



# FREEDOM OF INFORMATION



Connecticut Freedom of Information Commission • 18-20 Trinity Street, Suite 100 • Hartford, CT 06106  
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Gregory Slate,

Complainant(s)

against

Notice of Meeting

Docket #FIC 2015-734

First Selectman, Town of Westport; and Town of Westport,

Respondent(s)

June 1, 2016

## Transmittal of Proposed Final Decision

In accordance with Section 4-179 of the Connecticut General Statutes, the Freedom of Information Commission hereby transmits to you the proposed finding and decision prepared by the hearing officer in the above-captioned matter.

This will notify you that the Commission will consider this matter for disposition at its meeting which will be held in the Freedom of Information Commission Hearing Room, 18-20 Trinity Street, 1st floor, Hartford, Connecticut, at **2 p.m. on Wednesday, June 22, 2016**. At that time and place you will be allowed to offer oral argument concerning this proposed finding and order. Oral argument shall be limited to ten (10) minutes. For good cause shown, however, the Commission may increase the period of time for argument. A request for additional time must be made in writing and should be filed with the Commission **ON OR BEFORE June 10, 2016**. Such request **MUST BE (1) copied to all parties, or if the parties are represented, to such representatives, and (2) include a notation indicating such notice to all parties or their representatives.**

Although a brief or memorandum of law is not required, if you decide to submit such a document, an **original and fourteen (14) copies** must be filed **ON OR BEFORE June 10, 2016**. **PLEASE NOTE: Any correspondence, brief or memorandum directed to the Commissioners by any party or representative of any party MUST BE (1) copied to all parties, or if the parties are represented, to such representatives, (2) include a notation indicating such notice to all parties or their representatives and (3) be limited to argument. NO NEW EVIDENCE MAY BE SUBMITTED.**

If you have already filed a brief or memorandum with the hearing officer and wish to have that document distributed to each member of the Commission, it is requested that **fifteen (15) copies** be filed **ON OR BEFORE June 10, 2016**, and that **notice be given to all parties or if the parties are represented, to their representatives, that such previously filed document is being submitted to the Commissioners for review.**

By Order of the Freedom of  
Information Commission

W. Paradis

Acting Clerk of the Commission

Notice to: Adam Faillace  
Attorney Gail Kelly & Attorney Ira W. Bloom

2016-06-01/FIC# 2015-734/Trans/wrbp/VB//KKR

FREEDOM OF INFORMATION COMMISSION  
OF THE STATE OF CONNECTICUT

In the Matter of a Complaint by

Report of Hearing Officer

Gregory Slate,

Complainant

against

Docket #FIC 2015-734

First Selectman, Town of Westport; and  
Town of Westport,

Respondents

May 12, 2016

The above-captioned matter was heard as a contested case on January 15, 2016, at which time the complainant and respondents appeared, stipulated to certain facts and presented testimony, exhibits and argument on the complaint.<sup>1</sup>

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 October 24, 2015, the complainant made a written request to the respondents for a copy of an electronic file identified by the complainant as Document No. "00778423.DOCX" in its "original native electronic format" and asked that such file be provided to the complainant as an attachment to an e-mail or on a flash drive.
3. It is found that, on October 28, 2015, the respondents acknowledged the complainant's request and informed him that Document No. 0778423.DOCX, which was a letter dated May 15, 2015 from the Westport First Selectman to the Longshore Associates of Westport Limited Partnership detailing terms of a lease extension (hereinafter referred to as the "Lease Extension Letter"), in its original native electronic format was exempt from mandatory disclosure in accordance with §§1-210(b)(1) and 1-210(b)(10), G.S.
4. By letter filed on October 30, 2015, the complainant appealed to this Commission, alleging that the respondents failed to provide a copy of the responsive electronic file referenced in paragraph 2, above, in violation of the Freedom of Information Act.

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<sup>1</sup>The Commission notes that the complainant provided authorization for Adam Faillace to represent his interests at the hearing in this matter. Gregory Slate was not present at the hearing.

5. Section 1-200(5), G.S., defines “public records or files” as:

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, printed, photostated, photographed or recorded by any other method. (Emphasis added)

6. Section 1-210(a), G.S., provides, in relevant part, that:

Except 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.

7. 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.”

