



FREEDOM OF INFORMATION

Connecticut Freedom of Information Commission • 18-20 Trinity Street, Suite 100 • Hartford, CT 06106
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The Connecticut Campaign for Consumer
Choice,

Complainant(s)
against

Commissioner, State of Connecticut, Department of Insurance;
and State of Connecticut, Department of Insurance,
Respondent(s)

Notice of Meeting

Docket #FIC 2016-0497

June 7, 2017

Transmittal of Proposed Final Decision

In accordance with Section 4-179 of the Connecticut General Statutes, the Freedom of Information Commission hereby transmits to you the proposed finding and decision prepared by the hearing officer in the above-captioned matter.

This will notify you that the Commission will consider this matter for disposition at its meeting which will be held in the Freedom of Information Commission Hearing Room, 18-20 Trinity Street, 1st floor, Hartford, Connecticut, at **2 p.m. on Wednesday, June 28, 2017**. At that time and place you will be allowed to offer oral argument concerning this proposed finding and order. Oral argument shall be limited to ten (10) minutes. For good cause shown, however, the Commission may increase the period of time for argument. A request for additional time must be made in writing and should be filed with the Commission **ON OR BEFORE June 21, 2017**. Such request **MUST BE (1) copied to all parties, or if the parties are represented, to such representatives, and (2) include a notation indicating such notice to all parties or their representatives.**

Although a brief or memorandum of law is not required, if you decide to submit such a document, an **original and fourteen (14) copies** must be filed **ON OR BEFORE June 21, 2017**. **PLEASE NOTE: Any correspondence, brief or memorandum directed to the Commissioners by any party or representative of any party MUST BE (1) copied to all parties, or if the parties are represented, to such representatives, (2) include a notation indicating such notice to all parties or their representatives and (3) be limited to argument. NO NEW EVIDENCE MAY BE SUBMITTED.**

If you have already filed a brief or memorandum with the hearing officer and wish to have that document distributed to each member of the Commission, it is requested that **fifteen (15) copies** be filed **ON OR BEFORE June 21, 2017**, and that **notice be given to all parties or if the parties are represented, to their representatives, that such previously filed document is being submitted to the Commissioners for review.**

By Order of the Freedom of
Information Commission

Linda Fasciano
Acting Clerk of the Commission

Notice to: Attorney Simon I. Allentuch
Assistant Attorney General John Langmaid

FIC# 2016-0497/Trans/lf/LFS//TAH/2017-06-07

FREEDOM OF INFORMATION COMMISSION
OF THE STATE OF CONNECTICUT

In the Matter of a Complaint by

Report of Hearing Officer

The Connecticut Campaign for
Consumer Choice,

Complainant

against

Docket #FIC 2016-0497

Katherine L. Wade, Commissioner, State
of Connecticut, Department of Insurance;
and State of Connecticut, Department of
Insurance,

Respondents

June 7, 2017

The above-captioned matter was heard as a contested case on April 18, 2017 and May 22, 2017, 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 on May 26, 2016, the complainant made the following request for records:

[a] Any and all documentation or communication submitted to, sent from, or in possession of the Connecticut Department of Insurance (“DOI”) relative to the proposed acquisition by Aetna of Humana (the “Proposed Acquisition”), including but not limited to, the following:

[i] The “Form E” filing

[ii] Correspondence, including but not limited to, emails, letters and faxes, between the DOI and any party, including but not limited to, Aetna, Humana, state officials, state agencies, consumers and providers, relative to the Proposed Acquisition

- [b] Any and all market share analysis or competitive impact examination done by the CID [Connecticut Insurance Department] or any third party in connection with the Proposed Acquisition
- [c] Any and all orders or other documents granting approval of the Proposed Acquisition and/or demonstrating DOI's acceptance or lack of objection to the Proposed Acquisition[.]

Pursuant to the Act, we request you provide prompt access to the records we have requested. Further, if any of the records we have requested are exempt from disclosure, please identify which records will be withheld pursuant to which specific provision of the Act [.]

