

FREEDOM OF INFORMATION COMMISSION
OF THE STATE OF CONNECTICUT

In the Matter of a Complaint by

FINAL DECISION

Dan Barrett and the American Civil
Liberties Union of Connecticut,

Complainants

against

Docket #FIC 2016-0791

Town Manager, Town of Enfield; and
Town of Enfield,

Respondents

June 14, 2017

The above-captioned matter was heard as a contested case on March 28, 2017, at which time the complainants and the respondents appeared, stipulated to certain facts and presented testimony, exhibits and argument on the complaint. This matter was consolidated for hearing with Docket #FIC 2016-0840, Dan Barrett and the American Civil Liberties Union of Connecticut v. Town Manager, Town of Enfield; and Town of Enfield.

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 4, 2016, the complainants requested copies of “complete settlement agreements and/or releases resolving any suits by Eric Avalos, and Ronnie and Frank Salas.”
3. It is found that, on October 14, 2016, the respondent town manager informed the complainants that the town did not possess the requested records, and that their request had been forwarded to the outside counsel assigned to the cases by the town’s insurer.
4. By letter filed November 7, 2016, the complainants appealed to this Commission, alleging that the respondents violated the Freedom of Information (“FOI”) Act by failing to provide copies of the records they requested.
5. Section 1-200(5), G.S., provides:

Public 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, ... whether such data

or information be handwritten, typed, tape-recorded, printed, photostated, photographed or recorded by any other method.

6. 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 (1) inspect such records promptly during regular office or business hours, ... or (3) receive a copy of such records in accordance with section 1-212.

7. 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.

8. The respondents claimed that the settlement records are not public records because they do not have possession of the records.

9. It is found that the respondents’ insurer retained and/or appointed a private attorney to represent the respondent town in the federal lawsuit that resulted in the settlement records requested by the complainants.

10. It is found that such private outside counsel entered an appearance in the federal suit on behalf of the town and certain town officials, who became the attorney’s clients.

11. It is found that the town does not have physical possession of the requested records. It is found that that the town believes that the outside counsel maintains such records. It is found that the respondents have not asked the outside counsel to provide such records to them so that they would be able to comply with the complainants’ request.

12. In Thomas J. Londregan, New London Director of Law v. FOI Commission, 071894 CTSUP, 526105 and 529345, New London, J.D. (Teller, J.) (July 18, 1994), the city denied a request for copies of legal briefs and other records pertaining to ten cases in which the city was a party litigant and represented by outside counsel. Among other arguments, the city argued that because it did not have possession of the requested records, it could not be required to comply with the FOI request. Rejecting that argument, the Court reasoned:

The client involved as the real party in interest in all of the requested litigation files is New London. It is well settled that clients are entitled to their files and papers upon payment or funding of security for outstanding fees... New London, therefore, ...is entitled to possession of the files, or at least copies thereof, upon demand. Hence, as [the city’s] Director of Law, the plaintiff has the right to obtain possession of said files.

The plaintiff cannot evade the plain mandate of the FOIA by 'farming' the litigation files out to other counsel, as upon request, the plaintiff would be entitled to copies thereof. (Citation omitted.)

13. In this matter, it is concluded that because the respondent town in this matter is the client, the town is entitled to obtain possession of the requested records.

14. Moreover, as the complainants point out, §1.4(a)(4) of the Connecticut Rules of Professional Conduct requires an attorney to "promptly comply with reasonable requests for information" from a client, and Rule 1.16(d) requires an attorney to "surrender[] papers and property to which the client is entitled."

15. It is found that the requested records, albeit in the possession of outside counsel, are "owned" or "used" by the respondents within the meaning of §1-200(5), G.S. See also cases cited by the complainants in their post-hearing brief, such as Tribune-Review Publishing Co. v. Westmoreland County Housing Authority, 574 Pa. 661 (2003) (litigation settlement document prepared by private attorney for public agency's insurer on behalf of public agency is public record because within agency's control); Burnett v. County of Gloucester, 415 N.J.Super. 506 (2010) (litigation settlement document possessed by County's insurer or outside counsel is public record of County); Knightstown Banner v. Town of Knightstown, 838 N.E.2d 1127, 1133 (Ind. Ct. App. 2005) (private counsel retained by insurer to represent town "created, maintained, and retained" settlement agreement as public record during course of representation of client town); Journal/Sentinel, Inc. v. Sch. Bd. Of Sch. Dist. Of Shorewood, 186 Wis.2d 443, (1994) (affirming order for agency to furnish settlement agreement as public record held by outside counsel); and Providence Journal v. Silva, No. C.A. 87-1930, 1987 WL 859793, (R.I. Super. Ct. Oct. 28, 1987).

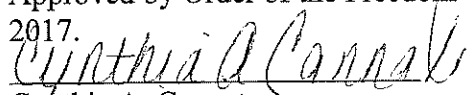
16. It is found, therefore, that the requested records are public records of the respondents, within the meaning of §§1-200(5), 1-210(a), and 1-212(a), G.S.

17. It is concluded that the respondents violated §§1-210(a) and 1-212(a), G.S., by failing to provide the requested records to 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 retrieve a copy of the requested records from their outside counsel and shall provide such records to the complainants, free of charge.
2. Henceforth, the respondents shall strictly comply with §§1-210(a) and 1-212(a), G.S.

Approved by Order of the Freedom of Information Commission at its regular meeting of June 14, 2017.


Cynthia A. Cannata

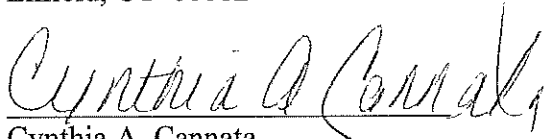
Acting Clerk of the Commission

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:

Dan Barrett and the American Civil Liberties Union of Connecticut
c/o Dan Barrett, Esq.
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Hartford, CT 06105

Town Manager, Town of Enfield; and Town of Enfield
c/o Maria S. Elsdon, Esq.
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820 Enfield Street
Enfield, CT 06082



Cynthia A. Cannata
Acting Clerk of the Commission