

STATE OF CONNECTICUT  
FREEDOM OF INFORMATION COMMISSION

In the Matter of a Complaint by

FINAL DECISION

Jillian Carr,

Complainant

against

Docket # FIC 2023-0348

Town Clerk, Town of Trumbull; and Town  
of Trumbull,

Respondents

June 26, 2024

The above-captioned matter was heard as a contested case on November 20, 2023, at which time the complainant and the respondents appeared, stipulated to certain facts, 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 email dated June 20, 2023, the complainant requested that the respondents provide her with a copy of the "Police Pension consideration study[,] the results of which were recently received."
3. It is found that, by email dated June 20, 2023, the respondents acknowledged the complainant's request. It is found that the respondents further indicated that they would make a good faith effort to locate the requested records and respond within a reasonable time.
4. It is found that, by email dated June 23, 2023, the complainant followed up with the respondents and informed them that "the company hired to perform the actuarial study was USI. I believe [the Director of Human Resources and Labor Relations (the "Director") for the Town of Trumbull (the "Town")] received the results/report a week or two ago."
5. It is found that, by email dated June 29, 2023, the complainant again followed up with the respondents inquiring about the status of the response to her records request described in paragraph 2, above.
6. It is found that, by email dated June 29, 2023, the respondents informed the complainant that the requested records were exempt from disclosure pursuant to §§1-210(b)(1) and 1-210(b)(9), G.S.

7. By email dated June 30, 2023, the complainant appealed to this Commission, alleging that the respondents violated the Freedom of Information (“FOI”) Act by failing to provide her with a copy of the requested records.

8. 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.

9. 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.

10. 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.”

11. It is concluded that the records requested by the complainant, to the extent that they exist, are public records within the meaning of §§1-210(a) and 1-212(a), G.S.

12. It is found that the Town and the collective bargaining unit for the Town police officers are parties to a series of successive collective bargaining agreements and, at the time of the hearing in this matter, the operative collective bargaining agreement was set to expire on June 30, 2024.

13. It is found that, after a vote by the Town Council (the “Town Council”) and a vote by the Town’s Board of Finance (the “BOF”), in January, 2023, the Town hired USI Consulting Group (“USI”) to analyze potential changes to the Town’s retirement benefit plan and, in particular, the feasibility of offering a defined benefit plan (“pension”), instead of a defined contribution plan.

14. It is found that, over the course of several months, the Director met with and had numerous conversations with the USI consultant concerning various options for the Town’s retirement benefit plan. It is found that the Town provided USI certain information, which the USI consultant entered into a computer application or module to compute the associated costs and other data for different retirement benefit plan options.

15. At the hearing on this matter and in their post-hearing brief, the respondents argued that no records responsive to the complainant's request described in paragraph 2, above, existed at the time she submitted such request to the respondents because the respondents were not in possession of any "police pension consideration study." At the hearing, the respondents also contended that, even if any such responsive records existed at the time of the complainant's request, they are exempt from disclosure pursuant to §§1-210(b)(1) and 1-210(b)(9), G.S.

16. At the hearing on this matter and in her post-hearing brief, the complainant disputed the respondents' claim that no responsive records existed at the time of her request, based upon her understanding that USI had provided to the Director the results of its analysis of the Town's Police retirement benefit plan approximately a week or so prior to her June 20, 2023 request. In addition, the complainant contended that the results of the USI study were not preliminary drafts or notes because she was seeking the results of USI's analysis as of the date of her June 20, 2023 request and that the "results were the results." The complainant also contended that §1-210(b)(9), G.S., did not apply because, at the time USI performed the analysis she was requesting, the Town and the employee bargaining units had not yet commenced formal negotiations.

17. With respect to the respondents' claim that no records existed that are responsive to the complainant's request described in paragraph 2, above, because no study existed as of the date that the complainant submitted her records request, on June 20, 2023, it is found that the respondents' interpretation of the complainant's records request is overly narrow.

