

STATE OF CONNECTICUT  
FREEDOM OF INFORMATION COMMISSION

In the Matter of a Complaint by

FINAL DECISION

Heather Sutter; and Bruce A. McDermott,

Docket #FIC 2023-0248

Complainants

Against

Town Manager, Town of Groton; and  
Town of Groton,

Respondents

May 8, 2024

The above-captioned matter was heard as a contested case on September 25, 2023, at which time the complainants and the respondents appeared, stipulated to certain facts, and presented testimony, exhibits, and argument on the complaint.

After the hearing, on October 10, 2023, the hearing officer ordered the respondents to provide affidavits attested to by the respondent John Burt, Town Manager, Town of Groton, and Attorney Richard Cody, Town Attorney, Town of Groton.<sup>1</sup> On October 18, 2023, the respondents partially complied with such order by providing the affidavit of John Burt, which has been marked as Respondents' Exhibit 5 (after-filed). In lieu of providing an affidavit attested to by Attorney Cody, the respondents instead filed a "Motion for Protective Order and/or Motion to Dissolve Order." The complainants opposed that motion on October 26, 2023.

On November 30, 2023, the hearing officer denied the respondents' "Motion for Protective Order and/or Motion to Dissolve Order," concluding that the respondents' assertions contained therein were not supported by facts or law. The hearing officer stayed the order for Attorney Cody's affidavit pending review of the in camera records submitted by the respondents on November 1, 2023, as ordered by the hearing officer.

By order dated January 10, 2024, the hearing officer withdrew the stayed order for Attorney Cody's affidavit. In lieu thereof, the hearing officer ordered the respondents to submit an affidavit by a person with knowledge of the records at issue attesting that the in camera records provided to the Commission represented all responsive records maintained by the respondents, even if the respondents contend that those records are not within the scope of the

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<sup>1</sup> The hearing officer indicated at the close of the hearing on this matter, that additional proceedings or evidence may be ordered, since neither the respondent Town Manager nor the attorney who responded to the complainants' request appeared at the hearing on this matter.

request because of how the request was characterized. The respondents submitted an affidavit of respondent John Burt (dated February 1, 2024), which has been marked as Respondents' Exhibit 6 (after-filed).

On February 15, 2024, the hearing officer ordered the respondents to submit additional evidence relevant to their claimed exemptions. Specifically, the hearing officer ordered the respondents to submit the meeting minutes for the June 15, 2022 special meeting of the Town of Groton Planning & Zoning Commission (hereinafter, the "June 15, 2022 PZC meeting"), along with an affidavit of a person with the requisite knowledge explaining such minutes. The respondents submitted an affidavit of respondent John Burt (dated February 21, 2024) and the minutes of the June 15, 2022 PZC meeting, which have been marked as Respondents' Exhibit 7 (after-filed) and Respondents' Exhibit 8 (after-filed) respectively. Although not ordered to do so, on February 22, 2024, the complainants submitted a copy of the June 15, 2022 PZC meeting minutes with an accompanying affidavit attested to by Bruce A. McDermott, which has been marked as Complainants' Exhibit E (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, by letter dated January 27, 2023, the complainants, through counsel, requested:
  - a. "any and all written documents prepared by the Town Attorney for Groton and separately, by the Town's Zoning Official, stating as written in the Horsely Witten Group memorandum dated June 9, 2022, [that] the longstanding opinion of the Town's Zoning Official and the Town Attorney that the definition of 'dwelling' covers all rentals no matter the length of stay. Therefore, STRs [i.e., short term rentals], are currently an unregulated allowed use[;]"and
  - b. "all written records or correspondence including letters, emails, texts or other document between Horsely Witten and any Town of Groton official, attorney or employee, or between any Town of Groton officials[,] attorneys or employees, the subject of which is the change of language in the Horsely Witten memorandum in the agenda package of the July 12, 2022 meeting of the Town Council."
3. It is found that on January 27, 2023, John Burt, the respondent Town Manager acknowledged the complainants' request indicating that it would be forwarded to Jonathan Reiner, the Town's Director of Planning & Development Services, and Richard Cody, the Town Attorney.
4. It is found that on February 13, 2023, the respondents disclosed records indicating changes that had been made to a memorandum regarding short term rentals ("STRs") prepared by Horsely Witten Group, Inc (hereinafter, "HW"), the company referenced in the complainants' request.