8. Section 1-211(a), G.S., provides that:

Any public agency which maintains public records in a computer storage system shall provide, to any person making a request pursuant to the Freedom of Information Act, a copy of any nonexempt data contained in such records, properly identified, on paper, disk, tape or any other electronic storage device or medium requested by the person, including an electronic copy sent to the electronic mail address of the person making such request, if the agency can reasonably make any such copy or have any such copy made. Except as otherwise provided by state statute, the cost for providing a copy of such data shall be in accordance with the provisions of section 1-212.

9. It is found that providing a public record in its original native electronic format would allow the requestor to view certain metadata<sup>2</sup> contained within the document, including certain document properties, author’s name and related dates, headers, custom XML data, comments and other related information concerning the creation of such document. It is further found that the metadata contained in the Lease Extension Letter in its original native electronic format is the subject of the complainant’s October 24, 2015 request for records.<sup>3</sup>

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<sup>2</sup>Metadata means “data that provides information about other data.” See Merriam Webster (definition of a metadata) at <http://www.merriam-webster.com/dictionary/metadata> (accessed: February 11, 2016).

<sup>3</sup>Despite some confusion, including the complainant’s own representative regarding the actual record being requested in the complainant’s October 24, 2015 records request, , it is clear that the only record at issue in this matter is

10. It is concluded that the Lease Extension Letter, in its original native electronic format, which record contains certain metadata, constitutes a public record within the meaning of §§1-200(5), 1-210(a), and 1-212(a), G.S.

11. At the hearing in this matter, the complainant's representative asserted that the reason for requesting that the Lease Extension Letter be provided as an attachment to an email or on a flash drive was to ensure that it would be received in its original native electronic format, so that certain metadata could be viewed by the complainant.

12. The respondents contended that the complainant was provided access to the Lease Extension Letter and made a copy of the letter in its final paper form. The respondents further asserted that they did not provide the Lease Extension Letter in its original native electronic format to the complainant because the Freedom of Information Act does not require them to provide a public record in any particular format.

13. It is found that §1-211(a), G.S., specifically covers computer stored public records. It is further found that while §1-211(a), G.S., provides the requester with the option to request a specific method of delivery of nonexempt computer stored data and that the public agency is required to use the method of delivery requested if it reasonably can do so or have it done (e.g., have the data copied or burned to a disk), §1-211(a), G.S., does not require a public agency to provide a copy of a computer stored public record in a particular format requested by a requester.

14. However, it is found that the complainant requested the Lease Extension Letter in its original native electronic format because he is actually seeking the metadata contained within that record, which metadata would not be visible to the complainant if such record was reduced to printed form. Therefore, it is found that the respondents in this instance are required to provide the Lease Extension Letter in its original native electronic format (the format requested by the complainant) to the extent that such metadata is not subject to any exemption. To find otherwise would render the complainant's records request for such metadata meaningless.

15. The respondents next maintain that the Lease Extension Letter in its original native electronic format is permissibly exempt from disclosure pursuant to §1-210(b)(1), G.S., which provides that disclosure is not required of "[p]reliminary drafts or notes provided the public agency has determined that the public interest in withholding such documents clearly outweighs the public interest in disclosure."

16. After the hearing in this matter, pursuant to an order of the hearing officer, the respondents submitted the Lease Extension Letter in its "original native electronic format,"

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Document No. 00778423.DOCX in its "original native electronic format," which would include all metadata contained in that record. While the complainant made a subsequent request for various versions of that document, he did not include a request for various versions in his complaint presently before the Commission. In fact, the October 30, 2015 complaint to the Commission specifically states that it is seeking the review of the respondents' failure to provide "the final version of the May 15 Letter in native electronic format (i.e. the Microsoft Word Document)."

which format contained certain metadata for in camera review, which record is identified as IC-2015-734-1.<sup>4</sup>

17. In Shew v. Freedom of Information Commission, 245 Conn. 149, 165 (1998), our Supreme Court held that “[p]reliminary drafts or notes reflect that aspect of the agency’s function that precedes formal and informed decision making . . . . It is records of this preliminary, deliberative and predecisional process that . . . the exemption was meant to encompass.”

18. It is found that the town was negotiating a lease extension with a third party, and respondents’ counsel prepared the resulting record, IC-2015-734-1, which memorialized the terms of the agreement resulting from that negotiation. It is further found that IC-2015-734-1 was then transmitted by respondents’ counsel to the respondents to be transferred onto respondent First Selectman’s letterhead and then the Lease Extension Letter (without the metadata) was forwarded to its intended recipient.