18. It is found that USI typically shared its computer screen with the Director during the majority of their meetings. Nonetheless, the USI consultant had provided the Director with draft memoranda, containing information concerning financial implications of various plan options, prior to the complainant's June 20, 2023 request.

19. As a result, it is found that certain records, which were potentially responsive to the complainant's request, existed on or before June 20, 2023.

20. Accordingly, on May 13, 2024, the hearing officer ordered the respondents to submit to the Commission, for in camera inspection, a copy of the records that the respondents and the Director received from USI, on or before June 20, 2023, that relate to the Town's Police retirement benefit plan and potential changes thereto. On May 29, 2024, the respondents submitted to the Commission a copy of such records for in camera inspection, along with an Index to Records Submitted for In Camera Inspection ("Index"). Such records are hereinafter referred to as IC-2023-0348-1 through IC-2023-0348-69. On the Index, the respondents claimed that all of the in camera records were exempt pursuant to §§1-210(b)(1) and 1-210(b)(9).

21. Our Supreme Court has made clear that "[a]s a practical matter, the FOIA is used repeatedly by members of the public who are unschooled in technical, legalistic language distinctions." Perkins v. Freedom of Infor. Comm'n, 228 Conn. 158, 167 (1993) ("Perkins"). The Supreme Court held that the trial court improperly "relied on distinctions that are overly formal and legalistic in light of the public policy expressed by the FOIA." In Perkins, the court emphasized that "[t]he overarching legislative policy of the FOIA is one that favors 'the open conduct of government and free public access to government records.'" Perkins at 166-167.

22. It is found that although the request described in paragraph 2, above, sought a copy of the “Police Pension consideration study[,] the results of which were recently received,” the request was not limited solely to a single or final study.

23. Rather, it is found that the request, which must be interpreted broadly and as understood by a layman, fairly requests the results of USI’s analysis of the police retirement plan options under consideration.

24. It is therefore found, based upon a careful in camera inspection, that IC-2023-0348-1 through IC-2023-0348-35, described on the Index as “Powerpoint Presentation Police Retirement Plan Design 6/14/23;” IC-2023-0348-43, described on the Index as “Cost Out of 6 different plan options;” IC-2023-0348-44, described on the Index as “Cost Comparison plan options;” IC-2023-0348-45 through IC-2023-0348-49, described on the Index as “Powerpoint Presentation 8 Options,” and IC-2023-0348-50 through IC-2023-0348-69, described on the Index as “Powerpoint Police Retirement Plan Design 5/8/23,” are responsive to the complainant’s request.

25. With respect to IC-2023-0348-36 through IC-2023-0348-42, which is identified on the Index as “Collective Bargaining Analysis of Other Police Pensions,” it is found that the complainant’s June 20, 2023 request did not request information relating to police departments other than the Trumbull Police Department, therefore it is found that IC-2023-0348-36 through IC-2023-0348-42 are not responsive to the complainant’s request and will not be further addressed herein.

26. After reviewing the in camera records, the hearing officer determined that additional information was needed to consider the respondents’ claimed exemptions. On May 30, 2024, the hearing officer ordered the respondents to submit an affidavit attesting to certain information regarding the in camera records. On June 4, 2024, in response to the hearing officer’s May 30, 2024 Order, the respondents submitted an affidavit of the Director– Respondents’ Exhibit 3 (after-filed).

### **§1-210(b)(1), G.S.**

27. With respect to the respondents’ claim that IC-2023-0348-1 through IC-2023-0348-35 and IC-2023-0348-43 through IC-2023-0348-69 are exempt from disclosure pursuant to §1-210(b)(1), G.S., such section provides that disclosure is not required of “preliminary drafts or notes provided the public agency has determined that the public interest in withholding such documents clearly outweighs the public interest in disclosure.”

28. The Connecticut Supreme Court ruled in Wilson v. Freedom of Info. Comm’n, 181 Conn. 324, 332 (1980) (“Wilson”), that:

[w]e do not think the concept of preliminary, as opposed to final, should depend upon who generates the notes or drafts, or upon whether the actual documents are subject to further alteration. . . .