5. It is found that on May 10, 2023, the complainants, via email from counsel, inquired as to the status of their January 27, 2023 request. The complainants noted that while the respondents provided records indicating changes to the HW memorandum as requested in paragraph 2b, above, the respondents had not provided any records responsive to their request as outlined in paragraph 2a, above.

6. It is found that on May 10, 2023, the respondent Town Manager replied to the complainants' inquiry indicating that the Town's Director of Planning & Development Services had provided all responsive records on February 13, 2023. It is further found that on the same day, in response to the respondent Town Manager's reply, the complainants, via email from counsel, reiterated that they had not received any record expressing the opinion of the Town Attorney or Zoning Official that STRs are permitted uses under the Town's zoning regulations.

7. It is found that on May 11, 2023, Attorney Cody, replied neither affirming nor denying the existence of records, but stating to the complainants "[a]ny opinion from our office would be privileged. We did not provide any written opinion, copy or original, to the zoning consultants [i.e., Horsely Witten Group, Inc.]"

8. It is found that on May 11, 2023, the complainants' counsel replied to Attorney Cody disagreeing that the attorney-client privilege was applicable to any records at issue.

9. By letter of complaint filed on May 18, 2023, the complainants appealed to this Commission alleging that the respondents violated the Freedom of Information (FOI) Act by failing to provide copies of the requested records described in paragraph 2, above.

### **Scope of the Complainants' FOI Request**

10. Throughout the hearing on this matter, the respondents maintained that the complainants' request described in paragraph 2, above, should be narrowly read as a request for documents explicitly containing the phrase ". . .the longstanding opinion of the Town's Zoning Official and Town Attorney that the definition of 'dwelling' covers all rentals no matter the length of stay. Therefore, STRs are currently an unregulated allowed use." Based upon that narrow reading, the respondents maintained that there were no responsive records. See Resp. Brief, p. 2.

11. It is found, however, that the complainants' request as outlined in paragraph 2, above, does not state that the respondents should limit their search to the exact quote used therein.

12. As previously found in paragraph 5, above, prior to filing their complaint with the Commission, the complainants reiterated the request without using any of the quoted language. Specifically, on May 10, 2023, the complainants' counsel informed the Town Manager, via email, that he had not received "any document as requested seeking a copy of the long held opinion of the Town Attorney and a copy of the long held opinion by the Zoning Official that short term rentals are a permitted use under [the Town's] zoning regulations."

13. It is found that the respondents' narrow interpretation of the complainants' request is not reasonable. It is further found that the complainants' use of a direct quote from the HW

memorandum in their request was descriptive in nature and is easily understood as a means to draw the respondents' attention to a particular topic (i.e., the regulation of STRs) and not exact search terms.

14. Additionally, as the Hearing Officer noted when denying the Respondents' Motion for Protective Order and Motion to Dissolve Order, the respondents' interpretation of the request is overly formal and legalistic. Members of the public should not be denied access to public records "simply because of arguable imperfections in the form in which a request for public records is couched." Perkins v. FOI Commission, 228 Conn. 158, 167 (1993).

15. Based on the foregoing, it is found that the complainants' request as described in paragraph 2, above, reasonably constituted a request for records containing opinions from the Town Attorney and Zoning Official regarding the regulation of STRs.

### **Whether the Complainants' Request Required Research**

16. The respondents also assert that a broader reading of the complainants' request would require "research." See Resp. Brief, p. 3.

17. To support their argument, the respondents cite Wildin v. Freedom of Information Commission, 56 Conn. App. 683 (2000). In Wildin, the Appellate Court concluded that a records request involves research if the respondents must exercise discretion to determine whether the records sought fall within the request. Id at 687.

18. It is found, however, that to be responsive to the complainants' request, a record must meet the following two conditions: (i) the record must contain an opinion of the Town Attorney or Zoning Official; and (ii) the opinion contained therein must relate to whether STRs are regulated uses.

19. It is found that neither condition, set forth in paragraph 18, above, requires the respondents to exercise discretion. Such records either will or will not contain an opinion of the Town Attorney or Zoning Official, and such opinions either will or will not be related to whether STRs are regulated uses.

