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Walter Casey,
Complainant(s)
against

First Selectman, Town of Darien; and Town of Darien,
Respondent(s)

Notice of Meeting

Docket #FIC 2016-0343

November 17, 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, lst floor, Hartford, Connecticut, at **2 p.m. on Wednesday, January 11, 2017.** 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 December 29, 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 December 29, 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 December 29, 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: Walter Casey
Attorney John Wayne Fox

FIC# 2016-0343/Trans/wrbp/LFS//PSP/2016-11-17

FREEDOM OF INFORMATION COMMISSION
OF THE STATE OF CONNECTICUT

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

Walter Casey,

Complainant

against — Docket #FIC 2016-0343

First Selectman, Town of Darien; and
Town of Darien,

Respondents — October 4, 2016

The above-captioned matter was heard as a contested case on July 26, 2016, at which time 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 by letter dated April 9, 2016, the complainant requested certain records concerning the McGrath Consulting Group's report on Darien's Emergency Medical System. In particular, the complainant requested a copy of the "Excel Spreadsheet" and "Draft Input Responses," both of which were referenced in the report.

3. It is found that on April 26, 2016, the respondent First Selectman informed the complainant that the Excel spreadsheet was located in the report beginning on page 74. It is found that the First Selectman also informed the complainant that the "draft input responses" were exempt as a preliminary draft pursuant to §1-210(b)(1), G.S.

4. By letter filed May 4, 2016, the complainant appealed to this Commission, alleging that the respondents violated the Freedom of Information ("FOI") Act by failing to provide the draft input responses.

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. It is found that the respondents retained the McGrath Consulting Group, Inc., to evaluate the EMS delivery system for the Town of Darien and Post 53 Darien EMS.

10. It is found that in February 2016, McGrath sent a draft report to the First Selectman for review and input from the First Selectman, the Police Chief, and the Post 53 Director.

11. It is found that distribution of the draft was limited to those three individuals, and it was not shared with the Board of Selectmen.

12. It is found that the First Selectman, the Police Chief, and the Post 53 Director each reviewed the draft and provided written comments and suggestions to McGrath.

13. It is found that McGrath reviewed the comments, and revised the draft where appropriate.

14. It is found that the final report was posted on the town website in March 2016, and that the report was presented to the Board of Selectmen in April 2016.

15. It is found that page 6 of the report states:

> In addition to this report, the consultants have provided the Town with two additional documents: ... A document "Draft Input Responses," which lists all of the written draft input provided by the Town and Post 53 officials, as well as the consultants' action taken on each draft input. The purpose of this document is to ensure that the consultants were not mandated to change any of their report contents unless they believed the input helped clarify the intent of the report." (Emphasis in original.)

16. Following the hearing in this matter, the respondents submitted records for in camera inspection. Such records shall be identified as IC-2016-0343-1 through IC-2016-0343-23.[1]

17. The written comments on the draft report provided to McGrath by the three town officials are identified in the respondents' Index as IC-2016-0343-16 through IC-2016-0343-23. It is found that such comments are the "draft input." The respondents also provided the "Draft Input Responses," which separately list each written comment with McGrath's corresponding response. Such "Draft Input Responses are identified in the respondents' index as IC-2016-0343-1 through IC-2016-0343-15. It is found that the "Draft Input Responses" comprise the document referenced in the final report, as described in paragraph 15, above.

18. The respondents claim that all of the records, described in paragraph 17, above, are 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[.]"

19. Upon careful examination of the in camera records, it is found that the "draft input" (i.e., IC-2016-0343-16 through IC-2016-0343-23) comprise part of the preparatory drafting process.

20. It is found that the First Selectman determined that the public interest in withholding such documents clearly outweighed the public interest in disclosure, in that she believed there to be public interest in providing confidentiality to assure candid assessments.

21. It is found that such records are preliminary drafts within the meaning of §1-210(b)(1), G.S.

22. Section 1-210(e)(1), G.S., provides: "notwithstanding the provisions of subdivisions (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 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[.]

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[1] The hearing officer numbered the pages because the records were submitted without proper pagination. See Conn. State Regs. §1-21j-37 (f) (3): "In each case in which an in camera inspection is ordered, the presiding officer, a commissioner or an authorized staff member, shall verify that each record submitted for such inspection has been identified by the party having custody of the record by reference to an individual reference number or numbers prescribed by the commission and included in an accompanying in camera inspection index." (Emphasis added.)

23. It is found that the draft input, which were the written comments provided to McGrath as part of the drafting process, became part of the draft report that was not shared with anyone other than the three town officials. It is found that such records did not comprise part of the process by which governmental decision and policies are formulated, within the meaning of §1-210(e)(1), G.S.

24. It is found that the records described in paragraph 23, above, are exempt from disclosure and it is concluded that the respondents did not violate the FOI Act by withholding such records from disclosure.

25. However, with respect to the draft input responses (IC-2016-0343-1 through IC-2016-0343-15), which list each written comment along with McGrath's itemized response to such comment, it is found that such records are incorporated by explicit reference into the final report, as described in paragraph 15, above. Moreover, it is found that McGrath intended such records to be available to town decision makers and the public to demonstrate that the process was transparent and free from undue influence.

26. It is found that such records, described in paragraph 24, above, are not preliminary drafts within the meaning of §1-210(b)(1), G.S., and are not exempt from disclosure.

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

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 disclose to the complainant, free of charge, the "draft input responses," referenced in the findings of fact as IC-2016-0343-1 through IC-2016-0343-15.

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

Lisa Fein Siegel
as Hearing Officer

2016-0343/hor/lfs092616