3. It is found that on June 8, 2016, the respondents provided 33 pages of responsive records, for which the complainant paid \$8.25. It is found that such records consist of an email chain from media organizations requesting information concerning the merger, letters and a petition from consumers and a consumer group, a copy of §38a-131, G.S., and a few internal emails concerning the merger and the federal lawsuit.

4. It is found that the respondents also produced additional records on May 16, 2017. It is found that such records consist of letters from a consumer and from consumer representatives of the National Association of Insurance Commissioners ["NAIC"], two copies of a letter from a union trade council to the respondent commissioner concerning the mergers, and a duplicate copy of the emails from media organizations that were disclosed on June 8, 2016.

5. By letter filed July 7, 2016, 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 records they requested. The complainant requested the imposition of a civil penalty.

6. 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.

7. 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.

8. 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.

9. 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.

10. At the hearing in this matter on April 18, 2017, the complainant withdrew its request for the “Form E filing,” described in paragraph 2(a)(i), above.

11. Following the first hearing in this matter, the hearing officer issued, on April 21, 2017, a Notice of Order to Submit Documents for In Camera Inspection, with accompanying Index.

12. It is found that on May 9, 2017, the respondents produced some records for in camera inspection, with an accompanying index, in compliance with the April 21, 2017 Order.

13. It is found that on May 17, 2017, the respondents informed the hearing officer that based on §38a-131(c), G.S., they had withheld some responsive records from their production of records for in camera inspection and refused to provide an index of such records.

14. On May 19, 2017, the respondents filed a “Motion for Reconsideration by Full Commission,” requesting that the Commission rescind the hearing officer’s April 21, 2017, order for production of in camera records. The respondents filed a “Statement of Law” that reiterated the reasoning set forth in their letter to the hearing officer on May 17, 2017, as described in paragraph 13, above.

15. On May 19, 2017, the complainant objected to the respondents’ “Motion for Reconsideration.” In addition, the complainant moved for the imposition of sanctions against the respondents, alleging that the respondents’ motion was frivolous and made in bad faith.

16. At the continued hearing in this matter on May 22, 2017, the hearing officer took under advisement the complainant’s motion for sanctions. As of the date of the continued hearing, the full Commission had taken no action on the respondents’ Motion for Reconsideration.

17. Section 38a-131(c), G.S., provides in relevant part:

For an acquisition ..., the acquiring party shall file a preacquisition notification in accordance with this section and the acquired party may file a preacquisition notification. The commissioner shall treat any information filed under this subsection as confidential in the same manner as provided under section 38a-137. (Emphasis added.)

(1) The preacquisition notification shall be in such form and contain such information as the National Association of Insurance Commissioners prescribes. The commissioner may require additional material and information the commissioner deems necessary, including, but not limited to, the opinion of an economist as to the impact of the proposed acquisition on competition in this state, to evaluate whether the proposed acquisition will violate the competitive standard described in subsection (d) of this section.

(2) ...[T]he commissioner may require, on a one-time basis, the acquiring party or the acquired party to submit additional needed information relevant to the proposed acquisition ...

18. Section 38a-137, G.S., provides in relevant part:

- (a) All information, documents, materials and copies thereof obtained by or disclosed to the commissioner or any other person in the course of an examination or investigation made pursuant to section 38a-14a and all information reported, furnished or filed pursuant to sections 38a-135 and 38a-136 shall (1) be confidential by law and privileged, (2) not be subject to disclosure under section 1-210, (3) not be subject to subpoena, and (4) not be subject to discovery or admissible in evidence in any civil action. The commissioner shall not make such information, documents, materials or copies public without the prior written consent of the insurance company to which it pertains unless the commissioner, after giving the insurance company and its affiliates who would be affected thereby notice and opportunity to be heard, determines that the interests of policyholders, security holders or the public will be served by the publication thereof, in which event the commissioner may publish all or any part thereof in such manner as the commissioner may deem appropriate. The commissioner may use such information, documents, materials or copies in the furtherance of any regulatory or legal action brought as part of the commissioner's official duties... (Emphasis added.)

