FREEDOM OF INFORMATION

Connecticut Freedom of Information Commission • 165 Capitol Avenue, Suite 1100 • Hartford, CT 06106
Toll free (CT only): (866) 374-3617 Tel: (860) 566-5682 Fax: (860) 566-6474 • www.ct.gov/foi • email: foi@ct.gov

Energy Policy Advocates
Complainant(s)
against

Attorney General, State of Connecticut, Office of the Attorney General; and State of Connecticut, Office of the Attorney General
Respondent(s)

Notice of Meeting

Docket #FIC 2020-0320

January 10, 2022

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 at **2:00 p.m. on Wednesday, January 26, 2022.**

At the meeting 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 January 14, 2022.*** 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.**

NOTICE: Due to public health concerns surrounding the COVID-19 pandemic as well as the Governor's reopening guidelines, the January 26, 2022 meeting will be conducted telephonically. Further guidance is included regarding the dial-in procedure to follow in the event that you wish to attend, or to present oral argument at, the January 26, 2022 meeting.

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 January 14, 2022.*** **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 January 14, 2022*** 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

/S/ Jennifer M. Mayo
Jennifer M. Mayo
Acting Clerk of the Commission

Notice to: Attorney Margaret A. Little
Attorney Matthew D. Hardin
Associate Attorney General Antoria Howard
Assistant Attorney General Matthew F. Fitzsimmons

FIC# 2020-0320/ITRA/MDR//PSP/JMM/1/10/22

FREEDOM OF INFORMATION COMMISSION
OF THE STATE OF CONNECTICUT

In the Matter of a Complaint by | Report of Hearing Officer

Energy Policy Advocates,

Complainant

against | Docket # FIC 2020-0320

Attorney General, State of Connecticut,
Office of the Attorney General; and State of
Connecticut, Office of the Attorney General,

Respondents | November 26, 2021

The above-captioned matter was heard as a contested case on March 1, 2021, at which time the complainant and the respondents appeared, stipulated to certain facts, and presented testimony, exhibits and argument on the complaint. For the purposes of hearing only, this matter was consolidated with Docket #FIC2020-0122, Energy Policy Advocates v. Attorney General, State of Connecticut, Office of the Attorney General; and State of Connecticut, Office of the Attorney General. Due to the COVID-19 pandemic and the state's response to it, the hearing was conducted telephonically.[1]

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 March 7, 2020, the complainant requested that the respondents provide copies of the following records:

> (a) all electronic correspondence, and any accompanying information including also any attachments, sent to or from or copying (whether as cc: or bcc:) Jill Lacedonia that includes, anywhere, whether in an email address, in the sent, to, from, cc, bcc fields, or the subject fields or body of an email or email "thread", including also in any attachments, Bachmann, and or Goffman, and is dated from November 1, 2019 through the date you process this request, inclusive;

[1] On March 14, 2020, the Governor issued Executive Order 7B, which suspended the requirement to conduct public meetings in person.

(b) all electronic correspondence, and any accompanying information including also any attachments, sent to or from or copying (whether as cc: or bcc:) Jill Lacedonia that was sent from Michael.myers@ag.ny.gov, and is dated from November 4, 2019 through November 8, 2019, inclusive and November 17, 2019, and

(c) any invitation sent to or received from Michael.myers@ag.ny.gov to participate in a November 18, 2019 telephone call.

Regarding (a) and (b) above, we request entire "threads" of which any responsive electronic correspondence is a part, regardless of whether any portion falls outside of the above time parameter.

Also for (a) and (b), to narrow this request, please consider as non-responsive electronic correspondence that merely receives or forwards newsletters or press summaries or 'clippings', such as news services or stories or opinion pieces, if that correspondence has no comment or no substantive comment added by a party other than the original sender in the thread (an electronic mail message that includes any expression of opinion or viewpoint would be considered as including substantive comment; examples of non-responsive emails would be those forwarding a news report or opinion piece with no comment or only "fyi" or "interesting").

