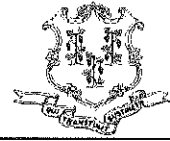




FREEDOM OF INFORMATION



Connecticut Freedom of Information Commission • 18-20 Trinity Street, Suite 100 • Hartford, CT 06106
Toll free (CT only): (866)374-3617 Tel: (860)566-5682 Fax: (860)566-6474 • www.state.ct.us/foi/ • email: foi@po.state.ct.us

Suzanne Carlson and the Hartford Courant,
Complainant(s)
against

Notice of Meeting

Docket #FIC 2014-240

Executive Director, East Hartford Housing Authority; and
East Hartford Housing Authority,
Respondent(s)

February 3, 2015

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, 1st floor, Hartford, Connecticut, at **2 p.m. on Wednesday, February 25, 2015**. 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 February 13, 2015**. 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 February 13, 2015**. **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 **fourteen (14) copies** be filed **ON OR BEFORE February 13, 2015**, 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: Suzanne Carlson
Ralph J. Alexander, Esq.

2015-02-03/FIC# 2014-240/Trans/wrbp/LFS//KKR

FREEDOM OF INFORMATION COMMISSION
OF THE STATE OF CONNECTICUT

In the Matter of a Complaint by

Suzanne Carlson and the Hartford Courant,

Complainants

Report of Hearing Officer

against

Docket #FIC 2014-240

Executive Director, East Hartford Housing
Authority; and East Hartford Housing
Authority,

Respondents

January 30, 2015

The above-captioned matter was heard as a contested case on October 1, 2014, at which time the complainants 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 April 16, 2014, the complainants requested copies of records concerning "costs for [the respondents'] legal defense of all court actions related to former executive director Terrence Madigan." The complainants specifically requested records containing attorneys' names, billable hours submitted, itemized lists of the type of work performed, hourly rate charged, and total amount spent on the legal defense by the respondents and their insurance providers.
3. It is found that on April 17, 2014, the respondents denied the complainants' requests, explaining that the records requested by the complainants pertain to "matters relating to current pending claims and litigation."
4. By letter filed April 23, 2014, the complainants appealed to this Commission, alleging that the respondents violated the Freedom of Information ("FOI") Act by failing to provide them with copies of the requested 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 concluded 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. At the hearing in this matter, the respondents submitted as an exhibit a redacted copy of an invoice package from the respondents' attorneys. The respondents also submitted an unredacted copy of the same records for an in camera inspection.

10. It is found that the requested records consist of 42 document packages, each with several pages. It is found that the records are copies of cover letters and attached invoices for professional services from May 31, 2008, through March 31, 2014, submitted to the respondents by their attorneys.

11. Upon careful examination of the in camera records, it is found that the respondents redacted the following information from each invoice: date of service, initials of attorney, details of service provided, hours and rate, and amount billed.

12. It is found that the respondents also included a cover sheet with each invoice package from which they redacted the total amount billed for the month.

13. The respondents claim the redacted portions of the requested records are exempt from disclosure pursuant to §§1-210(b)(1), 1-210(b)(4), and/or 1-210(b)(10), G.S. The respondents further claim that some portions of the records are outside the scope of the request.

14. Section 1-210(b)(1), G.S., provides:

Nothing in the Freedom of Information 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[.]

15. It is found that the respondents submitted no evidence at all that the invoices and cover letters are preliminary drafts or notes.

16. Moreover, upon examination of the in camera records, it is found that the requested records do not constitute preliminary drafts or notes within the meaning of §1-210(b)(1), G.S., and it is concluded, therefore, that §1-210(b)(1), G.S., does not exempt the requested records from disclosure.

17. Section 1-210(b)(4), G.S., provides that disclosure is not required 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.”

18. Section 1-200(8), G.S., defines a pending claim as:

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 or right is not granted.

19. Section 1-200(9), G.S., defines pending litigation as:

(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.

20. It is found that in 2009, Madigan successfully sued the respondents for wrongful termination. It is also found that the respondents appealed the wrongful termination verdict to the Appellate Court. At the date of the hearing in this matter, the litigation in the Appellate Court was “pending” within the meaning of §1-210(b)(4), G.S., and not adjudicated or otherwise settled.

21. The respondents claim that the redacted portions of the requested records constitute “strategy or negotiations” with respect to the wrongful termination litigation pending at the Appellate Court.

22. 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).

23. The respondents rely on City of New Haven v. FOI Commission, 205 Conn. 767 (1988) as the basis for the redactions in the requested records. The records at issue in City of New Haven were invoices for legal services containing the name of the attorney or law firm submitting the invoice and the total amount of the invoice. The Commission concluded that the City failed to prove that either §1-210(b)(4), G.S., or the attorney/client privilege exempted the records from disclosure. The trial court sustained the city’s appeal, concluding that disclosure of the requested information would reveal the negotiating posture and strategy of the City. The trial court also held that the need for confidentiality during the pendency of litigation outweighed the public interest in access to such information. Id., 772.

24. However, the trial court’s decision in City of New Haven was reversed by the Supreme Court, which held that the City failed to prove “a premise for a correlation between the invoices and strategy and negotiations.” Id., 777. The Court concluded: “We need not, nor can we decide, on the basis of the state of the record before this court, whether invoices for legal services that bear only the name of the attorney or law firm and the amount of the billing might, under other circumstances, pertain to strategy and negotiations in pending litigation.” Id.

