

FREEDOM OF INFORMATION COMMISSION
OF THE STATE OF CONNECTICUT

In the Matter of a Complaint by

FINAL DECISION

Kevin Kelly,

Complainant

against

Docket #FIC 2016-0638

Commissioner, State of Connecticut,
Department of Insurance; and State of
Connecticut, Department of Insurance,

Respondents

June 28, 2017

The above-captioned matter was heard as a contested case on December 14, 2016, and April 3 and 12, 2017, 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, on June 21, 2016, the complainant, who is a member of the Connecticut State Senate and co-chair of the Insurance and Real Estate Committee, sent a written request on Senate letterhead to the respondent Commissioner Katharine Wade. It is found that the complainant requested:

Copies of all records ... of communication relating to Anthem's merger with Cigna between the Insurance Department and (1) Cigna, Anthem and/or their lobbying firm, or other representatives, and/or (2) other federal or state officials including but not limited to insurance regulators or antitrust or trade authorities.

According to multiple press reports, the Insurance Department has held regular conference calls and/or meetings with Cigna and Anthem about the progress of their nation-wide merger and communicated with other states' insurance regulators.

I am requesting copies of all notes, transcripts, minutes or recordings from those calls and/or meetings as well as (1) all calendar notes indicating when such meetings or conferences took

place and who participated in these conferences and (2) any emails relating to or referencing in any way such calls and/or meetings.

3. It is found that, on August 8, 2016, counsel for the respondents provided approximately 125 pages of responsive records to the complainant. It is found that the respondents informed the complainant that they maintained other responsive records, but that such records would not be disclosed because they are either confidential by statute or are privileged by the attorney-client relationship.

4. By letter filed September 7, 2016, the complainant appealed to this Commission, alleging that the respondents violated the Freedom of Information ("FOI") Act by failing to provide copies of all non-exempt responsive records.

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:

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 (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: "Any person applying in writing shall receive, promptly upon request, a plain, facsimile, electronic or certified copy of any public record.

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

9. The complainant testified that the approximately 125 pages that the respondents provided consisted of simple calendar entries and public newspaper articles.

10. On December 20, 2016, the respondents were ordered to submit for in camera inspection all responsive records for which they claimed an exemption or which they claimed were confidential by statute, along with an index referencing each record claimed to be exempt.

11. In response, the respondents filed an objection on December 30, 2016. The respondents contended that the in camera inspection should be limited to records that are permissively exempt pursuant to §1-210(b), G.S. All other records, the respondents claimed, were categorically exempt pursuant to §§38a-131(c) and 137, G.S., and must not be submitted for in camera inspection, which would be “an entirely unnecessary disclosure with incumbent risks.” (Letter dated December 28, 2016, from attorney for Anthem to Commissioner Wade, attached as exhibit to respondents’ Objection).

12. In addition to their claim that submitting records for in camera review would constitute an impermissible “disclosure” of such records, the respondents also contended that even to cite §§38a-131(c) and 137, G.S., on the in camera index as the basis for their claim of exemption would impermissibly acknowledge the existence of such records.

13. Section 38a-131(c), G.S., provides in relevant part:

For an acquisition ..., the acquiring party shall file a preacquisition notification in accordance with this section and the acquired party may file a preacquisition notification. The commissioner shall treat any information filed under this subsection as confidential in the same manner as provided under section 38a-137. (Emphasis added.)

(1) The preacquisition notification shall be in such form and contain such information as the National Association of Insurance Commissioners prescribes. The commissioner may require additional material and information the commissioner deems necessary, including, but not limited to, the opinion of an economist as to the impact of the proposed acquisition on competition in this state, to evaluate whether the proposed acquisition will violate the competitive standard described in subsection (d) of this section.

(2) ...[T]he commissioner may require, on a one-time basis, the acquiring party or the acquired party to submit additional needed information relevant to the proposed acquisition ...

14. Section 38a-137, G.S., provides in relevant part:

(a) All information, documents, materials and copies thereof obtained by or disclosed to the commissioner or any other person in the course of an examination or investigation made pursuant to section 38a-14a and all information reported, furnished or filed pursuant to sections 38a-135 and 38a-136 shall (1) be confidential by law and privileged, (2) not be subject to disclosure under section 1-210, (3) not be subject to subpoena, and (4) not be subject to discovery or admissible in evidence in any civil action. The commissioner shall not

make such information, documents, materials or copies public without the prior written consent of the insurance company to which it pertains unless the commissioner, after giving the insurance company and its affiliates who would be affected thereby notice and opportunity to be heard, determines that the interests of policyholders, security holders or the public will be served by the publication thereof, in which event the commissioner may publish all or any part thereof in such manner as the commissioner may deem appropriate. The commissioner may use such information, documents, materials or copies in the furtherance of any regulatory or legal action brought as part of the commissioner's official duties... (Emphasis added.)