19. It is concluded that the reference in §38a-131(c), G.S., to the *manner* of confidentiality provided in §38a-137, G.S., means that any record of preacquisition notification (henceforth, "Form E filing"), obtained pursuant to 38a-131(c), G.S., shall not be subject to disclosure under §1-210, G.S., unless the commissioner determines that the interests of policyholders, security holders or the public will be served by publication.

20. The complainant concedes the confidentiality of Form E filings, and no longer seeks a copy of such records.

21. The respondents contend that all records that pertain to Form E filings are also confidential, and that §38a-131(c), G.S., prohibits them from compiling an index of responsive records and from providing any testimony concerning Form E filings, unless the respondent commissioner permits, and that she did not grant permission in this matter.

22. The respondents rely in part on the first sentence of §38a-137, G.S., to support their claim of confidentiality of Form E filings obtained pursuant to §38a-131(c), G.S. It is concluded, however, that the first sentence applies only to information, documents, and materials submitted as part of investigations undertaken pursuant to certain specified statutes, and §38a-131(c), G.S. is not one of the specified statutes. It is concluded that §38a-137, G.S., does not, by its terms, prohibit disclosure of the requested records.

23. Furthermore, the confidentiality requirement of §38a-131(c), G.S., applies only to “information filed[.]” Black’s Law Dictionary, 8th Ed. (2004), defines file: “to deliver a legal document to the ... record custodian for placement into the official record.” Also, “to fill out and submit to the appropriate office.” Webster’s Third New International Dictionary Unabridged (1961). Information filed under §38a-131(c), G.S., describes information submitted to the respondents through a formal legal procedure.

24. The respondents did not offer the testimony of any individual who had actually reviewed the requested records that the respondents claimed were prohibited by statute from providing to the Commission for in camera inspection.

25. It is found that an in camera inspection is necessary to show whether the requested records comprise or reveal information filed under §38a-131(c), G.S. “Unless the character of the documents in question is conceded by the parties, an in camera inspection of the particular documents by the commission may be essential to the proper resolution of a dispute under the act.” Wilson v. FOI Commission, 181 Conn. 324, 340 (1980).

26. In their post-hearing brief, the respondents assert, without support, that the Order to Submit Documents for In Camera Inspection is equivalent to a subpoena. The respondents claim that because §38a-137(a)(3), G.S., prohibits Form E filings from being the subject of a subpoena, the statute also prohibits Form E filings from being subject to an In camera Order.

27. However, on its face, the Order is not a subpoena. Moreover, a subpoena, without more, does not impose any confidentiality. In contrast, with respect to records submitted to a hearing officer for in camera inspection, Conn. Reg. State Agencies §1-21j-37(f) states in relevant part:

The procedure for an in camera inspection of records shall be as follows:

(1) Any party or intervenor may request an in camera inspection of the records claimed to be exempt from disclosure in a contested case; and the presiding officer or the commission may

order such an inspection on request, on such presiding officer's or the commission's own initiative, or on remand by a court.

(2) If an in camera inspection is ordered, the party having custody of the records claimed to be exempt from disclosure shall be required to submit a copy of the records together with an in camera inspection index referencing each record, and each item within each record, claimed to be exempt from disclosure. All parties shall be informed of their rights and obligations under these procedures.

(3) In each case in which an in camera inspection is ordered, the presiding officer, a commissioner or an authorized staff member, shall verify that each record submitted for such inspection has been identified by the party having custody of the record by reference to an individual reference number or numbers prescribed by the commission and included in an accompanying in camera inspection index.

(4) In each case in which an in camera inspection is ordered, an in camera inspection index shall be prepared in triplicate by the party having custody of the records submitted for such inspection on forms which shall be provided or approved by the commission. One part of the form shall be given to the party submitting the records as a receipt, indicating the records and date received and the name of the person authorized to receive and sign for such records on behalf of the commission. The receipt shall also certify that neither the records received for in camera inspection, nor their contents, shall be disclosed to any unauthorized person, except as provided by commission or court order and as provided below. The second part of the form shall be retained by the commission and kept for both inventory and decision-making purposes as part of the secure file in which the subject records themselves are kept. The third part of the form shall be retained by the commission as a public record and kept as part of the public file of the contested case. A copy of the completed index form shall be given to all other parties to the proceedings.