25. The respondents in this case claim that they established a premise for a correlation between the redactions and strategy and negotiations, as City of New Haven requires.

26. It is found, however, that the respondents did not explain any claimed correlation. Their testimony and brief merely stated in conclusory terms that disclosure would provide an unfair advantage to their opponents and would hamper the respondents’ ability to successfully defend and resolve the pending litigation. Proof of an exemption, however, requires “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.” City of New Haven, 205 Conn. 776.

27. Upon careful examination of the in camera records, it is found that, except for the information described in paragraph 28, below, the redactions — including the amounts billed and the itemized lists of the type of work performed -- reveal nothing about the respondents’ strategy or negotiations with respect to the pending litigation. Bloomfield Education Association v. Frahm, supra, 35 Conn. App. 390.

28. It is found that the some of the redactions consist of the names of potential expert witnesses interviewed by the respondents’ attorney and that such information does pertain to strategy with respect to the pending litigation and may be withheld. It is concluded, therefore, that the respondents did not violate §1-210(b)(4), G.S., by withholding such information.

29. With respect to the expert witness actually hired by the respondents, however, it is found that such expert has already testified in open court in the wrongful termination litigation, and his identity is no longer secret. It is found, therefore, that disclosure of the witness’s name

no longer reveal the respondents' confidential strategy. It is concluded, therefore, that the respondents violated §1-210(b)(4), G.S., by withholding such information after the witness testified at trial.

30. It is also found that the cost and description of work provided to the respondents by the expert witness and two other law firms and were submitted as evidence in the wrongful termination trial and were provided to the complainants at the hearing in this matter. It is found that disclosure of such records undercuts the respondents' claim that disclosure of similar information in the invoices at issue in this case would reveal strategy or would violate the attorney/client privilege.

31. It is found that, except for the names of expert witnesses not hired by the respondents, as identified in paragraph 28, above, the respondents failed to prove that the requested records pertain to strategy and negotiations with respect to a pending claim or litigation, within the meaning of §1-210(b)(4), G.S.

32. It is concluded, therefore, that §1-210(b)(4), G.S., does not exempt the requested records from disclosure (except for the names of expert witnesses not hired by the respondents; see paragraph 28, above).

33. With respect to the respondent's claim that the redactions are exempt as pursuant to the attorney/client privilege, §1-210(b)(10), G.S., permits the nondisclosure of "communications privileged by the attorney-client relationship...."

34. The applicability of the exemption contained in §1-210(b)(10), G.S., is governed by established Connecticut law defining the 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.

35. Section 52-146r(2), 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. . . .

36. 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, 260 Conn. 149.

37. Upon careful examination of the in camera records, it is found that the “details of the service provided” category on the invoices are general descriptions of tasks, consisting typically of a dozen words or less for each service rendered, and do not contain information relating to legal advice.

38. It is found that nothing in the requested records relates to legal advice, or records in furtherance of the rendition of such legal advice, within the meaning of §52-146r(2), G.S. On the contrary, it is found that the records were prepared in furtherance of the collection of fees, by describing the service for which the fee was sought to be collected, the unit price, and the total price.

39. It is concluded, therefore, that the requested records are not exempt from disclosure pursuant to §1-210(b)(10), G.S. See Docket #FIC 2003-345; Mayhew v. Connecticut Student Loan Foundation (August 25, 2004)(description of legal services in invoices not privileged); Docket #FIC 2002-075; Briggs v. Wenner, Superintendent of Schools, Amity Regional School District No. 5 (July 10, 2002) (dollar amounts and description of services not privileged); Docket #FIC 1995-66; Sicaras v. Finance Dept., City of Hartford (January 24, 1996)(description of legal services not privileged).

40. Accordingly, it is concluded that, except for the information described in paragraph 29, above, the respondents violated the provisions of §§1-210(a) and 1-212(a), G.S., by failing to disclose to the complainants the requested records.

41. The respondents claimed that some redacted information – generally the monthly invoice totals stated on the cover sheets – did not derive exclusively from the Madigan court actions. The respondents considered such information to be beyond the scope of the complainants’ request. It is found, however, that the monthly totals are responsive to the complainants’ request because they did derive, at least in part, from legal services provided on the Madigan court actions. It is concluded that §§1-210(a) and 1-212(a), G.S., require the respondents to disclose such records.

42. With respect to other records identified by the respondents as beyond the scope of the complainants’ request, it is concluded that the respondents did not violate the FOI Act by withholding any such records that are not responsive in *any* manner to the complainants’ request.

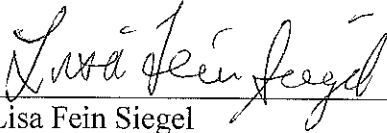
43. As described in paragraph 30, above, the respondents provided several copies of responsive records to the complainants at the hearing in this matter. It is found that such records were submitted to the court during the pending wrongful litigation in 2012, but the respondents nevertheless did not provide them to the complainants at the time of their request in April 2014.

44. It is found that the respondents’ failure to provide such records when requested, and their provision of such records at the time of the hearing in this matter, was not prompt. It is concluded that the respondents violated §§1-210(a) and 1-212(a), G.S.

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

1. The respondents shall forthwith provide the complainant with an unredacted copy of the invoices and cover letters, free of charge. In complying with this order, the respondents may redact those portions of the records described in paragraph 28 of the findings of fact, above, as well as any part of the invoices and cover letter that does not pertain in any way to the request.

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



Lisa Fein Siegel
as Hearing Officer