FREEDOM OF INFORMATION COMMISSION
OF THE STATE OF CONNECTICUT

In the Matter of a Complaint by FINAL DECISION

Ann Rubin,

Complainant

against Docket #FIC 2017-0306

First Selectman, Town of East Windsor;
and Town of East Windsor,

Respondents May 9, 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.

After consideration of the entire record, the following facts are found and conclusions of law are reached:

1. It is found that the respondents are public agencies within the meaning of §1-200(1), G.S.

2. In 2015, the Connecticut legislature enacted Special Act 2015-7, which authorizes the Mohegan Tribes of Indians of Connecticut and the Mashantucket Pequot Indian Tribe ("MMCT") to engage in negotiations and to enter into a casino development agreement with a municipality.

3. It is found that MMCT consequently issued a Request for Proposals ("RFP") relating to a commercial gaming facility to be located in Connecticut.

4. It is found that the respondents submitted a proposal to MMCT in response to the RFP.

5. It is found that in early January 2017, MMCT announced that it awarded the project to the respondent Town of East Windsor. It is found that the respondents and MMCT began negotiating the terms of their development agreement shortly thereafter. It is found that the final agreement was signed February 28, 2017, and has since been made available to the complainant and to the public.

6. It is found that on March 24, 2017, the complainant requested the following records created during the period from February 1, 2017 to March 24, 2017 concerning the gaming facility:

> [a] All proposals, communications, documents, or negotiations relating to discussions that have taken place during the period from January 1, 2015 through the date of this request, regarding a casino to be located in East Windsor, Connecticut …
>
> [b] All documents relating to proposals, communications, documents, or negotiations regarding a casino in East Windsor, presented to, considered, or discussed by East Windsor …
>
> [c] All documents relating to the actual location(s) of the site(s) for a potential casino under consideration by East Windsor … [and]
>
> [d] All documents relating to the infrastructure requirements for a potential casino to be located in East Windsor …

7. It is found that the complainant's request was the last in a series of requests concerning the casino dating from October 2016. It is found that by letter dated April 7, 2017, the respondents' counsel informed the complainant's counsel that they would provide 325 pages of records, but not other responsive records that were exempt as trade secrets or pursuant to the attorney-client privilege.

8. It is found that after further communication between the parties, the respondents' counsel sent a letter to the complainant's counsel on May 3, 2017, informing her that the respondents declined to disclose (1) written communications between the respondents and their attorneys, based on a claim of privilege; and (2) drafts of a development agreement between the respondents and MMCT Venture, LLC and communications concerning such drafts, based on a claim that such records were preliminary drafts.

9. By letter filed June 2, 2017, the complainant appealed to this Commission, alleging that the respondents violated the Freedom of Information ("FOI") Act by failing to provide copies of all of the requested records.

10. 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.

11. 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.

12. 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.

13. 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.

14. At the hearing in this matter, the respondents claimed that the withheld records are exempt pursuant to §§1-210(b)(1) (preliminary drafts) and (b)(10) (attorney-client privilege), G.S. The respondents did not claim that any of the records they withheld from disclosure were exempt as trade secrets.

15. At the conclusion of the hearing, and upon order of the hearing officer, the respondents submitted records for in camera inspection, along with a detailed Index to Records Submitted for In Camera Inspection. The respondents submitted the Index as Exhibit 3. Such in camera records shall be referenced herein as IC-2017-0306-EW-0001 through IC-2017-0306-EW-2352. The respondents claim that some of the records are exempt pursuant to the attorney-client privilege, others are exempt as preliminary drafts, and some are exempt both as privileged communications and as preliminary drafts.[1]

16. With respect to the records that the respondents claim are exempt pursuant to the attorney-client privilege, §1-210(b)(10), G.S., provides that disclosure is not required of "communications privileged by the attorney-client relationship." 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.

17. Section 52-146r(2), G.S., defines "confidential communications" as:

---

[1] The respondents admitted in their post-hearing brief that they submitted in error the record referenced as IC-2017-0306-EW-1222, as they had previously disclosed such record to the complainant. In addition, the respondents indicated on the Index that they will disclose records referenced as IC-2017-0306-1355 through IC-0306-1358 and IC-2017-0306-1364 through IC-306-1367, which the Index identifies as "FOIA-2-7-2017" and "FOI-Casino."

> 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....

18. Our Supreme Court has stated that a four-part test must be applied to determine whether communications are privileged: "(1) the attorney must be acting in a professional capacity for the agency; (2) the communications must be made to the attorney by current employees or officials of the agency; (3) the communications must relate to the legal advice sought by the agency from the attorney, and (4) the communications must be made in confidence." Lash v. Freedom of Information Commission, 300 Conn. 511, 516 (2011), citing Shew v. Freedom of Information Commission, 245 Conn. 149, 159 (1998).

19. Upon careful inspection of the in camera records, and in light of the evidence submitted at the hearing in this matter, it is found that except for the records referenced in paragraph 21 through 23, below, the communications contained in the records identified on the Index as exempt pursuant to §1-210(b)(10), G.S.,[2] satisfy the four-part test articulated by the Supreme Court. It is found that such records are exempt from disclosure and it is concluded that the respondents did not violate the FOI Act by withholding them from the complainant.

20. The complainant observes in her post-hearing brief that the respondents' Index contains several entries in which a record is claimed to be protected from disclosure by the attorney-client privilege, but the Index does not indicate that an attorney was party to the communication. Upon careful inspection of each of such records, however, it is found that an attorney for the respondents was one party of many to the communication, even though the respondents did not list the attorney or attorneys on the Index. It is also found that the other parties were either other attorneys for the respondents or employees or officials of the respondents.

