FREEDOM OF INFORMATION COMMISSION
OF THE STATE OF CONNECTICUT

In the Matter of a Complaint by FINAL DECISION

Craig Minor,

Complainant

against Docket #FIC 2015-880

Mayor, City of Bristol; and
City of Bristol,

Respondents October 26, 2016

The above-captioned matter was heard as a contested case on April 12, 2016, at which time the complainant and the respondents appeared and presented testimony, exhibits and argument on the complaint.

A report of hearing officer, dated July 18, 2016, was considered, but not adopted, by the Commission at its September 14, 2016 regular meeting. After discussion, the Commission voted to remand the matter back to the hearing officer for reconsideration of the findings of fact and conclusions of law contained in the report.

In their post-hearing brief, the respondents contended that the complaint, alleging that the respondents improperly denied the complainant's request to inspect a record they maintain, should be dismissed because the complainant obtained a copy of such record from a third party. Although the respondents, at the hearing in this matter, continued to claim that such record is exempt from disclosure, and had not, at the time of the hearing, permitted the complainant to inspect such record, they nonetheless argued that "there is no longer a controversy between the parties," and that the Commission therefore lacks jurisdiction to adjudicate such complaint.

It is concluded that the issue raised in the complaint is whether or not the respondents' alleged denial of the complainant's right to inspect the record violated the disclosure provisions of the Freedom of Information ("FOI") Act, and that such issue is not rendered moot by virtue of the fact that the complainant obtained such record from a third party. See e.g., Michael Daly v. Joan Ellis, Administrator, State of Connecticut, Department of Correction, Freedom of Information Office, Docket #FIC 2007-162 (February 13, 2008); Judith G. Freeman v. State of Connecticut, General Assembly, Legislative Commissioner's Office, Docket #FIC 2005-575 (June 28, 2006); Wilson Campos and Ismael Vasuez v. State of Connecticut, Department of Correction, Docket #FIC 90-485 (October 23, 1991); Thomas A. DeRiemer v. Employees' Review Board, Personnel Division, State of Connecticut, Department of Administrative Services, Docket #FIC 89-112 (January 10, 1990); Richard Lindquist v. Chairman, Department

of Pathology, University of Connecticut Health Center, Docket #FIC 89-94 (March 14, 1990). Accordingly, it is concluded that the Commission has jurisdiction over 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, during 2015, the respondent mayor and the president of Bristol Hospital ("hospital") engaged in oral discussions related to the purchase by the hospital of a portion of a certain parcel of land owned by the city, known as Depot Square, on which land the hospital proposed to build a new medical arts facility ("property"). It is found that, at some point in the discussions, the respondent mayor requested that the hospital provide to the city a written "letter of intent" setting forth the proposed terms and conditions of the hospital's purchase of the property. It is found that, by letter dated December 4, 2015, the hospital submitted such proposal ("letter of intent") to the city.

3. It is found that, by email, dated December 20, 2015, the complainant requested from the respondent mayor, the opportunity to inspect the letter of intent, described in paragraph 2, above.

4. It is found that, by email dated December 21, 2015, the respondents' counsel denied the request, stating that the letter of intent is a "preliminary draft and cannot be provided."

5. By email dated December 21, 2015, the complainant appealed to this Commission alleging that the respondents violated the FOI Act by denying his request to inspect the letter of intent, described in paragraph 2, above.

6. 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.

7. 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.

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 concluded that the letter of intent, described in paragraph 2, above, is a public record, within the meaning of §§1-200(5) and 1-210(a), G.S.

10. At the hearing in this matter, the complainant challenged the respondents' contention that the letter of intent is a "preliminary draft," within the meaning of §1-210(b)(1), G.S., because the letter was drafted by the hospital, which is not a public agency, and because the respondents failed to perform the balancing test required by the statute.

11. Section 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."

12. Section 1-210(e), G.S., provides that "[n]otwithstanding the provisions of subdivision (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 that 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).

13. In Van Norstrand v. Freedom of Information Comm'n, 211 Conn. 339 (1989), the Court observed that "preliminary," means "something that precedes or is introductory or preparatory," and a "draft" is a "preliminary outline of a plan, document or drawing." Id. at 343. Citing to its decision in Wilson v. Freedom of Information Comm'n, 181 Conn. 324 (1980), the Court opined that:

> preliminary drafts or notes reflect that aspect of the agency's function that precedes formal and informed decisionmaking." We believe that the legislature, [in enacting the "preliminary drafts or notes" exemption], 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 this preliminary, deliberative and predecisional process that we conclude the exemption was meant to encompass. Van Norstrand at 344.