Instead the term ‘preliminary drafts or notes’ relates to advisory opinions, recommendations, and deliberations comprising part of the process by which government decisions and policies are formulated. . . .

. . . [p]reliminary drafts or notes reflect that aspect of an agency’s function that precedes formal and informal decision making. We believe that the legislature sought to protect the free and candid exchange of ideas, the uninhibited proposition and criticism of options that often precedes, and usually improves the quality of, governmental decisions. It is records of this preliminary, deliberative, and predecisional process the exemption was meant to encompass.

29. The year following Wilson, the Connecticut General Assembly passed Public Act 81-431, which added to the FOI Act the language now codified in §1-210(e)(1), G.S. That provision, which narrowed the exemption for preliminary drafts or notes, provides in relevant part:

[n]otwithstanding [§1-210(b)(1)], disclosure shall be required of:

[i]nteragency or intra-agency memoranda or letters, advisory opinions, recommendations or any report comprising part of the process by which governmental decisions and policies are formulated, except that disclosure shall not be required of a preliminary draft of a memorandum, prepared by a member of staff of a public agency, which is subject to revision prior to submission to or discussion among the members of such agency. . . . (emphasis added).

30. In Van Norstrand v. Freedom of Info. Comm’n, 211 Conn. 339, 343 (1989) (“Van Norstrand”), the Supreme Court provided further guidance regarding “preliminary drafts”. Citing the dictionary definition, the court stated that the term “preliminary” means “something that precedes or is introductory or preparatory”, and “describes something that is preceding the main discourse or business.” Id. According to the Court, “[b]y using the nearly synonymous words ‘preliminary’ and ‘draft’, the legislation makes it very evident that preparatory materials are not required to be disclosed.” Id.

31. Accordingly, §§1-210(b)(1) and 1-210(e)(1), G.S., together, permit nondisclosure of records of an agency’s preliminary, predecisional, deliberative process, provided that the agency has determined that the public interest in withholding the records clearly outweighs the public interest in disclosing them and provided further that such records are not interagency or intra-agency memoranda or letters, advisory opinions, recommendations, or reports. See Shew v. Freedom of Info. Comm’n, 245 Conn. 149, 164-166 (1998) (“Shew”).

32. With regard to the “balancing test” required by §1-210(b)(1), G.S., it is well established that the responsibility for making the determination as to what is in the public interest is on the agency that maintains the records. See Van Norstrand, 211 Conn. at 345. The agency

must have considered in good faith the effect of disclosure and indicated the reasons for its determination to withhold disclosure, which reasons may not be frivolous or patently unfounded. Id., citing Wilson, 181 Conn. at 339; see also People for Ethical Treatment of Animals, Inc. v. Freedom of Info. Comm'n, 321 Conn. 805, 816-817 (2016). Thus, the only determination for the FOIC to make is whether the reasons for nondisclosure given by the agency are frivolous or patently unfounded. See Lewin v. Freedom of Info. Comm'n, 91 Conn. App. 521, 522-523 (2005); Coalition to Save Horsebarn Hill v. Freedom of Info. Comm'n, 73 Conn. App. 89, 99 (2002).

33. After careful in camera inspection of IC-2023-0348-1 through IC-2023-0348-35 and IC-2023-0348-43 through IC-2023-0348-69, it is found that such records consist of memoranda concerning the Town's Police retirement benefit plans and analyzing potential financial implications of various retirement and pension plan options.

34. Based upon the credible testimony of the Director, it is found that, prior to the complainant's June 20, 2023 request, the Director had engaged in informal discussions with the union representatives regarding a new collective bargaining agreement to include changes to the Town's retirement benefits, such as reverting back to a pension.<sup>1</sup>

35. At the hearing on this matter, the Director testified, and it is found, that he and the USI consultant had several "back and forth" discussions, over an extended period of time, regarding different versions of the memoranda and different options for the Town's retirement benefit plans, including but not limited to the retirement benefit plan options for police officers.