(5) It shall be the responsibility of the party submitting records for in camera inspection to certify that the copies of the records so submitted are true copies of the records at issue in the contested case. It shall also be the responsibility of such party to make available for examination and cross-examination at a commission hearing on the matter the official who issued the certification.

(6) After receiving records submitted for in camera inspection, the authorized person who signed the receipt for them on the index on behalf of the commission shall personally deliver the records for storage in a secure commission file.

(7) Ordinarily only commissioners, the presiding officer, the executive director, the managing director and staff counsel are authorized access to inspect records submitted for in camera inspection. In any particular case, however, the presiding officer or the commission may authorize greater or lesser access to such records and the executive director and managing director may authorize greater or lesser access by commission personnel to such records. All persons having access to the records submitted for in camera inspection shall be identified on the related in camera inspection index.

(8) The copying of records submitted to the commission for in camera inspection shall not be permitted. Likewise, no person authorized access to such records may take any notes making reference to specific information contained in such records and claimed to be exempt from disclosure. References to specific records submitted for in camera inspection, or the contents of such records, in proposed final decisions or final decisions shall be by the assigned reference numbers as endorsed on the records themselves or by reference to generic descriptions or characterizations as set forth in the related in camera inspection index or in other public records.

(9) At commission meetings open to the public, all mention of the specific contents of records submitted for in camera inspection shall be avoided. Mention of specific records submitted for in camera inspection, however, may be made by use of the assigned reference numbers as endorsed on the records themselves or by reference to generic descriptions or characterizations as set forth in the related in camera inspection index or in other public records.

(10) If it proves necessary for the commission to discuss the specific contents of records submitted for in camera inspection at one of its meetings, it shall first convene in executive session, as provided by law. Only commissioners and persons authorized access to the subject records and invited by the commission to present testimony or opinion shall attend the executive session, as provided by law.

(11) Unless a court appeal is filed in a particular contested case, the commission shall disclose on request those records in its possession submitted for in camera inspection and ordered disclosed by the commission in that case (A) after the expiration of forty-five (45) days from the mailing of the notice of final decision, or (B) if a request for reconsideration is received by the commission within such 45-day period, after the expiration of forty-five (45) days from the mailing of the notice denying that request or after the expiration of forty-five (45) days from the mailing of the notice of the final decision issued after reconsideration has been granted, as the case may be. If no court appeal is filed, the records submitted for in camera inspection and ordered disclosed shall be transferred from their secure file to the commission's corresponding public file after the expiration of the applicable time period.

(12) Unless a court appeal is filed, after issuing its final decision in a particular contested case, the commission shall notify the party that submitted records for in camera inspection in writing that it may make appropriate arrangements with the commission staff to take possession of such records after the expiration of the operative time periods set forth in subdivision (11) of this subsection. The party taking possession shall be required to sign a receipt for the records returned. If no arrangements are made for the return of such records, the commission shall cause the records to be destroyed any time after the expiration of the time periods for the retention of contested case evidence in the commission's current schedule for the retention and destruction of records, as approved by the state public records administrator.

(13) If a court appeal is filed in a particular contested case, the commission shall notify in writing all known parties to the appeal that, as part of the commission's record to be delivered to the court, the commission intends to deliver the records submitted for in camera inspection. The notice shall also advise the parties that the commission shall not move the court to seal such records, but that other parties may do so if they desire; and that any party seeking to seal the records should notify the commission of its intent to do so before the date by which the commission must certify the record of its proceedings into court. If notified that a motion to seal shall be made, the commission shall not transfer such records until the court makes its determination on the motion.

(14) Records submitted for in camera inspection which form part of a commission record on appeal shall, until delivered to the reviewing court, continue to be kept in their secure file and

separately from the remainder of the record on appeal. When the record on appeal is to be delivered to court, a person authorized access to such records on behalf of the commission shall personally deliver such records to the clerk of the applicable court. If the court has ordered such records sealed, such authorized person shall so notify the clerk on delivery.