Additionally, please consider all published or docketed materials, including pleadings, regulatory comments, ECF notices news articles, and/or newsletters, as non-responsive, unless forwarded to or from the named persons with substantive commentary added by the sender.

3. It is found that on March 12, 2020, the respondents acknowledged the complainant's request. Additionally, it is found that on March 26, 2020, the respondents notified the complainant that records responsive to the complainant's request had been reviewed and were being withheld pursuant to certain exemptions provided for by the FOI Act.

4. It is found that ten pages of responsive records were disclosed to the complainant with redactions.

5. By letter of complaint filed March 31, 2020,[2] the complainant appealed to the Commission, alleging that the respondents violated the Freedom of Information ("FOI") Act by denying his request for the records described in paragraph 2, above.

6. At the time of the request, §1-200(5), G.S., provided:

> "[p]ublic 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.[3]

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

> [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 . . . (3) receive a copy of such records in accordance with section 1-212.

8. 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."

9. It is found that the records described in paragraph 2, above, to the extent such records exist and are maintained by the respondents, are public records within the meaning of §§1-200(5), 1-210(a) and 1-212(a), G.S.

10. At the hearing and in an affidavit prepared by counsel for the respondents, the respondents contended that the redacted information was exempt from disclosure pursuant to several exemptions including §§1-210(b)(1), 1-210(b)(4), 1-210(b)(10), 1-210(e)(1) and 52-164r, G.S. Additionally, the respondents contended that some of the responsive records were exempt from disclosure pursuant to the common law "common interest privilege." The complainant challenged the propriety of the redactions and requested that the records be reviewed in camera.

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[2] On March 25, 2020, the Governor issued Executive Order 7M, thereby suspending the provisions of Conn. Gen. Stat. Sec. 1-206(b)(1), which requires the Freedom of Information Commission to hear and decide an appeal within one year after the filing of such appeal. Executive Order 7M is applicable to any appeal pending with the Commission on the issuance date and to any appeal filed on or after such date, through June 30, 2021. Consequently, the Commission retains jurisdiction.

[3] Public Act 21-2 (June Sp. Sess.) amended §1-200(5), G.S., to add the word "videotaped" to the definition of public records or files. Effective June 23, 2021.

11. After the hearing on this matter, the respondents were ordered submit copies of all responsive records for which exemptions were being claimed, in whole or in part, for an in camera inspection. The respondents complied with such order on March 17, 2021. The in camera records were marked and will be referred to as IC2020-0320-001 through IC2020-0320-018.

12. It is of note that the redactions cited by the respondents on the In Camera Index did not specifically match the exemptions claimed in the affidavit prepared and submitted by the respondents. The exemptions claimed on the In Camera Index were much broader than those articulated in the affidavit. For example, on the In Camera Index the respondents claimed that redactions made to IC2020-0320-001 were made pursuant to §§1-210(b)(1), 1-210(b)(4), 1-210(b)(10), 1-210(e)(1) and 52-146r, G.S. However, the affidavit prepared by the respondents and accepted as evidence in this matter states that the redaction to IC 2020-0320-001 was a "legal strategy statement made by Attorney Myers." Nonetheless, because of the relatively low number of in camera records in this matter, each record was analyzed for each of the exemptions claimed by the respondents on the In Camera Index.

13. The general rule under the FOI Act is disclosure; exceptions to this rule must be narrowly construed. The burden of establishing the applicability of an exemption clearly rests upon the party claiming the exemption. New Haven v. FOI Comm'n, 205 Conn. 767, 775 (1988). "This burden requires the claimant of the exemption to provide more than conclusory language, generalized allegations or mere arguments of counsel. Rather, a sufficiently detailed record must reflect the reasons why an exemption applies to the materials requested." Id. at 776.

14. With regard to the record identified as IC2020-0320-004, the sole redaction on that record was made to an alpha numeric call security code. At the hearing, the complainant stated that such redaction was not being contested. Therefore, such record will not be addressed further by the Commission.