36. It is found that, during an executive session of a joint meeting of the Town Council and the BOF, held on July 26, 2023, the Director and the USI consultant presented to the members of both agencies USI's draft findings concerning the Town employees' retirement benefit plans.

37. It is found that, at the time of the hearing in this matter, the Town and the police union had reached a tentative collective bargaining agreement, which included changes to the Town's retirement benefits plans. It is found that the Town Council was the ultimate decision maker for the Town with respect to approving the funding for such tentative agreement and that the Town Council was scheduled to vote on such a resolution to approve the funding for the tentative agreement at a meeting on November 27, 2023.

38. In his affidavit dated June 4, 2024, the Director averred, and it is found, that the USI consultant created IC-2023-0348-1 through IC-2023-0348-35 and IC-2023-0348-43 through IC-2023-0348-69 and provided them to the Director prior the complainant's June 20, 2023 request. The Director also averred, and it is found, that IC-2023-0348-1 through IC-2023-0348-35 and IC-2023-0348-43 through IC-2023-0348-69 constituted internal draft updates to guide where to

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<sup>1</sup> It is found that police pension benefits are a condition of employment that are a mandatory subject of collective bargaining, and thus any changes to the Town's police retirement plan were required to be negotiated with the collective bargaining unit representing the Town's police officers. Town of Middlebury v. Fraternal Ord. of Police, Middlebury Lodge No. 34, 212 Conn. App. 455, 479 (2022), aff'd, 348 Conn. 251 (2023).

focus their research and planning for collective bargaining. The Director further averred, and it is found, that IC-2023-0348-1 through IC-2023-0348-35 and IC-2023-0348-43 through IC-2023-0348-69 were used for the Town's preparations for collective bargaining negotiations with respect to the Town's Police retirement benefit plan. However, the Director averred, and it is found, that only himself and the Town's First Selectman reviewed IC-2023-0348-1 through IC-2023-0348-35 and IC-2023-0348-43 through IC-2023-0348-69. It is further found, based upon the respondents' testimony, that many changes were made to their recommendations concerning the Town's Police retirement benefit plan prior to review by the Town Council.

39. Based upon the respondents' testimony and a careful review of the in camera records, it is found that IC-2023-0348-1 through IC-2023-0348-35 and IC-2023-0348-43 through IC-2023-0348-69 contain preparatory materials and information regarding the Town's Police retirement benefits plan. It is found that the USI consultant, the Director and the First Selectman were working together to develop recommendations and advice to present to the Town Council, which would be used in the course of the collective bargaining negotiations with the police union. It is also found that the Town Council would make the ultimate decision on which Police retirement benefits plan would be funded by the Town, as found in paragraph 37, above.

40. It is found that that IC-2023-0348-1 through IC-2023-0348-35 and IC-2023-0348-43 through IC-2023-0348-69 are "preliminary drafts" within the meaning of §1-210(b)(1), G.S., in that they were advisory opinions and recommendations comprising part of the deliberative process by which government decisions and policies were formulated.

41. The Director testified at the hearing and averred in his affidavit, and it is found, that he determined that the public interest in withholding the records outweighed the public interest in disclosure of the records because the disclosure of IC-2023-0348-1 through IC-2023-0348-35 and IC-2023-0348-43 through IC-2023-0348-69 at that time could have interfered with and disrupted the collective bargaining process.

42. It is found that the balancing test was undertaken in good faith, and that the reasons for nondisclosure are not frivolous or patently unfounded.

43. With respect to §1-210(e)(1), G.S., it is found that the USI consultant, although not on the town payroll, served as a member of the Town Council's staff, for purposes of §1-210(e)(1). See Shew, 245 Conn. at 167 (concluding that the legislature did not intend to exclude from §1-210(e)(1), G.S., "drafts of memoranda prepared by persons who ... are hired on a contractual basis to perform tasks that are, for all relevant purposes, indistinguishable from those which may be performed by agency personnel."); see also Joan Coe v. First Selectman, Town of Simsbury, Docket #FIC 2002-082 (October 9, 2002) (finding "in light of the Shew decision ... the consultant, although not on the town payroll, served as a member of the respondent's staff.").

