

FREEDOM OF INFORMATION COMMISSION  
OF THE STATE OF CONNECTICUT

In the Matter of a Complaint by

FINAL DECISION

Claire Howard,

Complainant

against

Docket #FIC 2020-0053

Commissioner,  
State of Connecticut,  
Department of Economic  
and Community Development; and  
State of Connecticut, Department  
of Economic and Community  
Development,

Respondents

January 12, 2022

The above-captioned matter was heard as a contested case on October 23, 2020, January 7, 2021, and July 27, 2021, at which times both the complainant and the respondents appeared, stipulated to certain facts and presented testimony, exhibits and argument on the complaint. The caption has been amended, without objection, to reflect the correct complainant and the accurate names of the respondents.

Due to the COVID-19 pandemic and the state's response to it, the October 23, 2020, and January 7, 2021 hearings were conducted telephonically.<sup>1</sup> The July 27, 2021 hearing was conducted through the use of electronic equipment (remotely via video conference) pursuant to §149 of Public Act 21-2 (June Special Session).

On September 24, 2021, pursuant to an order of the hearing officer, the respondents submitted, without objection, an after-filed exhibit, which has been marked as Respondents' Exhibit 15 (after-filed): Emails dated August 23, 2018, and August 27, 2018, respectively. On November 3, 2021, pursuant to a separate order of the hearing officer, the respondents submitted, without objection, two after-filed exhibits, which have been marked as Respondents' Exhibit 15A (after-filed): Affidavit of Susan Shellard, dated October 28, 2021; and Respondents' Exhibit 15B (after-filed): Affidavit of Catherine H. Smith, dated October 29, 2021.

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<sup>1</sup> On March 14, 2020, the Governor issued Executive Order 7B, which suspended the requirement to conduct meetings in person.

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 January 17, 2020, the complainant requested a copy of the following records from the respondents:

Item 1. All documents, including, but not limited to, meeting minutes, memos, notes, statements, e-mails, text messages or other correspondence sent to and/or received by Susan Shellard, Catherine Smith, Bart Kollen, Tracey Rooslund, Sidney Yeung, James Amato, Irene Matulis, Kathy Woodward, Elizabeth Shapiro, Kristen Pepin, Brenda Abele, Irena Baj-Wright, Joseph Olender, David Lehman, David Kooris, Glendowlyn Thames, Maureen Breyan, Paige Rasid, Kim Boissonneault, Jane Schneider, German Rivera, Lorraine Vittner, referring to or mentioning Karen Bosse from October 1, 2015 through the date of this letter.

Item 2. Copies of registration for trainings, workshops, seminars or conferences for Susan Shellard, Sidney Yeung, Irene Matulis, Karen Bosse, James Amato from October 2015 through the date of this letter.

Item 3. Copies of Teleworking Agreements and/or Teleworking Requests submitted by Susan Shellard, Sidney Yeung, Irene Matulis, Karen Bosse and James Amato from October 2015 through the date of this letter.

Item 4. Copies of interim and/or Annual Performance Reviews for Susan Shellard, Sidney Yeung, Irene Matulis, Karen Bosse and James Amato from October 2015 through the date of this letter.

Item 5. Copies of Service Ratings for Susan Shellard, Sidney Yeung, Irene Matulis, Karen Bosse and James Amato from October 2015 through the date of this letter.

Item 6. Copies of emails sent by Susan Shellard referring [to] or mentioning Karen Bosse from October 2015 through the date of this letter.

(“January 17<sup>th</sup> request”). It is found that the complainant also informed the respondents that Karen Bosse had retained the complainant’s law firm to represent her with regard to matters arising from Ms. Bosse’s employment with the respondents. It is found that Ms. Bosse filed a complaint of illegal discrimination against the respondents with the Commission on Human Rights and Opportunities (“CHRO”).

3. It is found that the complainant emailed the January 17<sup>th</sup> request directly to Crystal Knight, the Paralegal Specialist and Freedom of Information Administrator in the respondents' Legal Department.

4. It is found that the complainant received an automatic out of office reply to her January 17<sup>th</sup> request. The automatic out of office reply informed senders, including the complainant, that Ms. Knight "will be out of the office...[and]...will not have access to email or voicemail." In addition, the automatic reply provided the following instruction: "If this is a Freedom of Information issue please contact [Attorney] Christon Kurker-Stewart by email at [christon.kurker-stewart@ct.gov](mailto:christon.kurker-stewart@ct.gov)." It is found that the complainant did not contact Attorney Kurker-Stewart regarding the January 17<sup>th</sup> request.

5. By letter of complaint received January 31, 2020,<sup>2</sup> the complainant appealed to the Commission, alleging that the respondents violated the Freedom of Information ("FOI") Act by failing to comply with her January 17<sup>th</sup> request.

