

(b) Phase 2 Applications for the 17 applicants that were not selected to receive funding in the first round of grant awards.

20. At the hearing in this matter and in their post-hearing brief, the respondents claimed that the Phase 2 Applications described in paragraphs 19(a) and 19(b), above, were exempt from disclosure pursuant to §1-210(b)(24), G.S., which provides that disclosure is not required of:

> Responses to any request for proposals or bid solicitation issued by a public agency, responses by a public agency to any request for proposals or bid solicitation issued by a private entity or any record or file made by a public agency in connection with the contract award process, until such contract is executed or negotiations for the award of such contract have ended, whichever occurs earlier, provided the chief executive officer of such public agency certifies that the public interest in the disclosure of such responses, record or file is outweighed by the public interest in the confidentiality of such responses, record or file ....

21. At the hearing and in its post-hearing brief, the complainant contended that the RFA was not a "request for proposal" within the meaning of §1-210(b)(24), G.S., because the RFA requested the submission of grant applications, and was not "a competitive bidding solicitation for a single award of work from private parties."

22. However, nothing in the language of §1-210(b)(24), G.S., precludes public agencies from claiming the exemption in the context of a request for grant proposals. It is found that the RFA expressly invited municipalities and regional waste authorities to submit "project proposals," and set forth in detail what such proposals must include to be eligible to receive funding. The respondents testified, and it is found, that they use the terms "request for proposals" and "request for applications" interchangeably when soliciting project proposals, and that they do not distinguish between the two terms.

23. The complainant further contended that the Phase 2 Applications were not "responses to [a] request for proposals," within the meaning of §1-210(b)(24), G.S., because the RFA applicants were public agencies. The complainant argued that, when public agencies respond to a RFP, the exemption set forth in §1-210(b)(24), G.S., applies only if the RFP was issued by a private entity, but not if the RFP was issued by another public agency.

24. Pursuant to §1-2z, G.S., "[t]he meaning of a statute shall, in the first instance, be ascertained from the text of the statute itself and its relationship to other statutes." The plain language of §1-210(b)(24), G.S., allows public agencies to refuse to disclose a response to "***any*** request for proposals ... ***issued by a public agency***." (Emphasis added.) Nothing in §1-210(b)(24), G.S., precludes public agencies from claiming the exemption for RFP responses submitted by another public agency.

25. Based on the foregoing, it is found that the RFA was a "request for proposal," within the meaning of §1-210(b)(24), G.S. It is further found that the Phase 2 Applications were "responses to [a] request for proposal … issued by a public agency," within the meaning of §1-210(b)(24), G.S.

26. The complainant next contended that the Commissioner's certification, described in paragraph 17, above, did not comply with §1-210(b)(24), G.S., because the Commissioner did not state the reasons for her determination that the public interest in disclosure was outweighed by the public interest in confidentiality at the time of the denial of the request. The complainant further contended that the respondents did not present a sufficient factual basis to support the Commissioner's certification.

27. In previous cases interpreting §1-210(b)(24), G.S., the Commission has concluded that, while the chief executive officer of the agency must personally certify that the public interest in disclosure is outweighed by the interest in confidentiality, nothing in the statute requires the chief executive officer to provide such certification, or the reasons therefore, at the time of the denial of a records request. See *Rosengren v. Daniel V. Jerram, First Selectman, Town of New Hartford, et al.*, Docket #FIC 2018-0427, ¶¶18-20. It is therefore concluded that the Commissioner's failure to state the reasons for her determination at the time of the denial did not preclude the respondents from denying the request pursuant to §1-210(b)(24), G.S.

28. With respect to whether there was a sufficient factual basis to support the Commissioner's determination that the public interest in disclosure was outweighed by the public interest in confidentiality, the Commission has concluded that its review of such determination is limited to whether "the chief executive officer's reasoning is frivolous or patently unfounded." See *Rosengren*, supra, ¶21.

