

FREEDOM OF INFORMATION COMMISSION
OF THE STATE OF CONNECTICUT

In The Matter of a Complaint by

FINAL DECISION

Daniel Oliverio,

Complainant

against

Docket #FIC 2018-0599

Director of Administrative Services,
Town of Stonington; and
Town of Stonington,

Respondents

August 14, 2019

The above-captioned matter was heard as a contested case on March 15, 2019, 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 email dated September 13, 2018, the complainant requested that the respondents provide him with copies of the following records:

A complete copy of any and all documents, including emails, reviewed by Meredith Diette in the conduct of the investigation she performed leading to the May 16, 2018¹ letter from [the Director of Administrative Services] with the written report. . . issued in response to my allegations of workplace harassment and retaliation together with a copy of all interview questions, interview outlines, agendas, [Ms. Diette's] notes from interviews or the notes of other interviewers, interview responses, witness statements, witness names, witness lists, etc., whether in writing or recorded, for all

¹ In subsequent correspondence, the complainant clarified that his reference to May 16, 2018 was an error, and that the date he meant to reference was June 21, 2018—the date that the respondents disclosed an investigation report concerning the complainant's workplace complaint. Despite the typographical error, the respondents understood that the September 13th request sought all records related to the investigation of the complainant's workplace complaint.

persons questioned in the course of [Ms. Diette's] investigation leading to said report. . . .
("The complainant's workplace complaint").

3. It is found that, by email dated September 20, 2018, the respondents, through Vincent Pacileo III, the Director of Administrative Services, acknowledged the September 13th request. It is found that Director Pacileo informed the complainant that all responsive records, other than counsel's notes, would be available for him by September 26, 2018. Director Pacileo informed the complainant that, with respect to counsel's notes, the request was denied.

4. It is found that, under cover of email dated September 25, 2018, Director Pacileo disclosed some non-exempt, responsive public records to the complainant, free of charge.

5. It is found that, by email dated October 3, 2018, the complainant requested that the respondents provide him with copies of the following records:

A complete copy of any and all documents, including emails, reviewed by Meredith Diette in the conduct of the investigation she performed leading to the May 16, 2018 letter from [the Director of Administrative Services] with the written report issued in regard to the potential disciplinary action requested by Ms. McKrell, together with a copy of all interview questions, interview outlines, agendas, [Ms. Diette's] notes from interviews or the notes of other interviewers, interview responses, witness statements, witness names, witness lists, etc., whether in writing or recorded, for all persons questioned in the course of [Ms. Diette's] investigation leading to said written report. . . .
("Ms. McKrell's workplace complaint").

6. It is found that, by email dated October 9, 2018, Director Pacileo acknowledged the October 3rd request. It is found that Director Pacileo informed the complainant that the records requested in the October 3rd request had previously been provided to the complainant on or about June 29, 2018, in response to the complainant's June 14, 2018 Freedom of Information ("FOI") Request. It is found, however, that later in the day on October 9th, Director Pacileo discovered additional records responsive to the October 3rd request and disclosed such records to the complainant, free of charge.

7. By letter dated October 23, 2018 and filed October 24, 2018, the complainant appealed to the Commission, alleging that the respondents violated the FOI Act by failing to provide him with all of the responsive records.

8. 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.

9. 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.

10. 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.”

11. It is found that the requested records are public records within the meaning of §§1-200(5), 1-210(a), and 1-212(a), G.S.

12. The complainant contended because the investigations referenced in paragraphs 2 and 5, above, were fact-finding investigations, all of the underlying information, which the respondents considered in arriving at conclusions concerning the underlying conduct (such as witness statements and interview questions), are factual records that should be disclosed. The complainant further contended that there is a legitimate public interest in the underlying investigative records. Finally, the complainant contended that, because the respondents disclosed the final investigations without redactions, including the parts of the reports that were privileged, they have waived any claim of privilege with regard to the underlying materials.

13. At the conclusion of the contested case hearing, the hearing officer ordered the respondents to submit the records at issue for an in camera inspection.