44. It is found that only the Director and the First Selectman reviewed IC-2023-0348-1 through IC-2023-0348-35 and IC-2023-0348-43 through IC-2023-0348-49. It is found that only the Director reviewed IC-2023-0348-50 through IC-2023-0348-69. Accordingly, it is found that IC-2023-0348-1 through IC-2023-0348-35 and IC-2023-0348-43 through IC-2023-0348-69 were not shown to the Town Council. It is also found that not until the July 26, 2023 joint meeting of the BOF and Town Council, approximately a month after the respondents' denied the

complainant's request, that the status of the discussions with USI was brought to the attention of the BOF and Town Council.<sup>2</sup>

45. It is found that IC-2023-0348-1 through IC-2023-0348-35 and IC-2023-0348-43 through IC-2023-0348-69 constitute preliminary drafts of memoranda or reports prepared by members of the staff of a public agency, which, at the time of the complainant's June 20, 2023 request and respondents' denial thereof, were subject to revision prior to submission to or discussion among the members of the Town Council, and therefore are not required to be disclosed pursuant to §1-210(e)(1), G.S.

46. Consequently, it is concluded that that IC-2023-0348-1 through IC-2023-0348-35 and IC-2023-0348-43 through IC-2023-0348-69 are exempt from disclosure pursuant to §1-210(b)(1), G.S., and the respondents did not violate the FOI Act by withholding such records.

### §1-210(b)(9), G.S.

47. Next, the respondents contended that IC-2023-0348-1 through IC-2023-0348-35 and IC-2023-0348-43 through IC-2023-0348-69 are exempt from disclosure pursuant to §1-210(b)(9), G.S.<sup>3</sup>

48. Section 1-210(b)(9), G.S., provides, in relevant part, that nothing in the FOI Act shall require disclosure of "records, reports and statements of strategy or negotiations with respect to collective bargaining[.]"

49. Section 1-210(b)(9), G.S., "does not exempt every record pertaining to collective bargaining from disclosure, *only those that reveal strategy or negotiations.*" Bloomfield Educ. Ass'n v. Frahm, 35 Conn. App. 384, 388, cert. denied, 231 Conn. 926 (1994)("Bloomfield"). (Emphasis added). In Bloomfield, the Appellate concluded that the legislature, by inserting the terms "strategy" and "negotiations," intended to qualify the exemption. Bloomfield, at 389. The court reasoned: "[h]ad the legislature meant to exempt all records, reports, and statements with respect to collective bargaining, then it would not have included the words 'strategy' and 'negotiations.'" Id.

50. Strategy is defined as "a careful plan or method and the art of devising or employing plans or stratagems toward a goal. ... Negotiations is a broad term ... but in general it means the deliberation which takes place between the parties touching a proposed agreement." (Citations omitted; internal quotation marks omitted.) Bloomfield, 35 Conn. App. at 390. "A key element of negotiations is the existence of an offer of possible settlement. In decisions concerning labor

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<sup>2</sup> In addition, it is found that the Director's final recommendations concerning the changes to the Town's Police retirement benefit plan were not presented to the Town Council for a vote until November 27, 2023 and that the recommendations had substantially changed from the time that IC-2023-0348-1 through IC-2023-0348-35 and IC-2023-0348-43 through IC-2023-0348-69 were created.

<sup>3</sup> Because the Commission has determined that the in camera records are exempt under §1-210(b)(1), G.S., the Commission need not decide whether such records are also exempt from disclosure under §1-210(b)(9), G.S. Nevertheless, the Commission believes it is prudent to do so, in this case, because the respondents primarily relied on this exemption in withholding the in camera records.



disputes, courts have described negotiations as the ‘process of submission and consideration of offers until an acceptable offer is made, and accepted....’” Bloomfield, 35 Conn. App. at 390.