29. At the hearing in this matter, the respondents presented the testimony of the Bureau Chief for the respondents' Bureau of Materials Management and Compliance Assurance ("Bureau"). The respondents testified that the Commissioner determined that maintaining the confidentiality of the Phase 2 Applications was necessary to protect the contracting process and ensure the success of the pilot projects. In particular, the respondents testified that they spend a significant amount of time negotiating with the RFA applicants about the details of their proposals, and that the details of such proposals often evolve throughout the negotiations. The respondents further testified that public participation in the pilot projects is critical to the success of the SMM Grant program. The respondents testified that the Commissioner determined that disclosing the details of an applicant's proposal before it is finalized might create confusion among the public about the scope of the applicant's project, thereby jeopardizing the success of the program.

30. Based on the foregoing, it is found that the Commissioner's determination that the public interest in disclosure of the Phase 2 Applications was outweighed by the public interest in confidentiality was not frivolous or patently unfounded. It is therefore concluded that the respondents complied with the certification requirements of §1-210(b)(24), G.S.

31. The complainant also contended that the respondents violated the FOI Act by denying the request for the records described in paragraphs 19(a) and 19(b), above, because,

even if §1-210(b)(24), G.S., allowed the respondents to withhold the Phase 2 Applications while negotiations with the applicants were ongoing, such negotiations ended "no later than October 25, 2022," when the respondents announced the recipients of the first round of grant awards.

32. With respect to the 7 Phase 2 Applications described in paragraph 19(a), above, it is found that contract negotiations between the respondents and such applicants remained ongoing as of the respondents' November 17, 2022, denial of the complainant's request. It is therefore concluded that such records were exempt from disclosure pursuant to §1-210(b)(24), G.S., at the time of such denial, and that the respondents did not violate §§1-210(a) and 1-212(a), G.S., by denying the complainant's request for such records.[1]

33. With respect to the Phase 2 Applications described in paragraph 19(b), above, for the 17 applicants that were not selected to receive the first round of grant awards, the respondents testified, and it is found, that they have not rejected any such Applications. It is found that, as of the date of the hearing in this matter, the respondents had yet to exhaust the initial $5 million authorized pursuant to Public Act 21-2, and had yet to award any of the $5 million authorized pursuant to Public Act 22-118. It is further found that the respondents plan to award all remaining funds to applicants that applied under the existing RFA, and that all such applicants remain eligible for a grant award. It is found that the respondents do not plan to open a new application process unless the available funds are not exhausted under the RFA.

34. Based on the foregoing, it is found that, under the facts and circumstances of this case, negotiations between the respondents and the 17 applicants that were not selected to receive funding in the first round of grant awards have not ended, within the meaning of §1-210(b)(24), G.S. It is therefore concluded that the Phase 2 Applications submitted by such applicants are exempt from disclosure pursuant to §1-210(b)(24), G.S., and that the respondents did not violate §§1-210(a) and 1-212(a), G.S., by denying the complainant's request for such records.

35. Finally, the complainant claims that the respondents violated the promptness requirement set forth in §§1-210(a) and 1-212(a), G.S.

36. This Commission has defined the word "promptly," as used in §§1-210(a) and 1-212(a), G.S., to mean "quickly and without undue delay, taking into account all of the factors presented by a particular request .... [including]: the volume of records requested; the amount of personnel time necessary to comply with the request; the time by which the requestor needs the information contained in the records; 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." FOI Commission Advisory Opinion #51, *In the Matter of a Request for Declaratory Ruling, Third Taxing District of the City of Norwalk* (Jan. 11, 1982). The Commission further explained:

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[1] The Commission notes, however, that §1-210(b)(24), G.S., applies only until negotiations have ended. The respondents are therefore required to disclose the Phase 2 Applications once negotiations have ended, even if the contract is not fully executed.