14. On March 29, 2018, the respondents submitted the in camera records to the Commission. The in camera records are fairly described as follows: a five-page email containing handwritten notes, (IC-2018-0599-1 through IC-2018-0599-5); five pages of typed questions also containing handwritten notes, (IC-2018-0599-22, IC-2018-0599-27, IC-2018-0599-30, IC-2018-0599-45 and IC-2018-0599-46); and thirty-eight pages of strictly handwritten notes, (IC-2018-0599-6 through IC-2018-0599-21, IC-2018-0599-23 through IC-2018-0599-26, IC-2018-0599-28 and IC-2018-0599-29, IC-2018-0599-31 through IC-2018-0599-44, and IC-2018-0599-47 through IC-2018-0599-58).

15. With regard to IC-2018-0599-1 through IC-2018-0599-5, the respondents contended that the handwritten notes contained on these pages are exempt pursuant to §1-210(b)(1), G.S., (preliminary drafts and notes) and pursuant to §1-210(b)(10), G.S.,

(the attorney-client privilege). With regard to IC-2018-0599-6 through IC-2018-0599-58, the respondents contended that such records are exempt in their entirety pursuant to §1-210(b)(1), G.S. and §1-210(b)(10), G.S.

16. 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.”

17. Section 1-210(b)(1), G.S., requires the respondents to prove that they determined that the public interest in withholding records clearly outweighs the public interest in disclosure. “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.” Van Norstrand v. Freedom of Info. Comm’n, 211 Conn. 339, 345 (1989).

18. In 1980, the Connecticut Supreme Court interpreted the phrase “preliminary drafts and notes” in the FOI Act. See Wilson v. FOIC, 181 Conn. 324 (1980) (“Wilson”). The Wilson court ruled that “preliminary drafts or notes reflect that aspect of an agency’s function that precedes formal and informal decision making. . . . It is records of this preliminary, deliberative and predecisional process that . . . the exemption was meant to encompass.” Wilson, 181 Conn. at 332. In addition, the Wilson court interpreted the phrase “preliminary drafts and notes” in the FOI Act as identical to the deliberative process privilege found in 5 U.S.C. §552(b)(5) of the federal Freedom of Information Act, with the exception that, under Connecticut’s FOI Act, the public agency carried the additional burden to show that “the public interest in withholding such document clearly outweighs the public interest in disclosure.” See Wilson, 181 Conn. at 333-340.

19. The year following Wilson, the Connecticut legislature adopted Public Act 81-431, which added to the FOI Act the language now codified in §1-210(e)(1), G.S. See ¶ 21, below.

20. It is found that with adoption of Public Act 81-431, the Connecticut Legislature made clear that the Connecticut FOI Act required more robust disclosure than is required by the deliberative process privilege permitted at the federal level.

21. Accordingly, §1-210(b)(1), G.S., must be read in conjunction with §1-210(e)(1), G.S., which provides, in relevant part, as follows:

Notwithstanding the provisions of [§1-210(b)(1), G.S.], 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.

22. Attorney Meredith G. Diette and Director Pacileo, both appeared and testified at the contested case hearing.

23. It is found that Director Pacileo is generally the person who conducts the investigations into workplace complaints. It is found, however, that, due to the scope and complexity of the workplace complaints referenced in paragraph 2 and 5, above, and after consultation with the First Selectman, the town determined that it would be best to engage the town's labor counsel to conduct the investigations and to provide legal advice on these matters.

24. It is found that Attorney Diette, a labor and employment attorney with Berchem Moses PC, was engaged by the town to conduct separate investigations regarding the complainant's workplace complaint and Ms. McKrell's workplace complaint and provide legal advice to the respondent concerning these matters.

25. It is found that Attorney Diette conducted the investigations referred to in paragraph 24, above, and provided the town with two separate reports, which report contained factual findings, conclusions and legal advice. It is found that Attorney Diette's final reports, as well as some additional documents, have been disclosed in their entirety to the complainant.

