

FREEDOM OF INFORMATION COMMISSION
OF THE STATE OF CONNECTICUT

In The Matter of a Complaint by

FINAL DECISION

Robert Young,

Complainant

against

Docket #FIC 2017-0290

First Selectman, Town of New
Canaan; and Town of New Canaan,

Respondents

April 25, 2018

The above-captioned matter was heard as a contested case on October 30, 2017, at which time the complainant and the respondents appeared, stipulated to certain facts and presented testimony, exhibits and argument on the complaint. For purposes of hearing, this matter was consolidated with Docket #FIC 2017-0313, Robert Young v. Chairman, Utilities Commission, Town of New Canaan; Utilities Commission, Town of New Canaan; and Town of New Canaan.

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 email dated March 22, 2017, the complainant sent the respondents the following request for copies of records:

Recently I saw photos from a balloon test at Irwin Park, which did not get press coverage. Indeed, this was effectively kept from the larger public despite assertions to the contrary portrayed at the special PZ¹ meeting last night. More importantly, the UC² talks about unobtrusive

¹ "PZ" is the complainant's abbreviation the Planning and Zoning Commission for the Town of New Canaan.

² "UC" is the complainant's abbreviation for the Utilities Commission for the Town of New Canaan.

equipment yet their action speak to towers. It should be clear by now: No one wants a tower in New Canaan and there are alternatives.

As it relates [to] each and every member of the Selectmen and Utilities Commission, kindly send me a copy of every email or snail mail (including exhibits) that incorporate on[e] or more of the following words: Homeland Tower, cellular, cell, microcell, cell tower, tower. This request includes all reports and diagrams of potential sites in New Canaan.

The dates are from January 1, 2017 through March 23, 2017³ (or the date at which you complete the review).

3. It is found that, by email dated March 22, 2017, the respondents, through Thomas A. Stadler, the Administrative Officer for the Town of New Canaan, acknowledged the complainant's request.

4. It is found that, by separate emails both dated March 23, 2017, the complainant amended his request for records in two ways. First, the complainant requested that the respondents include the following word searches: "Cityscape" and "All-Points Technology, Corporation", and, second, the complainant requested that the start date of the search be changed from January 1, 2017 to September 1, 2016.

5. It is found that, by email dated March 27, 2017, Mr. Stadler forwarded some of the responsive emails to the complainant.

6. It is found that, by email dated April 3, 2017, the complainant informed the respondents that he believed the "timing and quantity of the emails under my request is light" and he suggested that the respondents "gain access to [First Selectman's and Utilities Commission Chairman's] emails and conduct the requested searches."

7. It is found that, by email dated April 3, 2017, Mr. Stadler thanked the complainant for his suggestion.

8. It is found that, by email dated April 7, 2017, the complainant requested to know when he might receive the remainder of the requested emails.

9. It is found that, by email dated April 13, 2017, Mr. Stadler informed the complainant that the respondents were able to download the emails to a flash drive. Mr.

³ The Commission has jurisdiction over public records that exist at the time a request for such records is made. Accordingly, the end date of this request would be March 22, 2017—the date the request was issued to the respondents.

Stadler further informed the complainant that the emails were going to be reviewed, and that once the review was complete, they would notify the complainant about pickup. Mr. Stadler believed that the emails would be ready for pickup in one week.

10. It is found that, in response and by email dated April 17, 2017, the complainant stated the following:

As you know, the FOIA is the law. It is not at the convenience of those who think it might be optional. I am currently in the possession of lots of emails coming from Mr. Tesluk⁴ whether Mr. Tesluk knows it or not. Rob,⁵ I suggest you direct the immediate release of all communications related to my perfectly legal and succinct request. It would be a shame to be tagged with the intentional delay or obfuscation of what is legally required to be delivered. Many thanks. Pick a time tomorrow and I am happy to accommodate your schedule to pick up a drive with a fully compliant response.

11. It is found that, by email dated April 25, 2017, Mr. Stadler informed the complainant that the respondents had some of the emails ready for him and that he could pick them up.

12. It is found that, by email dated April 25, 2017, the complainant stated, in part, as follows:

Not sure why Mallozzi and Tesluk are taking so long. . . . Separately, I just noticed that my email letter yesterday left out the word Homeland . . I am interested in Homeland Tower so kindly make sure that Mimi⁶ searches for that as well. . . .⁷

13. It is found that, by email dated May 2, 2017, the complainant corresponded with Mr. Stadler, inquiring when the remaining emails would be ready for pickup and insisting that his original request be amended for a third time:

⁴ “Mr. Tesluk” refers to Tom Tesluk, the Chairman of the Utilities Commission for the Town of New Canaan.

⁵ “Rob” refers to Rob Mallozzi, the former First Selectman for the Town of New Canaan.

⁶ “Mimi” refers to Mimi Pitt, a Human Resources assistant for the Town of New Canaan.

