

STATE OF CONNECTICUT  
OFFICE OF PUBLIC HEARINGS  
COMMISSION ON HUMAN RIGHTS AND OPPORTUNITIES

Commission on Human Rights  
and Opportunities, ex rel.  
Kelly Kennedy, Complainant

CHRO No: 0710220  
EEOC No: 16aa200700497

v.

State of Connecticut, Department  
of Revenue Services,  
Respondent

April 29, 2009

**RULING ON COMPLAINANT'S  
MOTION TO COMPEL**

On or about October 24, 2008, the complainant served its first set of requests for disclosure and production on the respondent. On or about January 8, 2009, the respondent filed its notice of compliance regarding said disclosure and production. On or about March 13, 2009, complainant filed her motion to compel the respondent to produce the documents sought in its requests Number 8<sup>1</sup> and Number 12.<sup>2</sup>

Section 46a-54-89a of the Regulations of Connecticut State Agencies is entitled "Disclosure of Documents" and provides in subsection (a) that "Each party shall be afforded the opportunity to inspect and copy relevant and material records, papers and documents not in the possession of the party, except as otherwise provided by applicable state or federal law." This rule has been liberally interpreted in order to favor disclosure of documents. "A party pursuing such inspection (or production) must be given latitude in its search, especially because direct evidence of discrimination is extremely rare and, in the case of an employee's requests, that employee must rely on

circumstantial evidence to sustain his ultimate burden.” *Commission on Human Rights & Opportunities, ex rel. Kevin Langan, Complainant, v. RCK Corporation, dba J.P.Dempsey’s*, 2009 WL 281168, (CT.Civ.Rts.) (CHRO No. 0730256 Jan. 15, 2009), quoting *Chambers v. TRM Copy Centers Corp.*, 43 F.3d 29, 37 (2<sup>nd</sup> Cir. 1990).

In this matter, which is factually similar to that in the *Langan* case, the documents complainant seeks are relevant and material and unobtainable by any other means than compliance by the respondent with the complainant’s request for production. *Commission ex rel. Langan v RCK*, supra. I begin my analysis of respondent’s argument against disclosure of public employee’s medical records and assertion of a privilege against disclosure by reviewing the Connecticut Supreme Court’s decision in *Perkins v. Freedom of Information Commission*; 228 Conn. 158, 675 (1993). In that case, the Supreme Court held that (1) the invasion of personal privacy exception of FOIA precludes disclosure of personal or *medical* and similar files of public employees only when the information sought by request does not pertain to legitimate matters of public concern and is highly offensive to a reasonable person, and (2) the request under FOIA for disclosure of numerical data concerning public employees’ attendance records, including or limited to sick leave, does not constitute ‘invasion of privacy’ within the meaning of the exception. The Supreme Court in *Perkins* articulates its reasoning by noting that when a person accepts public employment he or she becomes a servant and accountable to the public. As a result that person’s reasonable expectation of privacy is diminished especially in regard to the dates and times requested to perform public duties.” *Id.*, at 170.

The employees whose information is being sought are employees of the State of Connecticut Department of Revenue Services-public employees-and the information sought-days missed from work or days restricted from working at 101 East River Drive -is largely statistical in nature and about respiratory problems, hardly an intensely personal medical condition and not one that the courts have ruled exempt from disclosure. *Mary K.O'Sullivan v. Helene Vartelas, et al*, OPH/WBR No.2008-086, November 20, 2008, (there is a narrow confidentiality privilege in favor of employees dealing with psychiatric treatment).

Here, as in *Perkins*, this tribunal finds that the requests for numerical data dealing with public employees' sick leave records do not constitute a per se invasion of personal privacy. This is especially true since subsequent to filing this motion to compel, complainant's counsel restricted his inquiry in Production request #12 to exclude employee names in connection with their rates of pay. Any lingering concern about these employees' rights to privacy can be addressed through a protective order. This tribunal has on previous occasions utilized protective orders. Authority for the issuance of a protective order is contained in § 46 a-54-89a of the Regulations of Connecticut State Agencies.<sup>3</sup> One final argument against disclosure has been raised by Respondent. Attorney Emons argues that compliance with these discovery requests violates Connecticut law in that the Office of Public Hearings, as an administrative tribunal, possesses no powers of enforcement that would punish any party for violating the confidentiality provisions of a protective order. Respondent's counsel assumes that there will be a violation of the proposed protective order. That is not a valid reason to

deny appropriate discovery. If there is breach of confidentiality, the parties are not without a statutory enforcement mechanism. See Conn. Gen. Stat. §46a-95.

Accordingly, I hereby order that respondent shall fully disclose all documents as requested in complainant's request for disclosure and production, subject to a protective order to be drafted by commission and complainant's counsel and respondents' counsel, if she chooses to participate, and submitted to me on or before May 13, 2009. If respondent's counsel chooses not to participate, she shall have until May 20, 2009 to review and make suggestions for changes in the proposed protective order. The proposed protective order along with all suggested changes shall be submitted to me by May 21, 2009. A sample protective order is attached to this ruling for reference. Respondent shall disclose the documents so ordered within two weeks of the date that the protective order is issued. The respondent shall submit an affidavit of compliance once it has satisfied its obligation to comply with the discovery requests and this ruling. Its failure to do so may result in appropriate sanctions as allowed by law.

It is so ordered this 29<sup>th</sup> day of April, 2009 at Hartford, Connecticut.

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Jerome D. Levine, Human Rights Referee

cc:

Kelly Kennedy-via first class regular mail  
Richard E. Hayber, Esq.-via fax only  
Jane Emons, Esq.-via fax only  
Alix Simonetti, Esq.-via fax only

<sup>1</sup> Production request #8 reads as follows: “All documents which contain information related to the Department of Revenue Services Number of employees assigned to 101 East River Drive whose physicians subsequently restricted them from working at the building, including the names of the restricting physicians and the length of time the employee was restricted from the building.

<sup>2</sup> Production request #12 reads as follows: “All documents which contain information related to the Department of Revenue Services for each employee assigned to 101 East River Drive, the amount of time he or she missed work, including time claimed as vacation, sick time, personal time and workers comp related absence. Also include data on time claimed by employees as workers comp related and rejected by DRS, DAS or GAB Robins and each employees hourly pay rate [to evaluate the cost of lost time]. **Employees’ NAMES are specifically NOT requested in connection with their rate of pay.”**

<sup>3</sup> Section 46 a-54-89 a (d) of the Regulations of Connecticut State Agencies states “ Any party or authorized representative who has reviewed or obtained copies of confidential and protected information in the commission’s file shall comply with the applicable provision of the Connecticut General Statutes and the Regulations of Connecticut State Agencies, restricting the use and disclosure of such information.