

STATE OF CONNECTICUT
FREEDOM OF INFORMATION COMMISSION

In the Matter of a Complaint by

FINAL DECISION

Stephen Nevas,

Complainant

against

Docket # FIC 2023-0063

Adjutant General, State of Connecticut,
Military Department; and State of
Connecticut, Military Department,

Respondents

January 24, 2024

The above-captioned matter was heard as a contested case on July 11, 2023 and September 26, 2023, at which times 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 January 11, 2023, the complainant requested that the respondents provide him with copies of the following records:
 - (a) All records pertaining to the Application(s) by and procedures pertaining consideration and acceptance for membership in First Company Governor's Horse Guard, Avon, CT ("1GHG") by Sheldon Shari Hernandez, [a/k/a Sheri Ellen Webb, Sheri Webb, Sheldon Webb and Sheri Hernandez].
 - (b) All records pertaining to a complaint of discrimination by the foregoing individual, including all records of statements by and interviews with the Complainant, Respondents, witnesses and investigators, and records of any and all actions taken or pending, created by any member of the Connecticut Military Department in connection with the foregoing, including its actual or proposed resolution.
 - (c) The July 11, 2022, Complaint of CPL Victoria Haskins against CPL Kimberly Nevas and all records, including records of external and internal communications of any kind, whether written or oral, by or between any member of the Connecticut Military Department or its agents that pertain to said Complaint.

(d) All additional records for the period from February 1, 2021 to the present that pertain or otherwise refer to CL Kimberly Nevas, including email, letters, memoranda, records or telephone calls or oral conversations and meetings, including but not limited to those by, between, received or reviewed by

- i. Major General Francis J. Evon
- ii. Col. Timothy Tomcho
- iii. Brigadier General Alberto Higuera
- iv. Colonel Michael Morris
- v. Russell Bonaccorso
- vi. Brigadier General Ralph Hedenberg
- vii. Major Richard Zaczynski
- viii. First Lieutenant Catriana Hersey
- ix. Staff Sergeant Jaelle Hersey
- x. Acting Executive Officer Nadia Gluch
- xi. Master Sergeant Mark Akeley
- xii. CPL Virginia Haskins
- xiii. Any other member, agent or affiliate of the Connecticut Military Department.

(e) The current 1GHG bylaws, and their effective date.

(f) Attendance records for all members of 1GHG for Fourth Quarter, 2022.

3. It is found that, by letter dated January 13, 2023, the respondents acknowledged receipt of the complainant's request, and provided the complainant with over 500 pages of records responsive to the request identified in paragraphs 2(a), 2(b), (2)(c) (in part), 2(e), and 2(f), above, some of which were redacted. It is found that the respondents notified the complainant that records responsive to the request described in paragraphs 2(c) and 2(d), above, would be provided at a later date.

4. It is found that, by letter dated February 1, 2023, the complainant notified the respondents that he intended to file a complaint with the Commission in ten days if the remaining responsive records were not provided.

5. By complaint filed February 15, 2023, the complainant appealed to the Commission, alleging that the respondents violated the Freedom of Information ("FOI") Act by "partially denying" his request for the records described in paragraph 2, above.

6. Section 1-200(5), G.S., provides:

"[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,

videotaped, printed, photostated, photographed or recorded by any other method.

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 concluded that the records described in paragraph 2, above, are public records within the meaning of §§1-200(5) and 1-212(a), G.S.

10. It is found that, by email dated March 28, 2023, the complainant inquired with the respondents about the status of his request. It is found that, by email dated April 4, 2023, the respondents notified the complainant that they needed an additional 30 days to comply.

11. It is found that, following receipt of the requests described in paragraphs 2(c) and 2(d), above, the respondents engaged their information technology (“IT”) staff, and that IT staff subsequently worked with the Department of Administrative Services Bureau of Information Technology (“BITS”) to conduct a search. It is found that, by early April 2023, IT had located records responsive to paragraphs 2(c) and 2(d), above, and provided such records to the respondents for review. It is found that the records located consisted of a large volume of email communications in “PST” format, and attachments.

12. It is found that the respondents needed to review the records described in paragraph 11, above, but during this time were experiencing staffing issues. It is found that the respondents requested assistance from the Office of the Attorney General. It is found, however, that the Office of the Attorney General could not assist with staffing, but suggested that the respondents subscribe to Everlaw, an e-discovery software, to aid in the review and redaction of the records. It is found that the respondents subscribed to Everlaw and used the program to further comply with the request. It is found that, on or about April 30, 2023, the respondents provided the complainant with over 2,000 additional pages of records responsive to the request described in paragraphs 2(c) and 2(d), above.

13. It is found that, by letter dated May 18, 2023, the complainant notified the respondents that he had concerns with the production of records described in paragraph 12, above, including the fact that the respondents had redacted such records. It is found that, by letter dated May 23, 2023, the respondents issued a response wherein they explained the basis for the redactions. It is found, however, that subsequent to the disclosure of the records described in

paragraph 12, above, the respondents, in conferring with counsel, decided to further review such records and work to reduce the number of redactions made.

