

FREEDOM OF INFORMATION COMMISSION  
OF THE STATE OF CONNECTICUT

In the Matter of a Complaint by

FINAL DECISION

Allco Renewable Energy Limited,

Complainant

against

Docket #FIC 2023-0311

Town Clerk, Town of Somers; and  
Town of Somers,

Respondents

May 22, 2024

The above-captioned matter was heard as a contested case on November 3, 2023 and March 26, 2024, at which times 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 letter dated December 1, 2022 (“December 1<sup>st</sup> request”), the complainant requested copies of the following records:
  - (a) the annual compensation paid by the respondents to Walter E. Topliff, Jr. from 2016 through 2022;
  - (b) the annual compensation agreed to be paid to Walter E. Topliff, Jr. from 2022 through 2023;
  - (c) all emails sent by or received by Walter E. Topliff, Jr. in 2020, 2021, and 2022; and
  - (d) information related to a town-wide property revaluation conducted in 2020, the property sales during the twelve months preceding such property revaluation, the reason for any change in property valuations that were made and a written explanation for any such changes.
3. It is found that, by multiple emails dated December 1, 2022, the respondents’ attorney acknowledged the complainant’s request, disclosed certain records and informed the complainant he would continue to work on the complainant’s outstanding requests.

4. It is found that, by email dated December 22, 2022, the complainant requested an update on the December 1<sup>st</sup> request and also requested copies of the following records:

- (a) “[a]ll invoices that have been sent to the Town of Somers in 2020, 2021, and 2022 from your firm (Fahey Landolina) and from Stedronsky & Meter.”

5. It is found that, by email dated February 8, 2023, the respondent town clerk provided an update on the status of the requests described in paragraphs 2 and 4, above, and informed the complainant that records responsive to the request described in paragraph 2(d), above, were available upon payment by the complainant.

6. It is found that, by email dated June 16, 2023, the chief executive officer of the complainant informed the respondents that he had not received any records responsive to the request described in paragraph 2(c), above, and requested “all invoices received by the Town of Somers in 2023 from Stedronsky & Meter LLC.”

7. By letter of complaint, dated and filed June 16, 2023, the complainant appealed to this Commission, alleging that the respondents violated the Freedom of Information (“FOI”) Act by failing to provide the records, described in paragraph 6, above. The complainant also requested “an award of attorney’s fees and costs due to the Town of Somers’ bad faith.”<sup>1</sup>

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:

[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.

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<sup>1</sup> The Commission notes that it does not have authority to award attorney’s fees and costs, and therefore, will not further address such request, herein. See Dept. of Public Safety v. FOI Comm’n, 103 Conn. App. 571, 577 (2007) (the Commission is a creature of statute with limited jurisdiction; it can only administer and enforce the provisions set forth in the FOI Act).

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

12. It is found that, at the November 3, 2023 contested case hearing, the respondents’ attorney represented that he required additional time to review responsive records, redact certain information and create an in camera log. The contested case was continued, without objection, to allow the respondents time to complete such work.

13. It is found that, at the March 26, 2024 continued hearing, the complainant’s attorney represented that the respondents had disclosed to the complainant all responsive records with certain redactions. The complainant’s attorney also represented, and it is found, that the only records still at issue were the redactions made to certain records responsive to the request described in paragraph 2(c), above.

14. It is found that, at the contested case hearings on this matter, the respondents offered no evidence or testimony to support their assertion that the specific records, described in paragraph 15, below, are exempt from disclosure under the FOI Act. It is also found that, at the March 26, 2024 hearing, the hearing officer explicitly referenced this lack of evidence, and the respondents’ attorney represented that it would be clear from the face of the records, described in paragraph 15, below, that such records are exempt from disclosure.

15. On April 22, 2024, pursuant to an order of the hearing officer, the respondents submitted to the Commission unredacted copies of the records at issue, described in paragraph 13, above, for an in camera inspection, along with an in camera index. Such records shall be identified hereinafter as IC-2023-0311-1, IC-2023-0311-2, and IC-2023-0311-3.

16. On the in camera index, the respondents contended that the information redacted from the in camera records is exempt from disclosure pursuant to §§1-210(b)(4) and 1-210(b)(5)(B), G.S.<sup>2</sup> In addition, in an attachment to the in camera index, the respondents claimed that IC-2023-0311-1 and IC-2023-0311-3 are exempt from disclosure pursuant to the attorney-client privilege.

17. With regard to the respondents’ claim that certain portions of IC-2023-0311-1 and IC-2023-0311-3 are exempt from disclosure pursuant the attorney-client privilege, §1-210(b)(10), G.S., permits a public agency to withhold from disclosure records of “communications privileged by the attorney-client relationship.”

18. The applicability of the exemption contained in §1-210(b)(10), G.S., is governed by

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<sup>2</sup> The Commission notes that, on the in camera index, the respondents erroneously cited to sections “1-210(4)” and “1-210 5(B)”, respectively, but it is clear that the respondents intended to refer to §§1-210(b)(4) and 1-210(b)(5)(B), G.S.

established Connecticut law defining the privilege. That law is well set forth in Maxwell v. FOI Comm'n, 260 Conn. 143 (2002). In that case, the Supreme Court stated that §52-146r, G.S., which established a statutory privilege for communications between public agencies and their attorneys, merely codifies “the common-law attorney-client privilege as this court previously had defined it.” Id. at 149.

19. Section 52-146r(a)(2), G.S., defines “confidential communications” as:

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. . . .