15. The respondents contended that IC2020-0320-001 through IC2020-0320-003 were exempt from disclosure because such records constituted preliminary drafts or notes pursuant to §1-210(b)(1), G.S. Additionally, the respondents also contended that the same records were exempt from disclosure pursuant to §1-210(e)(1), G.S.

16. Section 1-210(b)(1), G.S., provides that disclosure is not required 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."

17. The Connecticut Supreme Court ruled in Wilson v. Freedom of Information Commission, 181 Conn. 324, 332 (1980) ("Wilson"), that:

> [w]e do not think the concept of preliminary, as opposed to final, should depend upon who generates the notes or drafts, or upon whether the actual documents are subject to further alteration….

> Instead the term 'preliminary drafts or notes' relates to advisory opinions, recommendations, and deliberations comprising part of the process by which government decisions and policies are formulated….
>
> …[p]reliminary drafts or notes reflect that aspect of an agency's function that precedes formal and informal decision making. We believe that the legislature sought to protect the free and candid exchange of ideas, the uninhibited proposition and criticism of options that often precedes, and usually improves the quality of, governmental decisions. It is records of this preliminary, deliberative and predecisional process the exemption was meant to encompass.

18. The year following Wilson, the Connecticut General Assembly passed Public Act 81-431, which added to the FOI Act the language now codified in §1-210(e)(1), G.S. That provision, which narrowed the exemption for preliminary drafts or notes, provides in relevant part:

> [n]otwithstanding [§1-210(b)(1)], disclosure shall be required of:
>
> [i]nteragency 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…. (emphasis added).

19. In Van Norstrand v. Freedom of Information Commission, 211 Conn. 339, 343 (1989) ("Van Norstrand"), the Supreme Court provided further guidance regarding "preliminary drafts". Citing the dictionary definition, the court stated that the term "preliminary" means "something that precedes or is introductory or preparatory", and "describes something that is preceding the main discourse or business." Id. According to the Court, "[b]y using the nearly synonymous words 'preliminary' and 'draft', the legislation makes it very evident that preparatory materials are not required to be disclosed". Id.

20. Accordingly, §§1-210(b)(1) and 1-210(e)(1), G.S., together, permit nondisclosure of records of an agency's preliminary, predecisional, deliberative process, provided that the agency has determined that the public interest in withholding the records clearly outweighs the public interest in disclosing them and provided further that such records are not interagency or intra-agency memoranda or letters, advisory opinions, recommendations, or reports. See Shew v. Freedom of Information Commission, 245 Conn. 149, 164-166 (1998).

21. With regard to the "balancing test" required by §1-210(b)(1), G.S., it is well established that the responsibility for making the determination as to what is in the public interest is on the agency that maintains the records. See Van Norstrand at 345. The agency must have considered in good faith the effect of disclosure and indicated the reasons for its determination to withhold disclosure, which reasons may not be frivolous or patently unfounded. Id., citing Wilson at 339. See also People for Ethical Treatment of Animals, Inc. v. Freedom of Information Commission, 321 Conn. 805, 816-817 (2016). Thus, the only determination for the FOIC to make is whether the reasons for nondisclosure given by the agency are frivolous or patently unfounded. See Lewin v. Freedom of Information Commission, 91 Conn. App. 521, 522-523 (2005); Coalition to Save Horsebarn Hill v. Freedom of Information Commission, 73 Conn. App. 89, 99 (2002).

22. After a careful inspection of the in camera records identified in paragraph 15, above, it is found that the respondents failed to prove that such records were preliminary drafts or notes as contemplated by §1-210(b)(1), G.S. Other than the conclusory statements by the respondents at the hearing and the conclusory language of the affidavit submitted as evidence by the respondents, there was no testimony or other evidence presented regarding the claimed exemption. Additionally, even if the records were found to constitute preliminary drafts or notes, there was no testimony or evidence to indicate that the respondents performed the required balancing test to determine if the public interest in withholding such documents clearly outweighed the public interest in disclosure. Therefore, it is concluded that IC2020-0320-001 through IC2020-0320-003 are not exempt from disclosure pursuant to §1-210(b)(1), G.S.