20. Further, it is found that the respondents were, in fact, able to identify responsive records, as evidenced by the fact that they were able to produce records for in camera inspection when ordered to do so by the Commission.

21. It is therefore concluded that the respondents failed to establish that the reasonable interpretation of the complainants' FOI request would require them to conduct research.

### **Records Submitted by Respondents for In Camera Inspection**

22. Pursuant to an order of the hearing officer, on November 1, 2023, the respondents submitted responsive records to the Commission for in camera inspection along with an Index for Records Submitted for in Camera Inspection ("In Camera Index"). The respondents claimed that such records, or portions thereof, were either nonresponsive and/or exempt from disclosure

pursuant to the attorney-client privilege. The in camera records consist of 10 pages and are hereinafter referred to as IC-2023-0248-001 through IC-2023-0248-010.

23. The respondents maintain that the following portions of the in camera records are exempt from disclosure<sup>2</sup>:

- a. IC-2023-0248-002; Line 42 (not responsive; attorney-client privilege)
- b. IC-2023-0248-002; Line 49 (not responsive; attorney-client privilege)
- c. IC-2023-0248-002; Line 60 (not responsive; attorney-client privilege)
- d. IC-2023-0248-003; Line 79 (not responsive; attorney-client privilege)
- e. IC-2023-0248-003; Lines 90-98 (not responsive; attorney-client privilege)
- f. IC-2023-0248-004; Line 117 (not responsive; attorney-client privilege)
- g. IC-2023-0248-004; Lines 128-129 (not responsive; attorney-client privilege)
- h. IC-2023-0248-005; Line 148 (not responsive; attorney-client privilege)
- i. IC-2023-0248-005; Lines 153-154 (not responsive; attorney-client privilege)
- j. IC-2023-0248-005; Lines 174-177 (not responsive; attorney-client privilege)
- k. IC-2023-0248-006; Lines 178-180, 185 (not responsive; attorney-client privilege)
- l. IC-2023-0248-006; Lines 189-193 (not responsive; attorney-client privilege)
- m. IC-2023-0248-008; Lines 233-234 (not responsive; attorney-client privilege)
- n. IC-2023-0248-008; Lines 245-246 (not responsive; attorney-client privilege)
- o. IC-2023-0248-009; Lines 266-272 (not responsive; attorney-client privilege)
- p. IC-2023-0248-009; Lines 277 (not responsive; attorney-client privilege)
- q. IC-2023-0248-009; Lines 280-285 (not responsive; attorney-client privilege)

### **Responsiveness of In Camera Records**

24. The respondents assert that all the records submitted for in camera inspection are not responsive, based again upon their unreasonably narrow interpretation, as determined in paragraph 15, above.

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<sup>2</sup> Instead of restarting the line numbering at 1 for the first line of each new page, the respondents continued the line numbering from one page to the next. For convenience, the Commission will use the line numbers as indicated by the respondents.

25. Based on a careful review of the in camera records, however, the Commission agrees that IC-2023-0248-002, lines 42 and 60, are not responsive to the complainants' request as they do not contain or relate to an opinion of the Town Attorney or Zoning Official regarding STRs; therefore, such records will not be considered further herein.

26. With the exception of those portions of the in camera records identified in paragraph 25, above, it is concluded that the remaining portions of the in camera records referenced in paragraph 23, above, are responsive to the complainants' request (hereinafter, the "responsive in camera records").

### **Attorney-Client Privilege**

27. The respondents also assert that the in camera records referenced in paragraph 23, above, are attorney-client privileged records and exempt from disclosure pursuant to §1-210(b)(10), G.S.

28. Section 1-210(b)(10), G.S., provides in relevant part that nothing in the FOI Act shall require disclosure of "communications privileged by the attorney-client relationship. . . ."

29. The applicability of the exemption contained in §1-210(b)(10), G.S., is governed by established Connecticut law defining the privilege. That law is well set forth in Maxwell v. FOI Commission, 260 Conn. 143 (2002) ("Maxwell"). In that case, the Supreme court stated that §52-146r, G.S., which establishes 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., 149.

30. Section 52-146r, 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 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.