(15) Records submitted for in camera inspection, returned to the commission by a court and which records were held by the court to be exempt from disclosure shall be returned to their secure file immediately by a person authorized access to such records on behalf of the commission. Any records submitted for in camera inspection, returned to the commission by a court and held by the court to be disclosable shall be placed in the commission's public files. In either case, the commission shall notify the party that submitted such records for in camera inspection in writing that such party may make appropriate arrangements with the commission staff to take possession of those records or they shall be destroyed as provided in subdivision (12) of this subsection.

28. It is concluded that a subpoena in a civil proceeding offers none of the safeguards against public disclosure that are set forth in Conn. Reg. State Agencies §1-21j-37(f).

29. It is concluded that the respondents' claim is without merit, and §38a-137, G.S., does not prohibit the respondents from complying with the hearing officer's Order to Submit Documents for In Camera Inspection with Accompanying Index.

30. With respect to any records that are responsive to the complainant's request but that the respondents refused to provide to the complainant or to submit for in camera inspection, it is found that the respondents failed to prove that such records are exempt from disclosure.

31. It is concluded, therefore, that the respondents violated §§1-210(a) and 1-212(a), G.S., by failing to provide any such records referenced in paragraph 30, above, to the complainant.

32. With respect to the records submitted for in camera inspection on May 9, 2017, such records shall be referenced herein as IC-2016-0497-C001 through IC-2016-0497-C026 and IC-2016-0497-H001 through IC-2016-0497-H031.

33. The respondents no longer claim an exemption for IC-2016-0497-H003 through IC-2016-0497-H007 and IC-2016-0497-H019 through IC-2016-0497-H031.

34. The respondents claim that §38a-8(d), G.S., prohibits disclosure of the following records: IC-2016-0497-C002, IC-2016-0497-C003, IC-2016-0497-C017 through IC-2016-0497-C026; IC-2016-0497-H001, IC-2016-0497-H002, and IC-2016-0497-H008 through IC-2016-0497-H018.

35. Section 38a-8(d), G.S., provides in relevant part:

The commissioner shall develop a program of periodic review to ensure compliance by the Insurance Department with the minimum standards established by the National Association of Insurance Commissioners [NAIC] for effective financial surveillance and regulation of insurance companies operating in this state. The commissioner shall adopt regulations, in accordance with the provisions of chapter 54, pertaining to the financial surveillance and solvency regulation of insurance companies and health care centers as are reasonable and necessary to obtain or maintain the accreditation of the Insurance Department by the National Association of Insurance Commissioners. The commissioner shall maintain as confidential any confidential documents or information received from the National Association of Insurance Commissioners, or the International Association of Insurance Supervisors ["IAIS"], or any documents or information received from state or federal insurance, banking or securities regulators or similar regulators in a foreign country that are confidential in such jurisdictions.

36. Upon careful inspection of the records referenced in paragraph 34, above, it is found that the respondents failed to prove that the records submitted for in camera inspection are the type of records to which §38a-8(d), G.S., applies; that is, that the records pertain to "the minimum standards established by the NAIC for effective financial surveillance and regulation of insurance companies operating in this state." It is also found that the respondents failed to prove that the in camera records are "confidential documents or information received from the NAIC or the IAIS," or are documents or information received from state or federal regulators and that such documents or information are confidential in the originating jurisdictions.

37. It is found, therefore, that the respondents failed to prove that §38a-8(d), G.S., requires confidential treatment of the records referenced in paragraph 34, above.

38. The respondents claim that §38a-69a, G.S., prohibits disclosure of the following records: IC-2016-0497-C001 through IC-2016-0497-C016, IC-2016-0497-H001 and IC-2016-0497-H002.