23. With regard to the respondents' contention that IC2020-0320-001 through IC2020-0320-003 were exempt from disclosure pursuant to §1-210(e)(1), G.S., the respondents' interpretation of §1-210(e)(1), G.S., as an exception to disclosure for any material deemed to be part of the "deliberative process" is misplaced. Such statute actually requires the disclosure of records found to be part of the process by which governmental decisions and policies are formulated. It is found that the respondents failed to prove that the information redacted from the referenced in camera records was 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 as required by §1-210(e)(1), G.S. Accordingly, it is concluded that the referenced in camera records were not exempt from disclosure pursuant to §1-210(e)(1), G.S., as contended by the respondents.

24. The respondents contended that some or all of the in camera records pertained to legal strategy related to the filing of amicus briefs "in certain pending cases." However, in order for the cited exemption, §1-210(b)(4), G.S., to apply, there must be a pending claim or pending litigation *and* the public agency must be a party to such pending claim or pending litigation.

25. Section 1-210(b)(4), G.S., provides in relevant part that:

> [n]othing in the Freedom of Information Act shall be construed to require disclosure of:…Records pertaining to strategy and negotiations with respect to pending claims or pending litigation to which the public agency is a party until such litigation or claim has been finally adjudicated or otherwise settled.

26. The phrase "pending claim" as defined in §1-200(8) means:

> [a] written notice to an agency which sets forth a demand for legal relief or which asserts a legal right stating the intention to institute an action in an appropriate forum if such relief is not granted.

27. The phrase "pending litigation" as defined in §1-200(9) means:

> (A) a written notice to an agency which sets forth a demand for legal relief or which asserts a legal right stating the intention to institute an action before a court if such relief or right is not granted by the agency; (B) the service of a complaint against an agency returnable to a court which seeks to enforce or implement legal relief or a legal right; or (C) the agency's consideration of action to enforce or implement legal relief or a legal right.

28. Strategy is defined as "a careful plan or method and the art of devising or employing plans or stratagems toward a goal. … Negotiations is a broad term … but in general it means the deliberation which takes place between the parties touching a proposed agreement." (Citations omitted; internal quotation marks omitted.) Bloomfield Education Association v. Frahm, 35 Conn. App. 384, 390, cert. denied, 231 Conn. 926 (1994).

29. At the hearing, the respondents presented no testimony or other evidence with regard to the existence of any pending claim or pending litigation to which the respondents are a party. The respondents made only broad assertions that such records pertained to legal strategy regarding the filing of amicus briefs and the pursuit of potential litigation. The respondents presented no testimony or other evidence with regard to what information within the in camera records pertained to "strategy and negotiations" within the meaning of §1-210(b)(4), G.S.

30. After careful examination of IC2020-0320-001 through IC2020-0320-003, it is found that that the respondents failed to prove the existence of a pending claim or pending litigation or that the respondents are parties to such pending claim or pending litigation as required by the exemption set forth in §1-210(b)(4), G.S. Therefore, it is concluded that the referenced in camera records are not exempt from disclosure pursuant to §1-210(b)(4), G.S., as contended by the respondents.

31. The respondents also contended that some or all of the in camera records were protected by the attorney-client privilege and were therefore exempt from disclosure pursuant to §1-210(b)(10), G.S. Such statute permits a public agency to withhold from disclosure records of "communications privileged by the attorney-client relationship."

32. The applicability of such exemption is governed by established Connecticut law defining the attorney-client privilege. That 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.

33. 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. . ..

34. 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.

35. After careful examination of all the in camera records, it is found that the respondents failed to prove that any of their state agency clients had requested legal advice and that the in camera records pertained to any such advice. Therefore, it is found that such records are not exempt from disclosure pursuant to §§1-210(b)(10) or 52-146(r), G.S., as contended by the respondents.