14. Moreover, as the appellate court ruled in Coalition to Save Horsebarn Hill v. Freedom of Information Commission, 73 Conn. App. 89, 97 (2002), a document that is a public record may be a "preliminary draft" under §1-210(b)(1), G.S., even if it was created by a private entity.

15. With regard to the balancing test required under §1-210(b)(1), G.S., the Court stated that "[a]lthough the statute places the responsibility for making that determination on the public agency involved, the statute's language strongly suggests that the agency may not abuse its discretion in making the decision to withhold disclosure. The agency must, therefore, indicate the reasons for its determination to withhold disclosure and those reasons must not be frivolous or patently unfounded." Wilson at 346.

16. Prior to the hearing in this matter, a copy of the letter of intent was obtained by the complainant from a city council member and admitted as an exhibit in this matter. The first paragraph of the letter of intent states: [t]his letter of intent sets forth the proposed terms and conditions for a transaction whereby the [hospital] …will purchase certain real property from the [c]ity….Upon execution of this letter of intent, the Parties will proceed promptly, in good faith, to negotiate, prepare and execute a definitive agreement for the purchase and sale of the Property…containing the terms set forth therein and other terms and conditions upon which the Parties may agree….It is found that the letter of intent was signed by president of the hospital, but not by the mayor.

17. It is found that, after receiving the letter of intent, counsel for the respondents continued to negotiate certain terms relating to the sale of the property with counsel for the hospital, and counsel for the respondents discussed those negotiations with members of the council in executive session.[1] It is found that the respondents' counsel did not distribute the letter of intent to council members.

18. According to the respondents, the negotiations needed to be confidential because other potential purchasers[2] of the remainder of the Depot Square parcel would expect that their proposals and negotiations for such purchase would be confidential, and if they knew their proposals would be discussed in public, they might be dissuaded from purchasing the land. Therefore, according to the respondents, they balanced the public's interest in disclosure against the public interest in withholding the letter of intent and determined that the public interest in withholding the letter of intent outweighed the public's interest in disclosure.

19. It is found that, by letter dated January 6, 2016, the respondents provided to the complainant a copy of a revised letter of intent, dated December 30, 2015, pertaining to the sale of the property, signed by both the mayor and the president of the hospital. It is found that the December 30 letter of intent, which the respondents characterized as "the finalized letter of intent," contains terms that are different from the terms contained in the letter of intent dated December 4th.

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[1] The complainant did not allege that the executive session was held for an improper purpose.

[2] The hospital intended to purchase only a portion of the land owned by the city, and the city intended to sell the remainder of the land to other buyers.

20. Based upon all of the foregoing facts, it is further found that the letter of intent, described in paragraph 2, above, was "predecisional" and part of the process that "preceded formal and informed decisionmaking" by the respondents. Accordingly, it is concluded that the letter of intent was a "preliminary draft," pursuant to §1-210(b)(1), G.S., at the time it was requested.

21. In addition, it is found that the respondents performed the balancing test required by §1-210(b)(1), G.S., and determined that, because they believed that public disclosure of the letter of intent might harm the city's ability to sell the remainder of the Depot Square parcel, such public disclosure of the letter of intent was outweighed by the public interest in withholding such record. It is further found that the reason for such determination was not "frivolous or patently unfounded."

22. Moreover, it is concluded that, because one of the parties to the letter of intent was a private developer, such record is not an "interagency" (between members of different state agencies) or "intra-agency" (between members of the same state agency) memoranda, letter, advisory opinion, recommendations or report, that is required to be disclosed pursuant to §1-210(e), G.S. See Coalition to Save Horsebarn Hill v. Freedom of Information Commission, No. CV-000499178, 2001 WL 893779, at n. 4 (New Britain Superior Court, July 11, 2001), *affirmed on other grounds*, Coalition to Save Horsebarn Hill, *supra*.

23. Based upon the foregoing, it is concluded that the respondents did not violate the disclosure requirements in §§1-210(a) and 1-212(a), G.S., by failing to provide a copy of the letter of intent to the complainant.

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 October 26, 2016.

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:

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