19. Upon careful examination of IC-2015-734-1, it is found that the Lease Extension Letter was drafted following negotiations and recited a completed agreement at the time of its transmittal to the respondents, no further modifications by respondents’ counsel were made after its transmittal and all formal and informed decision making had been completed prior to that transmittal. With respect to the metadata contained within IC-2015-734-1 that is viewable, it is found that even though such metadata bears some semblance to a “note,” it is simply not preliminary to anything and is contained within a completed agreement. Consequently, it is found that IC-2015-734-1 does not constitute a preliminary draft or note as those terms are treated under the Freedom of Information Act.

20. It is therefore concluded that IC-2015-734-1 is not exempt as a preliminary draft or note pursuant to §1-210(b)(1), G.S.

21. Because it is found that IC-2015-734-1 is not a preliminary draft or note, it is not necessary to consider whether the respondents determined that the public interest in withholding such record clearly outweighed the public interest in disclosure.

22. The respondents next maintained that IC-2015-734-1 is permissibly exempt from disclosure pursuant to §1-210(b)(10), G.S., which provides that mandatory disclosure is not required of “communications privileged by the attorney-client relationship.” Specifically, as stated in the respondents’ pre-hearing brief, their concern is that the metadata contained within IC-2015-734-1 may include the author of the letter, when the letter was first drafted and changes made from prior versions.

23. Established Connecticut law defining the attorney-client privilege governs the applicability of the exemption contained in §1-210(b)(10), G.S. Such law is well set forth in Maxwell v. FOI Commission, 260 Conn. 143 (2002). In Maxwell, the Supreme Court stated that

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<sup>4</sup>The Commission notes that while IC-2015-734-1 refers collectively to the Lease Extension Letter in its original native electronic format and the metadata contained within that letter, at times each (letter and metadata) will be referred to separately.

§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.

24. Section 52-146r(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. (Emphasis added)

25. Our 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*, *supra* at 149.

26. However, not every communication between client and attorney is protected by the attorney-client privilege. “A communication from attorney to client solely regarding a matter of fact would not ordinarily be privileged, unless it were shown to be inextricably linked to the giving of legal advice.” *Olson v. Accessory Controls & Equipment Corp.*, 254 Conn. 145, 157 (2000); *PSE Consulting, Inc. v. Frank Mercede and Sons, Inc.*, 267 Conn. 279, 331 (2004) (“a reconstitution of an event that occurred with third parties involved” is not confidential). Additionally, “statements that are meant to be transmitted to another are not confidential.” *PSE Consulting, Inc.*, *supra* at 331; *C. Tait, Connecticut Evidence* (3d Ed. 2001) §5.23.2, p. 320.

27. It is found that IC-2015-734-1 is a communication from respondents’ counsel to the respondents that merely memorializes facts agreed to in conjunction with a lease extension agreement negotiated between the respondents and a third party that was intended to be transmitted to that third-party. It is further found that such a recitation of facts intended for a third party is not afforded the privileged status of an attorney-client communication within the meaning of §§1-210(b)(10) and 52-146r(2), G.S.

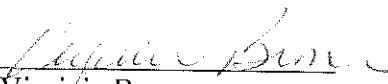
28. With respect to the metadata contained within IC-2015-734-1 that is viewable, it is found that the metadata reveals no changes made to the Lease Extension Letter by respondents’ counsel and only limited information regarding its actual creation. While the metadata is contained within a communication between client and attorney (albeit not a communication afforded privileged status), it is found that the actual metadata itself is neither “inextricably linked to the giving of legal advice,” nor necessarily a communication between an attorney and client. Based on those combined factors, it is found that the limited metadata contained within IC-2015-734-1 is also not afforded privileged status.

29. It is therefore concluded that IC-2015-734-1 is not exempt as a communication subject to the attorney-client privilege exemption contained in §1-210(b)(10), G.S.

30. Accordingly, it is concluded that the respondents violated the disclosure requirements of §§1-210(a) and 1-212(a), G.S., by refusing to provide the complainant with a copy of IC-2015-734-1 in its original native electronic format.

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

1. Forthwith, the respondents shall provide the complainant with a copy of IC-2015-734-1 in its original native electronic format.
2. Henceforth, the respondents shall strictly comply with the provisions of §§1-210(a) and 1-212(a).

  
Virginia Brown  
as Hearing Officer