39. Section 38a-69a, G.S., provides in relevant part:

(a) All financial analyses, financial examination workpapers, operating and financial condition reports concerning any insurance company, fraternal benefit society or health care center prepared by or on behalf of or for the use of the Insurance Commissioner or the Insurance Department examiner, shall be confidential unless such documents are otherwise a matter of public record, or the

commissioner, in the commissioner's opinion deems it in the public interest to disclose or otherwise make available for public inspection the information contained in such documents. (Emphasis added.)

40. It is found that the respondents failed to prove that the information contained in the records referenced in paragraph 38, above, is not otherwise a matter of public record. The Commission takes administrative notice of the following websites, all accessed on June 5, 2017:¹ <http://www.courant.com/business/hc-aetna-humana-merger-0704-20150703-story.html>; <https://news.aetna.com/news-releases/aetna-to-acquire-humana-for-37-billion-combined-entity-to-drive-consumer-focused-high-value-health-care/>; <https://www.sec.gov/Archives/edgar/data/1122304/000119312515306908/d67897d424b3.htm>; <file:///C:/Users/SiegelL/Downloads/Aetna-HumanaInvestorPresentation.pdf>. Based on the foregoing, it is found that the information contained in the records referenced in paragraph 38, above, is a matter of public record.

41. It is found, therefore, that the respondents failed to prove that §38a-69a, G.S., requires confidential treatment of the records referenced in paragraph 38, above.

42. The respondents claim that §1-210(b)(1), G.S., exempts the following records: IC-2016-0497-C002, IC-2016-0497-C003, IC-2016-0497-C017, IC-2016-0497-C018, IC-2016-0497-C022, and IC-2016-0497-C024 through IC-2016-0497-C026.

43. 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.”

44. It is found that the respondents failed to prove that IC-2016-0497-C002, IC-2016-0497-C003, IC-2016-0497-C017, IC-2016-0497-C018, IC-2016-0497-C022, and IC-2016-0497-C024 are preliminary drafts within the meaning of §1-210(b)(1), G.S. It is found that the handwritten notes on IC-2016-0497-C007, IC-2016-0497-C008, IC-2016-0497-C025, and IC-2016-0497-C026 are notes within the meaning of §1-210(b)(1), G.S.

45. However, §1-210(b)(1), G.S., also 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. FOI Commission*, 211 Conn. 339, 345 (1989). (Emphasis added.)

46. The respondents indicated that their reason for not disclosing the records referenced in paragraph 42, above, was because the records contained confidential information pursuant to §38a-8(d), G.S., and that disclosure would undermine the respondents’ effectiveness. In light of

¹ Pages from the cited websites have been printed and made part of the Administrative Record.

the Commission's conclusion in paragraph 37, above, that §38a-8(d), G.S., does not require confidentiality of the records submitted for in camera inspection, and upon careful inspection of the *content* of the records referenced in paragraph 42, above, it is found that the respondents failed to weighed the public interest in disclosure against the public interest in withholding the records. Moreover, it is found that the respondents' reasons for withholding disclosure of such records are without basis and frivolous.

47. Notwithstanding the findings in paragraph 44, it is found that the respondents failed to prove an essential element of the exemption – that they made a non-frivolous determination that the public interest in withholding records clearly outweighs the public interest in disclosure. It is found, therefore, that the respondents failed to prove that §1-210(b)(1), G.S., exempts from mandatory disclosure the records referenced in paragraph 42, above.

48. The respondents claim that §1-210(b)(5)(B), G.S., exempts the following records: IC-2016-0497-C004 through IC-2016-0497-C018, IC-2016-0497-C021, IC-2016-0497-C022, and IC-2016-0497-C024 through IC-2016-0497-C026.

49. Section 1-210(b)(5)(B), G.S., provides that a public agency is not required to disclose: “Commercial or financial information given in confidence, not required by statute[.]”

50. Upon careful review of the in camera records, it is found that the respondents failed to prove that the information contained in the records referenced in paragraph 47, above, was given in confidence, within the meaning of §1-200(5)(B), G.S., particularly in light of the finding in paragraph 40, above, that such information is otherwise a matter of public record.

51. It is found that the respondents failed to prove that §1-200(b)(5)(B), G.S., exempts from mandatory disclosure the records referenced in paragraph 47, above.