21. It is found that the respondents' Index identifies certain records as "June_24_2009_Spectrum_final_report_to_the_State_of_Connecticut_pdf." Such records are referenced as IC-2017-0306-271 through IC-2107-0306-660 and IC-2017-0306-719 through IC-2017-0306-717-1108, which are duplicates of IC-2017-0306-271 through IC-2107-0306-660. Upon careful inspection of such records, and based on the respondents' identification of such records in the Index as a final report to the State of Connecticut, it is found that the respondents failed to prove that such records are confidential communications within the meaning of §§1-210(b)(10) and 52-146r(2), G.S.

22. It is found, therefore, that §1-210(b)(10), G.S., does not exempt from disclosure the records referenced as IC-2017-0306-271 through IC-2107-0306-660 and IC-2017-0306-719

---

[2] See Index (Exhibit 3 in the Administrative Record).

through IC-2017-0306-717-1108. It is concluded that the respondents violated §§1-210(a) and 1-212(a), G.S., by not disclosing such records to the complainant.

23. In addition, the respondents' Index identifies certain other records as privileged communications made in the course of negotiating the development agreement. Such records are referenced as IC-2017-0306-1254 through IC-2017-0306-1281. It is found that such communications were made by the respondents' attorneys to MMCT's employees or agents, with whom the respondents were negotiating. It is found, therefore, that such records are not communications between a public official or employee of a public agency and a government attorney, within the meaning of §52-146r(2), G.S. It is concluded, therefore, that such records are not protected by the attorney-client privilege, and §1-210(b)(10), G.S., does not exempt such records from disclosure. However, the respondents also claimed that such records are exempt as preliminary drafts. See paragraphs 24-30, below.

24. With respect to records claimed in the Index to be exempt as preliminary drafts, §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."

25. It is found that, except for the records discussed in paragraph 30, below, the records that the respondents withheld pursuant to §1-210(b)(1), G.S.,[3] as well as the records referenced as IC-2017-0306-1254 through IC-2017-0306-1281, described in paragraph 22, above, reflect the ongoing negotiation of terms of the development agreement between the town and MMCT and subsequent communications concerning tax issues related to the casino.

26. The respondents presented evidence that they determined that the public interest in withholding the records clearly outweighed the public interest in disclosure. The respondents' witness testified that disclosure would likely hinder the respondents' negotiating posture in other contracts, because other entities may be able to glean the town's negotiating strategy. It is found that such determination was not "frivolous or patently unfounded." Van Norstrand v. FOI Comm'n, 211 Conn. 339, 345 (1989).

27. It is found that the records described in paragraphs 25 and 26, above, are preliminary drafts within the meaning of §1-210(b)(1), G.S. See Coalition to Save Horse Barn Hill v. FOI Comm'n, 73 Conn. App. 89, 97-99 (2002) (drafts of proposed agreement between University of Connecticut and private pharmaceutical company exempt as preliminary drafts).

28. Section 1-210(e), G.S., provides in relevant part:

> Notwithstanding the provisions of subdivisions (1) ... of subsection (b) of this section, disclosure shall be required of:

[3] See Exhibit 3 in the Administrative Record.

> (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[.] (Emphasis added.)

29. It is found that the preliminary drafts are not interagency or intra-agency memoranda or letters, advisory opinions, recommendations or a report, within the meaning of §1-210(e)(1), G.S.; therefore the disclosure provisions of §1-210(e)(1), G.S., are not applicable.

30. With respect to the in camera records referenced as IC-2107-0306-1490, 1491, 1605, and 1613, it is found such records contain little more than scheduling information; for example IC-2017-0306-1490 is an email identified on the Index as "re: call." It is found that such records are not drafts within the meaning of §1-210(b)(1), G.S. It is concluded that the respondents violated §§1-210(a) and 1-212(a) by not disclosing such records to the complainant.

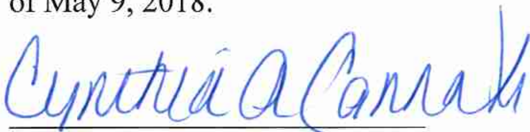
31. The complainant alleged at the hearing that the respondents violated the FOI Act by failing to provide copies of invoices for legal work. The respondents claimed, and it is found, that a fair reading of the request did not encompass such invoices. It is concluded that the respondents did not violate §§1-210(a) and 1-212(a), G.S., by not disclosing copies of invoices for legal work.

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 referenced in the findings of fact, above, as IC-2107-0306-271 through -660 (and, if the complainant requests, such records' duplicates: IC-2017-0306-719 through -1108); IC-2017-0306-1490, 1491, and 1605 through -1613.

2. 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 May 9, 2018.



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.

THE PARTIES TO THIS CONTESTED CASE ARE:

ANN RUBIN, c/o Attorney James K. Robertson, Jr., Carmody, Torrance, Sandak & Hennessey LLP, 50 Leavenworth Street, PO Box 1110, Waterbury, CT 06702

FIRST SELECTMAN, TOWN OF EAST WINDSOR; AND TOWN OF EAST WINDSOR, c/o Attorney Mark J. Sommaruga, Pullman & Comley, LLC, 90 State House Square, Hartford, CT 06103

Cynthia A. Cannata
Acting Clerk of the Commission

FIC 2017-0306/FD/CAC/5/9/2018