⁷ Because the complainant’s original request for records contains the search term “Homeland Tower,” see ¶ 2, above, the Commission is unsure why, on April 25, 2017, he requested that this search term be added to his request.

Have you requested Tesluk's login information? . . . Give me a date this week when I can pick up the drive? In the meantime, you can expand my FOIA request to include your requests and Tesluk's replies.

14. It is found that, by email dated May 2, 2017, Mr. Stadler inquired with Chairman Tesluk whether he would like Mr. Stadler's office to conduct the email search or whether Chairman Tesluk planned to conduct the search himself.

15. It is found that, by email dated May 11, 2017, Mr. Stadler informed the complainant that Chairman Tesluk's emails and First Selectman Mallozzi's emails had been collected and were being reviewed by the First Selectman.

16. It is found that, by email dated May 18, 2017, the complainant again inquired into the status of his request. It found that on this same day, while away on vacation, Mr. Stadler responded to the complainant and suggested that the complainant contact his executive assistant.

17. It is found that, by email dated May 22, 2017, the complainant again inquired with Mr. Stadler as to when he could pick up the remaining emails.

18. By email dated and filed May 30, 2017, the complainant appealed to this Commission, alleging that the respondents violated the FOI Act by failing to provide him with records responsive to the request.

19. 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, 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.

20. 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 (1) inspect such records promptly during regular office or business hours, (2) copy such records in accordance with subsection (g) of section 1-212, or (3) receive a copy of such records in accordance

with section 1-212.

21. 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.”

22. It is found that the records requested by the complainant in paragraph 2, above, as well as the records requested in the amended requests described in paragraphs 4 and 13, above, are public records within the meaning of §§1-200(5), 1-210(a), 1-212(a), G.S., and must be disclosed unless they are exempt from disclosure.

23. At the start of the contested case hearing, the complainant contended that, although he had received multiple flash drives and multiple packages of hardcopy records from the respondents, he believed that there were more records in the respondents’ possession that should have been provided to him.

24. First Selectman Mallozzi, Chairman Tesluk and Administrative Officer Stadler appeared at the contested case hearing and presented testimony.

25. It is found that the respondents did not disclose attorney-client privileged records or unexecuted contracts.

26. With regard to attorney-client privileged records, the complainant indicated at the contested case hearing that he was not requesting these records.

27. With regard to unexecuted contracts, the respondents claimed that such records are exempt from disclosure pursuant to §1-210(b)(1), G.S., as preliminary drafts.

28. Section 1-210(b)(1), G.S., provides, in relevant part, that nothing in the FOI Act shall be construed to require disclosure of:

Preliminary drafts or notes provided the public agency has determined that the public interest in withholding such documents clearly outweighs the public interest in disclosure....

29. In 1980, the Connecticut Supreme Court interpreted the phrase “preliminary drafts and notes” in the FOI Act. See Wilson v. FOIC, 181 Conn. 324 (1980) (“Wilson”). The Wilson court ruled that “preliminary drafts or notes reflect that aspect of an 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.” Wilson, 181 Conn. at 332. In addition, the Wilson court interpreted the phrase “preliminary drafts and notes” in the FOI Act as identical to the deliberative process privilege found in 5 U.S.C. §552(b)(5) of the federal Freedom of Information Act, with the exception that, under Connecticut’s FOI Act, the public agency carried the additional burden to show that “the public interest in withholding such document clearly outweighs the public interest in disclosure.” See Wilson, 181 Conn. at 333-340.

30. The year following Wilson, the Connecticut General Assembly adopted Public Act 81-431, which added to the FOI Act the language now codified in §1-210(e)(1).

31. Accordingly, §1-210(b)(1), G.S., must be read in conjunction with §1-210(e)(1), G.S., which provides, in relevant part, as follows:

Notwithstanding the provisions of [§1-210(b)(1), G.S.], disclosure shall be required of:

(1) 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 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.

32. It is found that the Utilities Commission, through Chairman Tesluk, is still in the process of negotiating the terms of contracts regarding the installation of services to improve cell reception in the Town of New Canaan. It is found that, at the time of the contested case hearing, no final agreements had been reached and no contracts had been executed. It is further found that the unexecuted contracts have not even been distributed to the individual members of the Utilities Commission. It is therefore found that the records at issue are “preliminary drafts” with the meaning of §1-210(b)(1), G.S.

33. It is further found that public interest in withholding unexecuted contracts clearly outweighs the public interest in disclosure. In this regard, Chairman Tesluk testified that disclosing contracts that are still in the process of being negotiated would reveal the town’s position on various matters; in the event that the current negotiations fail to result in finalized agreements, the town’s bargaining position would be weakened in subsequent negotiations. The Commission agrees. See Coalition to Save Horsebarn Hill, et al. v. FOIC, et al., 73 Conn. App. 89 (2002) (various drafts of proposed development contract between UCONN and Pfizer were preliminary drafts, exempt from public disclosure pursuant to §1-210(b)(1), G.S.)