26. After a careful in camera inspection, it is found that all of the in camera records contain Attorney Diette's handwritten notes. Specifically, it is found that IC-2018-0599-1 through IC-20180599-5 comprise a five-page email sent by the complainant to various town officials. It is found that the first selectman forwarded this email to the Attorney Diette. The in camera version of this email contains Attorney Diette's handwritten notes, which the respondents contended are exempt from disclosure. It is found that IC-2018-0599-6 through IC-2018-0599-21, IC-2018-0599-23 through IC-2018-0599-26, IC-2018-0599-28 and IC-2018-0599-29, IC-2018-0599-31 through IC-2018-0599-44, and IC-2018-0599-47 through IC-2018-0599-58 are comprised solely of Attorney Diette's handwritten notes.

27. It is found that all the notes referred to in paragraph 26, above, are Attorney Diette's impressions and thoughts concerning the five-page email and concerning witnesses as they are being interviewed, including her impressions regarding candor and how the matters being discussed relate to other issues or impact legal matters.

28. It found that IC-2018-0599-22, IC-2018-0599-27, IC-2018-0599-30, IC-2018-0599-45 and IC-2018-0599-46 are each a one-page, typewritten template of questions. It is found that the questions on each of the five in camera records are identical. It is found that each template contains Attorney Diette's handwritten notes. It is found that Attorney Diette used one template during each of five, follow-up witness interviews to ensure that she covered certain questions. It is further found that, as she

conducted the interviews, Attorney Diette wrote her notes on the templates. Again, it is found that these notes contain Attorney Diette's thoughts and impressions regarding the witnesses, and other related legal matters.

29. It is found that Attorney Diette has never shared her notes or the templates with anyone. It further found that Attorney Diette referenced her notes and the templates containing her notes as she drafted the final the investigatory reports.

30. It is found that Attorney Diette's handwritten notes, and the templates she created, are preliminary "notes," within the meaning of §1-210(b)(1), G.S.

31. It is further found that the respondents determined that the public interest in withholding Attorney's Diette's notes and templates clearly outweighs the public interest in disclosure.² It is further found that the respondents' reasoning for withholding these records was not frivolous or patently unfounded.

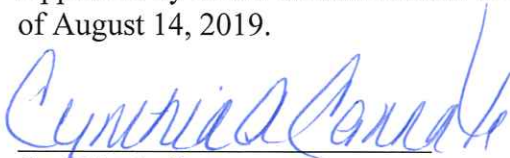
32. Finally, it is found that Attorney Diette's handwritten notes and the templates she created are not interagency or intra-agency memoranda, letters, advisory opinions, recommendations or reports, within the meaning of §1-210(e)(1), G.S.

33. Accordingly, it is concluded that the respondents did not violate the FOI Act when they declined to disclose Attorney Diette's notes and templates to the complainant.³

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 August 14, 2019.



Cynthia A. Cannata
Acting Clerk of the Commission

² In this regard, Director Pacileo testified that disclosing these records might have a chilling effect on how workplace investigations are conducted in the future, including inhibiting investigators from taking notes or even being willing to conduct these kinds of investigations. Director Pacileo further testified that, if it were determined that the notes an investigator takes during an investigation or the template of questions that an investigator creates prior to conducting a witnesses interview had to be disclosed, investigators would become guarded when taking notes or creating a template, which could, in turn, compromise the ultimate work product.

³ Because the Commission has determined that Attorney Diette's handwritten notes and the templates she created are exempt pursuant to §1-210(b)(1), G.S., it need not consider whether such records are also exempt pursuant to the attorney-client privilege.

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:

DANIEL OLIVERIO, c/o Attorney Kristi D. Kelly, Suisman, Shapiro, Wool, Brennan, Gray & Greenberg , 2 Union Plaza, Suite 200, New London, CT 06320

**DIRECTOR OF ADMINISTRATIVE SERVICES, TOWN OF STONINGTON;
AND TOWN OF STONINGTON**, c/o Attorney Brian K. Estep, Conway, Londregan, Sheehan & Monaco, P.C., 38 Huntington Street, New London, CT 06320, Attorney Thomas J. Londregan, Conway, Londregan, Sheehan & Monaco, P.C, 38 Huntington Street, New London, CT 06320, and Attorney Jeffrey Londregan, Conway, Londregan, Sheehan & Monaco, P.C, 38 Huntington Street, New London, CT 06320



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