15. It is concluded that the reference in §38a-131(c), G.S., to the *manner* of confidentiality provided in §38a-137, G.S., means that any record of preacquisition notification (henceforth, "Form E filing"), obtained pursuant to §38a-131(c), G.S., shall not be subject to disclosure under §1-210, G.S., unless the commissioner determines that the interests of policyholders, security holders or the public will be served by publication.

16. The complainant conceded the confidentiality of Form E filings, and he did not request a copy of such records.

17. It is concluded that nothing in §§38a-131(c) and 38a-137, G.S., prohibits the disclosure of *whether or not* a Form E filing has been made.

18. Furthermore, the Commission takes administrative notice of the respondents' public website, which states that the Department of Insurance received a Form E filing by Anthem:

In accordance with CGSA 38a-130 and CGSA 38a-131, Anthem has also filed with the Commissioner a confidential Form E Pre-Acquisition Notification (the "Form E") that describes the competitive impact in Connecticut with respect to certain lines of insurance written by Anthem and Cigna.

<http://www.cidverifylicense.ct.gov/portalApps/viewFile.aspx?F=109>, accessed April 24, 2017.

19. The respondents contended, in addition, that all records of communication that pertain in any way to Form E filings are also confidential.

20. The respondents relied on the first sentence of §38a-137, G.S., to support their claim of confidentiality of Form E filings obtained pursuant to §38a-131(c), G.S. It is concluded, however, that the first sentence applies only to information, documents, and materials submitted as part of investigations undertaken pursuant to certain specified statutes, and §38a-131(c), G.S.,

is not one of the specified statutes. It is concluded that §38a-137, G.S., does not, by its terms, prohibit disclosure of the requested records of communication.

21. Furthermore, the confidentiality requirement of §38a-131(c), G.S., applies only to “information filed[.]” Black’s Law Dictionary, 8th Ed. (2004), defines file: “to deliver a legal document to the ... record custodian for placement into the official record.” Also, “to fill out and submit to the appropriate office.” Webster’s Third New International Dictionary Unabridged (1961). Information filed under §38a-131(c), G.S., describes information submitted to the respondents through a formal legal procedure.

22. The respondents did not offer the testimony of any individual who had reviewed the requested records of communication that the respondents claimed were prohibited by statute from providing to the Commission for in camera inspection.

23. It is found that an in camera inspection is necessary to show whether the requested records of communication comprise or reveal information filed under §38a-131(c), G.S. “Unless the character of the documents in question is conceded by the parties, an in camera inspection of the particular documents by the commission may be essential to the proper resolution of a dispute under the act.” Wilson v. FOI Commission, 181 Conn. 324, 340 (1980).

24. On January 26, 2017, the hearing officer issued a Revised Notice of Order to Submit Documents for In Camera Inspection, which permitted the respondents to omit from their in camera submission “Form E filings,” “Form A filings,” and all records previously disclosed to the complainant. The Revised Notice ordered the respondents to submit all other responsive records of communication for in camera inspection, and ordered the first installment of such records to be delivered to the hearing officer on February 24, 2017.

25. On February 24, 2017, the respondents applied to the hearing officer for a temporary stay of the order. The hearing officer denied the respondents’ application on March 1, 2017. On March 30, 2017 (amended on April 3, 2017), the respondents applied to the Commission for a temporary stay of the Order to Submit Documents for In Camera Inspection, which the Commission considered and then voted to deny at its regular meeting of April 12, 2017.

26. The respondents filed a “Motion for Reconsideration by Full Commission” on April 21, 2017. The Commission considered and then voted to deny the motion for reconsideration at its regular meeting of May 10, 2017, thus leaving in effect the January 26, 2017 Revised Notice of Order to Submit Documents for In Camera Inspection.

27. It is found that the respondents did not comply with the January 26, 2017 Revised Notice of Order to Submit Documents for In Camera Inspection except to the extent described in paragraph 30, below. It is found that, in addition to the records submitted for in camera inspection, the Form E filings, records posted on the respondents’ website, and records provided to the complainant, the respondents maintain records that are responsive to the complainant’s request. It is found that the respondents did not provide such records to the complainant, nor did they submit such records for in camera inspection or provide any evidence as to the number or nature of such records.