31. Section 52-146r, G.S., prohibits disclosure of confidential communications between a government attorney and a public official or employee of a public agency and provides, in relevant part, 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 such disclosure.

32. The Supreme Court has also stated that “both the common-law and statutory privilege 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 [their] public agency client, and relate to the legal advice sought by the agency from the attorney.” Maxwell, at 149.

33. 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).

34. Based upon a careful review of the responsive in camera records, it is found that such records consist of communications by and between one or more public officials/employees for the Town of Groton and an attorney representing the Town of Groton. It is further found that the public officials/employees were acting within the scope of their employment when communicating with the Town Attorney, and those communications related to legal advice sought by the public agency or public officials/employees. Accordingly, it is found that the responsive in camera records are covered by the attorney-client privilege, unless the privilege was waived.

35. The complainants argue that any attorney-client privilege that applied to the in camera records was in fact waived by virtue of:

- a. the public disclosure of the draft version of the HW memorandum containing the phrase “It should be noted that it is the longstanding opinion of the Town’s Zoning Official and the Town Attorney that the definition of ‘dwelling’ covers all rentals no matter the length of stay. Therefore, STRs are currently an unregulated allowed use[;]”
- b. the public disclosure of the final version of the HW memorandum that does not contain the quoted language in subparagraph (a), above, but states that “Any existing STRs would be legally nonconforming. . . [;]” or
- c. Attorney Cody’s comments made during the June 15, 2022 public special meeting of the Town of Groton Planning & Zoning Commission (“PZC”), which were reproduced in the meeting minutes.

36. Connecticut courts have recognized that the “[v]oluntary disclosure of the content of a privileged attorney communication constitutes a waiver of the privilege.” McLaughlin v. FOI Commission, 83 Conn. App. 190, 197, (2004). “[I]t is the client’s responsibility to insure continued confidentiality of his communications.” In re Von Bulow, 828 F.2d 94, 101 (2d Cir. 1987).

37. Accordingly, the Commission must determine: (i) whether the respondents voluntarily disclosed any attorney-client privileged information sought by the complainant; and, if so, (ii) the extent of that voluntary disclosure.

38. With respect to the complainants' argument regarding waiver noted in paragraph 35(a), above, it is found that the draft version of the HW memorandum containing the reference to the Town Attorney's opinion was inadvertently shared to the Town Council and made available to the public.

39. It is also found that the language quoted in paragraph 35(a), above, was drafted by HW, and that neither the Town of Groton, nor its attorneys shared with HW any opinion regarding the definition of dwelling at that time.

40. It is therefore found that, based on the facts and circumstances of this case, that the inclusion of the language quoted in paragraph 35(a), above, in the draft HW memorandum and its availability to the public did not constitute a voluntary waiver of the attorney-client privilege.

41. With respect to the complainants' argument noted in paragraph 35(b), above, it is found that the final HW memorandum contains options/recommendations created by HW and does not contain any opinion from the Town Zoning Official or Town Attorney regarding the regulation of STRs.

42. Accordingly, it is found that the public disclosure of the final HW memorandum, referenced in paragraph 35(b), above, likewise did not constitute a voluntary waiver of the attorney-client privilege.

43. With respect to the complainants' argument noted in paragraph 35(c), above, that the statements made by Attorney Cody during the June 15, 2022 PZC meeting constitute a voluntary waiver of the attorney-client privilege concerning the responsive in camera records, it is found that the minutes for the June 15, 2022 PZC meeting contains the following passage:

Attorney Cody reiterated that the practice of the town is that STRs are not regulated. From what I have heard from the Building Official, he is measuring it against the definition of a dwelling unit, currently his feeling is that a STR falls under the definition of a dwelling unit and they cannot be prohibited.<sup>3</sup>

44. In Berlin Public Schools v. FOI Commission, Superior Court, judicial district of New Britain, CV-15-6029080-S, 2016 WL 785578, \*4 (February 2, 2016) (hereinafter, "Berlin Public Schools"), the court concluded that where disclosure of communications protected by attorney-client privilege occurs in an *extrajudicial setting* – i.e., outside of the context of an adversarial proceeding – waiver applies only to "the particular matters actually disclosed."