52. The respondents claim that §1-210(b)(10), G.S., exempts the following records: IC-2016-0497-C023 and IC-2016-0497-C024.

53. Section 1-210(b)(10), G.S., provides that a public agency is not required to disclose: “communications privileged by the attorney-client relationship[.]”

54. Established Connecticut law defining the attorney-client privilege governs the applicability of the exemption contained in §1-210(b)(10), G.S. Such 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.

55. 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....

56. The Supreme Court has also stated that “both the common-law and statutory privileges protect those communications between a public official or employee and an attorney that are confidential, made in the course of the professional relationship that exists between the attorney and his or her public agency client, and relate to legal advice sought by the agency from the attorney.” Maxwell, supra at 149.

57. Upon careful inspection of the in camera records, it is found that IC-2016-0497-C023 and IC-2016-0497-C024 are written confidential communications between a public official or employee and an attorney, made in the course of the professional relationship, and relate to legal advice sought by the agency.

58. It is found that IC-2016-0497-C023 and IC-2016-0497-C024 are exempt from disclosure pursuant to §1-210(b)(10), G.S.

59. It is concluded that, except for IC-2016-0497-C023 and IC-2016-0497-C024, the respondents failed to prove that any of the records submitted for in camera inspection are exempt from mandatory disclosure.

60. It is concluded, therefore, that the respondents violated §§1-210(a) and 1-212(a), G.S., by failing to disclose the remainder of such records to the complainant.

61. With respect to the complainant’s request for a civil penalty, §1-206(b)(2), G.S., provides in relevant part:

. . . upon the finding that a denial of any right created by the Freedom of Information Act was without reasonable grounds and after the custodian or other official directly responsible for the denial has been given an opportunity to be heard at a hearing conducted in accordance with sections 4-176e to 4-184, inclusive, the commission may, in its discretion, impose against the custodian or other official a civil penalty of not less than twenty dollars nor more than one thousand dollars.

62. It is found that at all times material to this complaint, the respondent commissioner was Katherine L. Wade. In view of the request for the imposition of a civil penalty, the caption of this matter has been amended to reflect this fact.

63. It is further found that Commissioner Wade, acting in part through her deputy commissioner, is the official directly responsible for denying the complainant its right of prompt access to non-exempt public records. It is found that the complainant requested the imposition of a civil penalty in its letter of appeal filed with the FOI Commission and that Commissioner Wade had an opportunity to be heard at the hearings in this matter, during which the imposition of a civil penalty was considered.

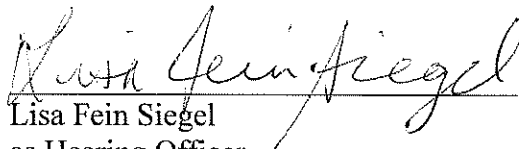
64. It is found that the exemptions claimed by Commissioner Wade were almost entirely without merit, and it is also found that the Commissioner's refusal to submit records for in camera inspection and to provide an index of exempt records demonstrates an unreasonable attempt to avoid a long established process for determining whether a public record is subject to disclosure.

65. It is found, therefore, that the denial of the complainant's right of prompt access to non-exempt public records was without reasonable grounds.

66. After consideration of the entire record in this case, the Commission in its discretion imposes against the respondent commissioner a civil penalty in the amount of \$1000.

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 submitted for in camera inspection, except for the records referenced as IC-2016-0497-C023 and IC-2016-0497-C024 in the findings, above.
2. In addition, the respondents forthwith shall provide, free of charge, a copy of all other records responsive to the complainant's request.
3. In complying with paragraph 2 of the order, above, the respondents are not ordered to provide the actual Form E filing, records already provided to the complainant, or records that are posted on the respondents' public website.
4. Within 45 days of the notice of final decision in this matter, the respondent commissioner shall remit to the Commission a civil penalty in the amount of \$1000.
5. Henceforth, the respondents shall strictly comply with §§1-210(a) and 1-212(a), G.S.


Lisa Fein Siegel
as Hearing Officer