51. Subsequent to the Bloomfield decision, the Connecticut Supreme Court interpreted the analogous statutory provision as to public meetings. See Glastonbury Education Assn. v. Freedom of Info. Comm’n, 234 Conn. 704, 711-13 (1995) (“Glastonbury”) and Waterbury Teachers Assn. v. Freedom of Info. Comm’n, 240 Conn. 835, 694 A.2d 1241 (1997) (“Waterbury”). In Glastonbury, the Supreme Court found the language in §1-18a(b), G.S., the predecessor of §1-200(2), G.S., providing that public meetings “shall not include ... strategy or negotiations with respect to collective bargaining” means that what is excluded from the term “meeting” is not all collective bargaining, but only “strategy or negotiations” sessions that relate to collective bargaining. The court reasoned:

This interpretation accords proper respect for the manifest legislative policy expressed in the [FOI Act]. It also comports with its legislative history, which suggests that the collective bargaining exception was understood to provide privacy for “the give-and-take in negotiating sessions of collective bargaining ...” ... Had the legislature intended a broader exclusion, it could have excluded “collective bargaining” without limitation, or it could have excluded “collective bargaining, including but not limited to strategy and negotiations relating thereto.” ... It chose neither of these options.

Glastonbury, 234 Conn. at 712-13. In Waterbury, the Supreme Court similarly held that grievance hearings should be bifurcated to allow public access to the presentation of evidence of the underlying facts but not to the negotiations or settlement discussions

52. Relying on Glastonbury and Waterbury, the Connecticut Superior Court held that part of a record that contained the school principal's response to the grievant's statement was not exempt from disclosure because it was an “informational response” and could not “be characterized as a negotiation for settlement or tactical purposes. East Lyme Teachers Ass'n v. Freedom of Info. Comm'n, No. CV 970571973, 1998 WL 310827, at \*4 (Conn. Super. Ct. June 5, 1998).

53. In his affidavit dated June 4, 2024, the Director averred, and it is found, that the Town hired USI “to provide research and advice on collective bargaining issues related to the police pension[,]” and that IC-2023-0348-1 through IC-2023-0348-35 and IC-2023-0348-43 through IC-2023-0348-69 involved “research on potential pension negotiations” and guides as to “where to focus [their] research and planning for collective bargaining.” Nonetheless, based upon the respondents’ testimony and a careful review of the in camera records, it is found that IC-2023-0348-1 through IC-2023-0348-35 and IC-2023-0348-43 through IC-2023-0348-69 provide information regarding the Town’s Police retirement benefits plan options.

54. Accordingly, it is found that the records themselves provide information related to a subject of collective bargaining, but they do not contain the respondents’ specific negotiation

strategy nor the parties' settlement offers involved in the collective bargaining process, within the meaning of §1-210(b)(9), G.S.

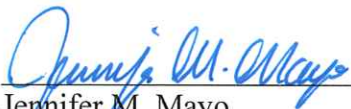
55. Accordingly, it is concluded that IC-2023-0348-1 through IC-2023-0348-35 and IC-2023-0348-43 through IC-2023-0348-69 are not exempt from disclosure pursuant to §1-210(b)(9), G.S.

56. Nonetheless, based on the findings in paragraphs 1 through 45, above, and the conclusion in paragraph 46, above, it is concluded that the respondents did not violate the FOI Act by withholding IC-2023-0348-1 through IC-2023-0348-35 and IC-2023-0348-43 through IC-2023-0348-69 from the complainant.

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 June 26, 2024.

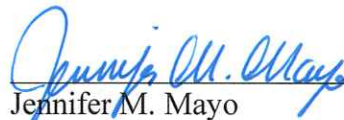
  
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Jennifer M. Mayo  
Acting Clerk of the Commission

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:

**JILLIAN CARR**, 147 Deerfield Drive, Trumbull, CT 06611

**TOWN CLERK, TOWN OF TRUMBULL; AND TOWN OF TRUMBULL**, c/o Attorney Daniel F. Schopick, Trumbull Town Attorney, 572 White Plains Road, Trumbull, CT 06611

  
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Jennifer M. Mayo  
Acting Clerk of the Commission