28. It is found, therefore, that the respondents failed to prove that such other records are exempt from disclosure.

29. It is concluded that the respondents violated §§1-210(a) and 1-212(a), G.S., by failing to disclose such records to the complainant.

30. On February 24, 2017 and on March 15, 2017, the respondents submitted 159 documents for in camera inspection, referenced herein as IC-2016-0638-D1 through IC-2016-0638-D84 and IC-2016-0638-JA1 through IC-2016-0638-JA75, respectively.

31. It is found that the records submitted for in camera inspection are copies of records maintained by two attorneys employed by the Insurance Department. The respondents claimed that the following records are permissively exempt pursuant to §1-210(b)(10), G.S:

IC-2016-0638-D1 through IC-2016-0638-D4; IC-2016-0638-D26 through IC-2016-0638-D37; IC-2016-0638-D39, IC-2016-0638-D40, IC-2016-0638-D45 through IC-2016-0638-D84; IC-2016-0638-JA1 (partial); IC-2016-0638-JA6 (partial), IC-2016-0638-JA11, IC-2016-0638-JA12 (partial), IC-2016-0638-JA16, IC-2016-0638-JA17, IC-2016-0638-JA21, IC-2016-0638-JA22 (partial), IC-2016-0638-JA26, IC-2016-0638-JA27, IC-2016-0638-JA28 (partial), IC-2016-0638-JA32 (partial), IC-2016-0638-JA39 through IC-2016-0638-JA43.

32. Section 1-210(b), G.S., provides in relevant part:

Nothing in the Freedom of Information Act shall be construed to require disclosure of: ...

(10) [C]ommunications privileged by the attorney-client relationship[.]

33. 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 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.

34. 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....

35. 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, supra at 149.

36. Upon careful review of the in camera records, it is found that the following records are confidential communications between a public official or employee and an attorney, made in the course of the professional relationship, and relate to legal advice sought by the agency:

- a. IC-2016-0638-D-26 through IC-2016-0638-D-37,
- b. IC-2016-0638-D-39 through IC-2016-0638-D-40,
- c. IC-2016-0638-D-45,
- d. IC-2016-0638-D-74 through IC-2016-0638-D-84; and
- e. The portions of the following records referenced as exempt on respondents’ Revised Index dated April 12, 2017:
 - IC-2016-0638-JA-1,
 - IC-2016-0638-JA-06,
 - IC-2016-0638-JA-011,
 - IC-2016-0638-JA-012,
 - IC-2016-0638-JA-016,
 - IC-2016-0638-JA-017 (lines 1 – 12 only),
 - IC-2016-0638-JA-021,
 - IC-2016-0638-JA-022,
 - IC-2016-0638-JA-026,
 - IC-2016-0638-JA-027,
 - IC-2016-0638-JA-028,
 - IC-2016-0638-JA-032,
 - IC-2016-0638-JA-039 through IC-2016-0638-JA-043.

37. It is found that the records referenced in paragraph 36, above, are exempt from disclosure pursuant to §1-210(b)(10), G.S.

38. Accordingly, it is concluded that the respondents did not violate the FOI Act by denying the complainant copies of the records described in paragraph 36, above. It is unnecessary to address any other claims of exemption with respect to such records.

39. With respect to the remaining records that the respondents claim are exempt pursuant to §1-210(b)(10), G.S., (see paragraph 31, above), it is found that the respondents failed to prove that the following records relate to legal advice sought by the respondents or a public official or employee of the respondents: IC-2016-0638-D-1 through IC-2016-0638-D-4.

40. In addition, it is found that respondents failed to prove that IC-2016-0638-D-46 through IC-2016-0638-D-73 are records of communication transmitted in confidence.

41. It is found that §1-210(b)(10), G.S., does not exempt the records referenced in paragraphs 39 and 40, above.

42. With respect to records submitted for in camera inspection that are not exempt pursuant to §1-210(b)(10), G.S., the respondents claimed that §1-210(b)(1), G.S., exempts the following:

IC-2016-0638-D-1 through IC-2016-0638-D-4, IC-2016-0638-D-11 through IC-2016-0638-D-13, IC-2016-0638-D-21, IC-2016-0638-D-23, and IC-2016-0638-D-46 through IC-2016-0638-D-74.

43. Section 1-210(b)(1), G.S., provides that disclosure shall not be 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.”