20. The Supreme Court has also 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.” Maxwell at 149.

21. The Commission recognizes that “[w]here legal advice of any kind is sought from a professional legal adviser in his capacity as such, the communications relating to that purpose, made in confidence by the client, are at his instance permanently protected from disclosure by himself or by the legal adviser, except the protection be waived.” Rienzo v. Santangelo, 160 Conn. 391, 395 (1971); see also Olson v. Accessory Controls & Equipment Corp., 254 Conn. 145, 159, 757 A.2d 14 (2000). Moreover, in Connecticut, “the attorney-client privilege protects both the confidential giving of professional advice by an attorney acting in the capacity of a legal advisor to those who can act on it, as well as the giving of information to the lawyer to enable counsel to give sound and informed advice. . . . The privilege fosters full and frank communications between attorneys and their clients and thereby promote[s] the broader public interests in the observation of law and [the] administration of justice.” PSE Consulting, Inc. v. Frank Mercede & Sons, Inc., 267 Conn. 279, 329-30 (2004). However, the privilege only applies when necessary to achieve its purpose; it is not a blanket privilege. Harrington v. FOI Comm'n, 323 Conn. 1, 12 (2016). Further, a party can establish that a document is privileged by showing that the document itself is the record or memorialization of a communication between the client and the attorney; by showing that the document was created with the intent to communicate the contents to an attorney, and the client actually communicated the contents to the attorney; or by showing that the document was somehow transformed for the purpose of seeking legal advice and communicated or intended to be communicated to an attorney. See State v. Kosuda-Bigazzi, 335 Conn. 327 (2020).

22. With regard to claims of privilege involving records, “[t]he privilege must be established for ‘each document separately considered’ and must be narrowly applied and strictly construed.” Id. at 342-43. However, if it is clear from the face of the records, extrinsic evidence is not always required to prove the existence of the attorney-client privilege. Lash v. FOI Comm’n, 300 Conn. 511, 516 (2011).

23. Based upon a careful inspection of the in camera records identified in paragraph 17, above, it is found that the redacted portions of such records constitute written communications, transmitted in confidence, between a public official or employee of a public agency, acting within the scope of their employment, and their attorney(s), and that such communications are related to legal advice sought. It is also found that no evidence was provided by the complainant to rebut the presumption that such communications were made in confidence. See Blumenthal v. Kimber Mfg., Inc., 265 Conn. 1, 15 (2003).

24. It is therefore concluded that the records identified in paragraph 17, above, are exempt from disclosure pursuant to §1-210(b)(10), G.S., and that the respondents did not violate the FOI Act by withholding such records from disclosure.<sup>3</sup>

25. With regard to the respondents’ claim that IC-2023-0311-2 is exempt from disclosure pursuant to §1-210(b)(5)(B), G.S., that provision states that disclosure is not required of “[c]ommercial or financial information given in confidence, not required by statute.”

26. Based upon a careful inspection of the in camera records identified in paragraph 25, above, it is found that the records claimed to be exempt from disclosure pursuant to §1-210(b)(5)(B), G.S., consist entirely of a lease agreement between two third-party entities and attached land records.

27. The Commission notes that 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 Comm’n, 256 Conn. 764, 773 (2001), citing New Haven, *supra*.

28. For the exemption in §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. FOI Comm’n, et al. Superior Court, Judicial District of New Britain, Docket #CV21-6069278 (Aug. 26, 2022) (the provisions

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<sup>3</sup> In light of the conclusion reached in paragraph 24, above, the Commission need not address the respondents’ claim that the redacted portions of IC-2023-0311-1 and IC-2023-0311-3 are exempt from disclosure pursuant to section 1-210(b)(4), G.S. The Commission notes, however, that in the attachment to the in camera index, the respondents admit that the applicable “[p]ending [claim or pending litigation] is AFL-HBAN Solar Trust v. Town of Somers, HHB-CV21-6065444-S which has been settled.”

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).

29. With respect to the first element of the exemption, at the hearings 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. Based upon a careful inspection of the in camera records described in paragraph 25, 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 does not constitute commercial information, within the meaning of §1-210(b)(5)(B), G.S.

30. With respect to the second element of the exemption, the Connecticut Appellate Court in Allco Renewable Energy Limited v. FOI Comm’n, 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.

31. At the hearings 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 a careful inspection of the in camera records described in paragraph 25, 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.

32. With respect to the third element of the exemption, at the hearings 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 a careful inspection of the in camera records described in paragraph 25, 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.

33. Consequently, it is found that the respondents failed to prove that the in camera records described in paragraph 25, above, are exempt from disclosure, pursuant to §1-210(b)(5)(B), G.S.


34. 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 25, 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 an unredacted copy of the record identified in paragraph 25, above, free of charge.

2. Henceforth, the respondents shall strictly comply with the 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 May 22, 2024.

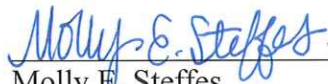
  
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Molly E. Steffes  
Acting Clerk of the Commission

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:

**ALLCO RENEWABLE ENERGY LIMITED**, c/o Attorney Michael Melone, Allco Renewable Energy Limited, 157 Church Street, 19th Floor, New Haven, CT 06510

**TOWN CLERK, TOWN OF SOMERS; AND TOWN OF SOMERS**, c/o Attorney Carl T. Landolina, Fahey & Landolina, 487 Spring Street, Windsor Locks, CT 06096



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Molly E. Steffes  
Acting Clerk of the Commission