14. It is found that, by email dated June 29, 2023, the respondents provided the complainant with responsive records with fewer redactions. It is found, however, that soon thereafter, the respondents discovered that the June 29, 2023 production was incomplete due to an error by their staff, who did not use the Everlaw software to conduct his review. It is found, after realizing the error and conferring with counsel, that the respondents decided to commence a new and complete review of all of the records located, and on July 9, 2023, the respondents disclosed over 3,600 pages of responsive records.

15. Two days later, on July 11, 2023, a hearing convened and the parties appeared before the hearing officer in this matter. The complainant requested that the matter be continued to allow additional time to review the records that were disclosed on July 9, 2023. Absent objection from the respondents, such request was granted.

16. It is found that, on July 25, 2023, the respondents disclosed excel spreadsheets to the complainant that the respondents did not deem responsive but that the complainant expressed that he was interested in receiving from the respondents.

17. It is found that, by email dated September 19, 2023, the complainant contacted the respondents' counsel, stating that he continued to believe that all records responsive to the request described in paragraph 2, above, had not been provided.

18. It is found that on September 21, 2023, respondents' counsel replied to the complainant and asserted that all responsive records had been provided. It is further found that the respondents agreed to provide certain additional records that were not within the scope of the request, as a courtesy to the complainant.

19. At the September 26, 2023 continued hearing, and in a post-hearing brief, the complainant contended that the respondents' conduct in this matter was calculated to "harass, annoy, confuse and overburden" the complainant, that the respondents unlawfully destroyed public records, that the respondents impermissibly withheld responsive records pursuant to claims of exemption, and that the respondents failed to provide a complete copy of all responsive records. Each contention will be addressed in turn, below.

20. With respect to the contention that the respondents' conduct in this matter was calculated to "harass, annoy, confuse and overburden" the complainant, the complainant cites to the delay in disclosure, varying numbering systems employed by the respondents when providing each production of records, and changes to the number of the redactions made, in support of his contention. However, it is found that the evidence does not support that the respondents' conduct in this matter was calculated as described by the complainant. Rather, it is found that the respondents' conduct throughout this matter demonstrates a good faith effort to comply with the FOI Act, despite circumstances that interfered with their ability to do so, as described in paragraphs 11-14, above.

21. With respect to the contention that the respondents “unlawfully destroyed public records,” it is found that, several months prior to the date of the complainant’s request in this matter, an investigating officer had prepared certain notes as part of an investigation, but he later destroyed his notes. Notwithstanding, jurisdiction over the retention and destruction of public records rests with the State’s Public Records Administrator and not this Commission. See *Dept. of Public Safety v. FOI Commission*, 103 Conn. App 571, 577 (2007) (the FOI Commission is a creature of statute with limited jurisdiction; it can only administer and enforce the provisions of the FOI Act).

22. Next, the complainant contended that the respondents improperly withheld certain records pursuant to §§1-210(b)(10) and/or 1-210(b)(1), G.S.¹ Pursuant to the order of the hearing officer, the respondents submitted copies of 36 pages of records for in camera inspection, along with an Index to Records Submitted for In Camera Inspection (“Index”). Such records shall be identified as IC-2023-0063-001 through IC-2023-0063-036.²

23. With respect to the contention that IC-2023-0063-001 through IC-2023-0063-019 are exempt from disclosure pursuant to §1-210(b)(10), G.S., such exemption provides, in relevant part, that nothing under the FOI Act requires the disclosure of “communications privileged by the attorney-client relationship.”

24. The applicability of the exemption contained in §1-210(b)(10), G.S., is governed by established Connecticut law defining the attorney-client privilege. That law is 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.*, 149.

25. 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....

26. The Supreme Court has further stated that, “[i]n Connecticut, the attorney-client privilege protects both the confidential giving of professional advice by an attorney acting in the capacity of a legal advisor to those who can act on it, as well as the giving of information to the

¹ During the hearing, the respondents contended that certain personally identifiable information was also exempt from disclosure. The complainant stated that he did not object to the withholding of such information. Consequently, such claim of exemption shall not be addressed further herein.

² The Commission notes that the in camera records were not submitted containing a sequential numbering system. Therefore, the hearing officer penciled in a numerical 1 through 36 on each page of the in camera records submitted.

lawyer to enable counsel to give sound and informed advice.” *Olson v. Accessory Controls and Equipment Corp.*, 254 Conn. 145, 157 (2000).

27. After careful in camera inspection, it is found that IC-2023-0063-001 through IC-2023-0063-019 constitute email communications between an attorney and an employee of the respondents, and that such communications relate to legal advice sought by the respondents. It is found that the in camera records were transmitted in confidence. It is further found that the respondents have not waived the attorney-client privilege.