> In weighing these and other factors, common sense and good will ought to be the guiding principles. The Commission believes that if an agency politely explains to a person seeking access to records why immediate compliance is not possible, that person will most likely understand and appreciate the agency's obligation to balance its duties as custodian of public records with its other duties. And as long as it appears to that person that the agency is not trying to unduly delay compliance, or impose unnecessary restrictions, he or she will most likely try to accommodate the agency. Indeed, it has been the Commission's experience that when an agency is sensitive to the needs of the requester, in most cases the agency is able to meet such person's essential requirements in a manner that also permits it to satisfactorily perform its other functions. In the final analysis, it is the Commission's opinion that this rule of reason and courtesy, if implemented, should eliminate the vast majority of potential conflicts between a citizen's right to timely access to public records, and an agency's duty to comply while processing other important business.

37. The respondents testified that the Bureau receives approximately 1400 public records requests per year. The respondents further testified that they experienced significant turnover during the year prior to the request, including the departure of the Bureau's FOI Liaison and the respondents' chief FOI Liaison.

38. However, it is found that the complainant's request was discrete and targeted, involving a narrowly defined set of records. It is further found that such records were maintained in a central location, such that the respondents did not need to conduct an unduly burdensome or time-consuming search in order to comply with the complainant's request.

39. With respect to the 55 Phase 1 Applications described in paragraph 18(a), above, it is found that Phase 1 of the RFA was complete as of January 25, 2022, almost 6 months before the complainant submitted the initial request, and that the respondents did not provide the complainant with copies of such records until November 17, 2022, approximately 5 months after the request. It is found that the respondents never claimed that such records were exempt from disclosure, and did not otherwise explain why they were not able to provide the complainant with such records during the 5 months following the request.

40. Based on the foregoing, it is found that the respondents failed to provide the complainant with copies of the Phase 1 Applications "promptly," within the meaning of §§1-210(a) and 1-212(a), G.S.

41. With respect to the 11 Phase 2 Applications described in paragraph 18(b), above, it is found that the respondents did not provide such records to complainant when negotiations with the applicants ended, but instead withheld such records until the contracts were fully executed.

The respondents testified, and it is found, that it can take months from the time negotiations between the respondents and a Phase 2 applicant end until the contract is fully executed. Specifically, it is found that after the end of negotiations, the following steps must take place before a contract is fully executed: first, the municipal or regional body with authority to authorize the applicant to enter into the contract must pass a resolution approving such contract; next, the contract must be reviewed by the respondents' program staff, business office, legal counsel, and management; and finally, the contract must be reviewed by the Office of the Attorney General prior to final execution. The respondents testified that, in some instances, just the Attorney General's final review and sign off can take up to 2 months.

42. It is found that the respondents did not present any evidence of when negotiations with the applicants that submitted the Phase 2 Applications described in paragraph 18(b), above, ended. It is further found that the respondents did not claim that there was any reason for the delay in providing such records to the complainant other than the fact that the contracts were not fully executed.

43. Based on the foregoing, it is found that the respondents failed to prove that they provided the complainant with copies of the 11 Phase 2 Applications described in paragraph 18(b), above, "promptly," within the meaning of §§1-210(a) and 1-212(a), G.S.

44. Accordingly, it is concluded that the respondents violated the promptness requirement set forth in §§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. Henceforth, the respondents shall strictly comply with the promptness requirement set forth in §§1-210(a) and 1-212(a), G.S.

Approved by Order of the Freedom of Information Commission at its regular meeting of September 27, 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:

USA WASTE AND RECYCLING, INC., c/o Attorney David Hardy, Carrmody Torrance Sandak Hennessey LLP, 195 Church Street, P.O. Box 1950, New Haven, CT 06509

COMMISSIONER, STATE OF CONNECTICUT, DEPARTMENT OF ENERGY AND ENVIRONMENTAL PROTECTION; AND STATE OF CONNECTICUT, DEPARTMENT OF ENERGY AND ENVIRONMENTAL PROTECTION, c/o Attorney Peggy Diaz, Department of Energy and Environmental Protection, 79 Elm Street, Hartford, CT 06106

Jennifer M. Mayo
Acting Clerk of the Commission

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