45. The court in Berlin Public Schools noted that the process of determining what was "actually disclosed" is fact specific. *Id.*, at \*6. The purpose of this inquiry is to "identify what portion of the attorney-client communication confirms what was actually disclosed." *Id.* Additionally, the "actually disclosed" standard "focuses on the substance rather than the exact wording of the disclosure." *Id.*, \*5.

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<sup>3</sup> Based on the affidavit of John Burt, Town Manager for the Town of Groton, filed with the Commission on February 21, 2024 (Respondent's Exhibit #7 – After Filed), Attorney Cody is the speaker in the second sentence.



46. In practical terms, the “actually disclosed” standard requires the Commission to compare the alleged public disclosure against the substance of the in camera records for which the attorney-client privilege is asserted. See *Id.*, \*6 (“The commission in the first instance should compare the disclosure with the sealed report, and under the standards discussed here and employing the procedures it deems appropriate, determine what portion of the report the minutes ‘actually disclosed’”).

47. It is found that Attorney Cody’s statements cited in paragraph 43, above, were made during a public meeting (i.e., the June 15, 2022 PZC meeting), to which neither the Town nor the PZC, as the client, objected, and that such statements were later published by the PZC as part of its publicly available meeting minutes.

48. It is found, based upon a careful review of the responsive in camera records identified in paragraph 26, above, that the substance of such records overlaps with the information disclosed by Attorney Cody during the June 15, 2022 PZC meeting and reproduced in the PZC’s publicly available meeting minutes.

49. It is found that the passage quoted from the June 15, 2022 PZC meeting minutes in paragraph 43, above, discloses that: (i) the practice of the town is that STRs are not regulated; (ii) the Town of Groton Zoning Official informed Attorney Cody that he feels that STRs fall within the definition of a dwelling unit; and (iii) based on that definition STRs cannot be prohibited.

50. With respect to IC-2023-0248-003 (lines 79 and 90-98), IC-2023-0248-004 (lines 117 and 128-129), IC-2023-0248-005 (lines 148, 153-154, and 174-177), IC-2023-0248-006 (lines 178-180 and 185), IC-2023-0248-006 (line 189 and line 190, up to and including the comma on line 190), IC-2023-0248-008 (lines 233-234 and 245-246), IC-2023-0248-009 (lines 266-272 and 277), and IC-2023-0248-009 (lines 280-282, up to and including the comma on line 282) it is found that: (i) the substance of such communications were actually disclosed by Attorney Cody at the June 15, 2022 PZC meeting; (ii) the Town and the PZC did not object to such disclosure; and (iii) Attorney Cody’s comments were published in the publicly available meeting minutes of the PZC. It is therefore found that the attorney-client privilege has been waived for those portions of such records.

51. With respect to IC-2023-0248-002 (line 49), IC-2023-0248-006 (line 190, after the comma, and lines 191-193) and IC-2023-0248-009 (line 282, after the comma, and lines 283-285), it is found that the substance of such communications were not actually disclosed at the June 15, 2022 PZC meeting, and those portions of such records may be properly withheld under the attorney-client privilege.


52. Accordingly, it is concluded that the respondents violated the disclosure provisions of §§1-210(a) and 1-212(a), G.S., by withholding those portions of the in camera records described in paragraph 50, above, from the complainants.

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 the complainant with copies of those portions of the in camera records described in paragraph 50 of the findings, above, unredacted and free of charge.

2. Henceforth, the respondents shall strictly comply with the disclosure requirements 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 8, 2024.

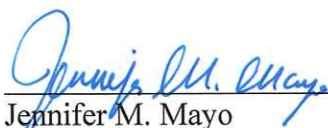
  
Jennifer M. Mayo  
Acting Clerk of the Commission

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:

**HEATHER SUTTER AND BRUCE A. MCDERMOTT**, c/o Attorney Edward E. Moukawsher, 48 West Elderkin Avenue, Groton, CT 06340

**TOWN MANAGER, TOWN OF GROTON; AND TOWN OF GROTON**, c/o Attorney Richard S. Cody and Attorney Kristi D. Kelly, Suisman, Shapiro, Wool, Brennan, Gray & Greenberg, 2 Union Plaza, Suite 200, New London, CT 06320



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Jennifer M. Mayo  
Acting Clerk of the Commission