36. Additionally, the respondents contended that some or all the in camera records were exempt from disclosure pursuant to "the common law common interest privilege." The joint defense privilege, also called the "common-interest" rule, is an extension of the attorney-client privilege that protects communications between parties and the parties' attorney when the parties have decided upon and undertaken a joint defense strategy in litigation. "It serves to protect the confidentiality of communications passing from one party to the attorney for another party where a joint defense effort or strategy has been decided upon and undertaken by the parties and their respective counsel ... Only those communications made in the course of an ongoing common enterprise and intended to further the enterprise are protected." McPhee Elec. Ltd., LLC v. Konover Const. Corp., Superior Court, Judicial District of New Haven at New Haven, Docket No. CV075009694 (October 22, 2009, Lager, J.) (Internal citations omitted).

37. The common interest rule was intended "to protect the free flow of information from client to attorney ... whenever multiple clients share a common interest about a legal matter." Raymond Rd. Assocs., LLC v. Taubman Centers, Inc., Superior Court, Judicial District of Waterbury, Docket No. X02UWY-CV075007877-S (October 30, 2009, Eveleigh, J.). "Third parties receiving copies of the communication and claiming a community of interest may be distinct legal entities from the client receiving the legal advice and may be a non-party to any anticipated or pending litigation." Id.

38. A party relying on the common interest doctrine to shield privileged communications from disclosure has the burden of establishing all of its elements. Id. at *5 Therefore, the party claiming the privilege has the burden of proving that the records for which an exemption is being claimed consist of: (a) a communication; (b) made between counsel and client; (c) in confidence; (d) for the purpose of seeking, obtaining or providing legal advice to the client. Additionally, the party claiming the exemption must prove that a common legal interest exists between entities represented in the records for which the privilege is being claimed.

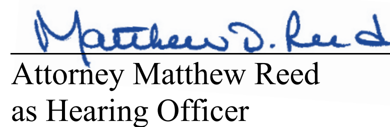
39. It is found that the in camera records identified as IC2020-0320-004 through IC2020-0320-018 comprise a document entitled, "Common Interest Agreement…." Such records were withheld from disclosure in their entirety. The respondents failed to provide any specific testimony or evidence that such records contained any confidential information protected by the attorney client privilege. Accordingly, it is found that IC2020-0320-004 through IC2020-0320-018 were not exempt from disclosure as contended by the respondents.

40. Based on the foregoing, it is concluded that none of the in camera records were exempt from disclosure pursuant to §§1-210(b)(1), 1-210(b)(4), 1-210(b)(10), 1-210(e)(1), G.S.; §52-146(r), G.S.; or the "common interest legal privilege," as contended by the respondents. Accordingly, it is found that the respondents violated §§1-210(a) and 1-212(a), G.S., when they failed to disclose the requested records in their entirety.

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 unredacted copies of the in camera records at no charge, with the exception of IC2020-0320-004.

2. Henceforth, the respondents shall strictly comply with the disclosure requirements of §§1-210(a) and 1-212(a), G.S.



Attorney Matthew Reed
as Hearing Officer

FREEDOM OF INFORMATION

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Toll free (CT only): (866) 374-3617 Tel: (860) 566-5682 Fax: (860) 566-6474 • www.ct.gov/foi • email: foi@ct.gov

Energy Policy Advocates

Complainant(s)

Against

Docket # 2020-0320

Attorney General, State of Connecticut,
Office of the Attorney General; and
State of Connecticut, Office of the
Attorney General

Respondent(s)

January 10, 2022

NOTICE OF DIAL IN INFORMATION

Due to public health concerns surrounding the Covid 19 pandemic, the Commission Meeting of January 26, 2022 will be conducted telephonically at 2:00 p.m.

Should you wish to attend the meeting telephonically, please dial in at 1:50 p.m.

+1 860-840-2075

Conference ID: 340 752 608#