34. Finally, it is found that the unexecuted contracts are not “interagency” or intra-agency” records within the meaning of §1-210(e)(1), G.S. Rather, it is found that the requested records are various versions of contracts that have been exchanged between a public agency and private entities. Therefore, it is found that the records are not subject to disclosure pursuant to §1-210(e)(1), G.S. See Coalition to Save Horsebarn Hill v. FOIC, No. CV 00-0499178, 2001 WL 893779, at *6 n.4 (Conn. Super. Ct., July 11, 2001) (Owen, J) (holding that the provisions of §1-210(e)(1), G.S., do not apply to draft agreements being passed

between a state agency and a private corporation).

35. It is found, however, that many non-exempt records have been disclosed to the complainant. Specifically, it is found that, on May 31, 2017, Mr. Stadler informed the complainant that the First Selectman had just finished reviewing 15,000 emails, that he was having IT move the responsive emails to a flash drive, and that he believed that the flash drive would be ready for him on June 2, 2017. It is found that, of the 15,000 emails that the respondents had to review, only 400 emails were responsive to the request. It is found that one of the reasons why the respondents had so many hits is due to the search term “cell.” See ¶ 2, above. It is found that this particular search term picked up many non-responsive emails in which individuals had noted their “cell” numbers.

36. It is found that, on June 4, 2017, the complainant corresponded with Mr. Stadler and informed him that he had been traveling, but was now interested in picking up the records.

37. It is found that, on June 5, 2017, Mr. Stadler informed the complainant that he could pick up the flash drive on June 6th. Mr. Stadler further informed the complainant that the First Selectman continued to work on the remainder of the emails.

38. It is found that, on June 6, 2017 after having picked up the flash drive, the complainant sent Mr. Stadler the following email:

I just reviewed the memory stick. There is not one email coming from Tom Tesluk. . . I am happy to drive back to your office today to pick up the Tesluk drive. . . .

39. It is found that, on July 31, 2017, the respondents, through Ms. Pitt, informed the complainant that two more flash drives were ready for him. It is found that the first flash drive contained the emails of the Selectmen, the Utilities Commissioners and the Town Councilmen.⁸ It is found that the second flash drive contained additional emails from the First Selectman.

40. With regard to the Selectmen’s emails, it is found that the respondents ran the requested word searches on each of the three Selectmen’s town email addresses. With regard to the Utilities Commissioners, it is found that the respondents had the five of the Utilities Commissioners search their own Gmail accounts (which are the accounts on which the Commissioners conduct business with the town) and provide all responsive emails to either

⁸ The Commission notes that, while the complainant did not request the emails from the Town Councilmen in the instant request, there is evidence in this record that the respondents did in fact provide the complainant with all of the Town Councilmen’s emails (in addition to the Selectmen’s emails and hardcopy records and the Utilities Commissioners’ emails and hardcopy records).

Ms. Pitt or Mr. Sadler.⁹ It is found that a sixth Utilities Commissioner searched her own personal email account and provided the responsive emails to Mr. Sadler.

41. It is further found that, after all of the Selectmen's emails and other records were searched and disclosed to the complainant, First Selectman Mallozzi reached out to the complainant and asked whether the complainant believed he was missing any record. It is found that the complainant informed the First Selectman that he believed he was missing a particular map and a couple of other records. It is found that the First Selectman ensured that the complainant had received those records. At the contested case hearing, the complainant contended that other records were missing. Based on the testimony of the First Selectman, it is found that the records that the complainant was concerned about are available on the Town of New Canaan's website.

42. Moreover, it is found that, while the initial request for records had a date range of January 1, 2017 through March 22, 2017, see ¶ 2, above, which was subsequently amended to September 1, 2016 through March 22, 2017, see ¶ 4, above, the respondents agreed to extend the search and provide the complainant with responsive emails and other hardcopy records through July 27, 2017. It is further found that, by the time of the contested case hearing, the respondents had again agreed to extend the end date of the search, and had almost completed re-running the search terms for all individuals through September 30, 2017.

43. It is found that by willingly extending the scope of the search and re-running search terms multiple times for nine individuals, the respondents have demonstrated exceptional good will in their dealings with this plaintiff.

44. It is concluded that the respondents did not violate the disclosure provisions of the FOI Act, as alleged in the complaint.

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

1. The complaint is dismissed.

Approved by Order of the Freedom of Information Commission at its regular meeting of April 25, 2018.



Cynthia A. Cannata
Acting Clerk of the Commission

⁹ For example, it is found that, with regard to just Chairman Tesuk, the respondents provided the complainant with 1,300 pages of emails from Mr. Tesuk's Gmail account, and 88 pages of emails from Mr. Tesluk's personal email account.

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:

ROBERT YOUNG, 219 Michigan Road, New Canaan, CT 06840

FIRST SELECTMAN, TOWN OF NEW CANAAN; AND TOWN OF NEW CANAAN,
c/o Attorney Ira W. Bloom, Berchem, Moses & Devlin, P.C., 1221 Post Road East, Westport,
CT 06880



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