28. Based on the foregoing, it is found that the in camera records described in paragraph 27, above, constitute attorney-client privileged communications within the meaning of §1-210(b)(10), G.S. It is therefore concluded that the respondents did not violate the disclosure provisions in §§1-210(a) and 1-212(a), G.S., when they did not provide copies of such records to the complainant.

29. Because it has been determined that IC-2023-0063-001 through IC-2023-0063-019 are permissibly exempt from disclosure pursuant to §1-210(b)(10), G.S., the Commission need not consider whether such records are also exempt from disclosure pursuant to §1-210(b)(1), G.S.

30. With respect to the respondents’ contention that IC-2023-0063-020 through as IC-2023-0063-036 are exempt from disclosure pursuant to §1-210(b)(1), G.S., such provision 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.”

31. In *Shew v. FOI Commission*, the Court ruled that “the concept of preliminary [drafts or notes], as opposed to final [drafts or notes], should not depend upon...whether the actual documents are subject to further alteration...” but rather “[p]reliminary drafts or notes reflect that aspect of the agency’s function that precede formal and informed decision making.... It is records of this preliminary, deliberative and predecisional process that...the exemption was meant to encompass.” *Shew v. FOI Commission*, 245 Conn. 149, 165 (1998), citing *Wilson v. FOI Commission*, 181 Conn. 324, 332 (1989). In addition, once the underlying document is identified as a preliminary draft or note, “[i]n conducting the balancing test, 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.” *State of Connecticut, Office of the Attorney General v. FOI Commission*, 2011 WL 522872, *8 (Conn. Super. Ct. Jan. 20, 2011) (citations omitted).

32. The year following *Wilson*, the Connecticut legislature adopted Public Act 81-431, and added to the FOI Act the language now codified in §1-210(e)(1), G.S. Accordingly, §1-210(b)(1), G.S., must be read in conjunction with §1-210(e)(1), G.S., which provides, in relevant part:

Notwithstanding the provisions of subdivisions (1) and (16) of subsection (b) of this section, disclosure shall be required of...

(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....

33. Upon careful inspection of IC-2023-0063-020 through IC-2023-0063-036, and based on the credible testimony of the respondents' witness, it is found that such records are records of the agency's preliminary, predecisional deliberative process by which government decisions are formulated, and therefore are preliminary drafts, within the meaning of §1-210(b)(1), G.S.

34. It is also found that the respondents determined that the public interest in withholding the records identified in paragraph 33, above, clearly outweighs the public interest in disclosure. The respondents' witness testified that disclosure is not in the public interest because of the potential chilling effect disclosure would have on those involved in the complaint and investigation process, including witnesses and investigators. It is found that the respondents' reasoning for withholding such records was not frivolous or patently unfounded.

35. It is also found that IC-2023-0063-020 through IC-2023-0063-036 do not constitute interagency or intra-agency memoranda, letters, advisory opinions, recommendations or reports subject to mandatory disclosure, as required by §1-210(e)(1), G.S.

36. Accordingly, it is concluded that the respondents did not violate the disclosure provisions in §§1-210(a) and 1-212(a), G.S., when they did not provide copies of the in camera records described in paragraph 30, above, to the complainant.

37. With respect to the contention that the respondents did not provide the complainant with a copy of all non-exempt responsive records, the complainant relies on a document that he received from the respondents that includes the notation "page image missing number." The complainant contended that such notation necessarily means that pages of responsive records have not been provided. Such contention is unavailing.

38. It is found, based on the credible testimony of the respondents' witness, that the notation "page image missing number" is a technical phrase used by Everlaw to describe excel files that the program could not convert into a PDF format. However, as already found in paragraph 16, above, such records were provided to the complainant.

39. Based on the foregoing, and in reliance on the credible testimony of the respondents' witness, it is found that the respondents conducted a reasonable and diligent search and that all responsive records have been provided to the complainant.

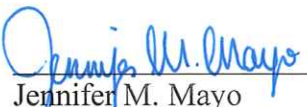
40. It is therefore concluded that the respondents have not violated §§1-210(a) and 1-212(a), G.S., of the FOI Act, as alleged in the complaint.

41. With respect to the complainant's request that the Commission impose a civil penalty against the respondents, because it has been concluded that the respondents have not violated the FOI Act, as alleged in the complaint, consideration of the imposition of a civil penalty is not warranted.

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

1. The complaint is hereby dismissed.

Approved by Order of the Freedom of Information Commission at its regular meeting of January 24, 2024.



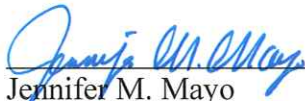
Jennifer M. Mayo
Acting Clerk of the Commission

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:

STEPHEN NEVAS, Nevas Law Group, LLC, 237 Post Road West, Westport, CT 06880

**ADJUTANT GENERAL, STATE OF CONNECTICUT, MILITARY DEPARTMENT;
AND STATE OF CONNECTICUT, MILITARY DEPARTMENT**, c/o Assistant Attorney
General Leland J. Moore, 110 Sherman Street, Hartford, CT 06105



Jennifer M. Mayo
Acting Clerk of the Commission