44. Section 1-210(e), G.S., provides that “[n]otwithstanding the provisions of subdivision (1) and (16) of subsection (b) of this section, disclosure shall be required of interagency 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 the staff of a public agency, which is subject to revision prior to submission to or discussion among the members of such agency[.]”

45. Section 1-210(b)(1), G.S., requires the respondents to prove that they determined that the public interest in withholding records clearly outweighs the public interest in disclosure. “The statute’s language strongly suggests that the agency may not abuse its discretion in making the decision to withhold disclosure. The agency must, therefore, indicate the reasons for its determination to withhold disclosure and those reasons must not be frivolous or patently unfounded.” Van Norstrand v. FOI Commission, 211 Conn. 339, 345 (1989).

46. It is found, based on a review of the records referenced in paragraph 42, above, and on the conclusory nature of the respondents’ testimony, that the respondents failed to indicate the reasons for their determination to withhold disclosure. It is found, therefore, that the respondents failed to prove an essential element of the exemption – that they determined by balancing the public interests involved that the public interest in withholding the records clearly outweighs the public interest in disclosure.

47. Moreover, it is found that the respondents failed to prove that the records referenced in paragraph 42, above, are preliminary drafts or notes. It is also found that, even if IC-2016-0638-D-46 through IC-2016-0638-D-74 are preliminary drafts, the respondents failed to prove that such records are not nevertheless required to be disclosed pursuant to §1-210(e), G.S.

48. The respondents also claimed that §38a-8(d), G.S., imposes confidentiality on many of the records submitted for in camera inspection.

49. Section 38a-8(d), G.S., provides in relevant part:

The commissioner shall develop a program of periodic review to ensure compliance by the Insurance Department with the minimum standards established by the National Association of Insurance Commissioners for effective financial surveillance and regulation of insurance companies operating in this state. The commissioner shall adopt regulations, in accordance with the provisions of chapter 54, pertaining to the financial surveillance and solvency regulation of insurance companies and health care centers as are reasonable and necessary to obtain or maintain the accreditation of the Insurance Department by the National Association of Insurance Commissioners. The commissioner shall maintain as confidential any confidential documents or information received from the National Association of Insurance Commissioners ["NAIC"], or the International Association of Insurance Supervisors ["IAIS"], or any documents or information received from state or federal insurance, banking or securities regulators or similar regulators in a foreign country that are confidential in such jurisdictions.

50. It is found that the respondents failed to prove that the records submitted for in camera inspection are the type of record to which §38a-8(d), G.S., applies; that is, that the records pertain to "the minimum standards established by the NAIC for effective financial surveillance and regulation of insurance companies operating in this state." It is also found that the respondents failed to prove that the in camera records are "confidential documents or information received from the NAIC or the IAIS," or are documents or information received from state or federal regulators and that such documents or information are confidential in the originating jurisdictions.

51. It is found, therefore, that the respondents failed to prove that §38a-8(d), G.S., requires confidential treatment of the records submitted for in camera inspection.

52. It is concluded that the respondents are permitted to withhold only those records submitted for in camera inspection that contain communications protected by the attorney-client privilege, within the meaning of §1-210(b)(10), G.S. Such records are referenced in paragraph 36, above.

53. It is concluded that the respondents violated §§1-210(a) and 1-212(a), G.S., by failing to disclose the in camera records, except for those referenced in paragraph 36, above.

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

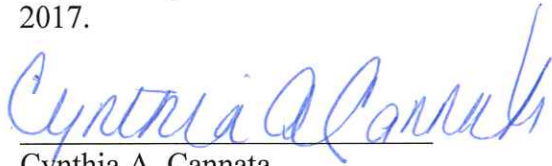
1. Forthwith, the respondents shall provide a copy of the records submitted for in camera inspection, except for the records described in paragraph 36 of the findings, above.

2. Forthwith, the respondents shall conduct a diligent search for additional records responsive to the complainant's request. Such search shall include records of communication maintained on personal devices or prepared, used, received, or retained on personal electronic accounts. The respondents shall provide to the complainant, free of charge, copies of all records discovered as a result of such search.

3. In complying with paragraph 2 of the order, above, the respondents are not ordered to provide the Form E filing or records already provided to the complainant or posted online.

4. 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 28, 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.

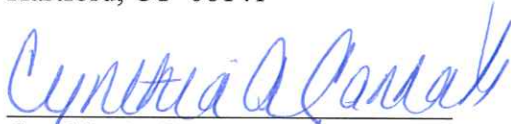
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