6. At the time of the request, section 1-200(5), G.S., provided:

"[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, printed, photostated, photographed or recorded by any other method.<sup>3</sup>

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 (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 that "any person applying in writing

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<sup>2</sup> On March 25, 2020, the Governor issued Executive Order 7M, thereby suspending the provisions of Conn. Gen. Stat. §1-206(b)(1), which required the Freedom of Information Commission to hear and decide an appeal within one year after the filing of such appeal. Executive Order 7M, which was extended by Executive Order 12B, applied to any appeal pending with the Commission on the issuance date and to any appeal filed prior to July 1, 2021. Consequently, the Commission retains subject matter jurisdiction.

<sup>3</sup> Section 147 of Public Act 21-2 (June Sp. Sess.) amended the definition of "public records or files" to also include data or information that is "videotaped".

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. It is found that Ms. Knight returned to the office on February 10, 2020, at which time she read the January 17<sup>th</sup> request, but did not take any further action.

11. It is found that Ms. Knight received copies of the complaint and January 17<sup>th</sup> request on or about May 19, 2020,<sup>4</sup> and discovered that the complainant had not forwarded such request to Attorney Stewart as instructed in the automatic out of office reply. It is found that Ms. Knight proceeded to review and search for records responsive to the January 17<sup>th</sup> request.

12. It is found that, by email dated May 21, 2020, Ms. Knight informed Susan Shellard, Sidney Yeung, Irene Matulis, and James Amato, of the January 17<sup>th</sup> request and pending complaint. It is found that Ms. Knight also notified those individuals that such request sought information the disclosure of which “would legally constitute an invasion of privacy.” It is found that Ms. Knight specifically referenced Items 3 through 5 of the January 17<sup>th</sup> request for copies of teleworking agreements and/or teleworking requests, interim and/or annual performance reviews, and service ratings concerning Susan Shellard, Sidney Yeung, Irene Matulis and James Amato. It is found that each of these individuals objected to the disclosure of such records.

13. It is found that, on May 26, 2020, and May 28, 2020, Ms. Knight submitted two separate e-discovery requests to the State of Connecticut Bureau of Enterprise and System Technology for records responsive to Items 1 and 6 of the January 17<sup>th</sup> request. It is found that approximately 20,000 documents were located. It is found that a search was also conducted of paper files for responsive records.

14. It is found that, by email dated May 29, 2020, the respondents, through counsel, informed the complainant that they had reviewed her January 17<sup>th</sup> request and were working diligently to assemble responsive information. It is also found that the respondents informed the complainant that to the extent that the January 17<sup>th</sup> request sought personnel records concerning employees other than Ms. Bosse, such request was denied pursuant to §§1-210(b)(2), 5-225 and/or 5-237, G.S.

15. It is found that between May 29, 2020, and June 18, 2020, the complainant and respondents’ counsel conferred several times regarding the January 17<sup>th</sup> request. It is found that the respondents inquired whether the complainant would narrow such request, and were informed that she would not.

16. It is found that between June 18, 2020 and July 27, 2021, the respondents provided

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<sup>4</sup> The docketing letters, which included copies of the complaint and January 17<sup>th</sup> request, were sent by the Commission to the parties five months later on May 11, 2020.

the complainant with approximately 15,707 pages of records responsive to her January 17<sup>th</sup> request on a rolling basis, with corresponding privilege logs for redactions made to such records. At the July 27, 2021 hearing, the respondents testified that they were also prepared to disclose to the complainant an additional 1,311 pages of records on that day.

17. It is found that as of July 27, 2021, there remained approximately 12,398 records consisting of emails (with possible attachments) that had yet to be reviewed that may be responsive to Item 1 of the January 17<sup>th</sup> request. At the July 27, 2021 hearing, counsel for the respondents represented that they would continue to work on the January 17<sup>th</sup> request.

18. At the hearings, the complainant contended that the respondents unreasonably delayed responding to the January 17<sup>th</sup> request. The complainant also contended that the respondents failed to provide her with all responsive records, and challenged their claims that certain records were statutorily exempt from disclosure. In addition, the complainant challenged the respondents' basis for withholding records on the ground that they were "non-responsive" to the January 17<sup>th</sup> request.

19. On October 23, 2020, January 7, 2021, and August 3, 2021, the respondents submitted to the Commission unredacted copies of certain records, along with in camera indices, for in camera inspection.<sup>5</sup> The respondents claimed that such records, or portions thereof, were exempt from disclosure pursuant to §§1-210(b)(1), 1-210(b)(2), 1-210(b)(10), 5-225, and 5-237, G.S., and/or were withheld on the ground that they were "non-responsive" to the January 17<sup>th</sup> request. The respondents also cited Personnel Director v. FOIC, 214 Conn. 312 (1990). In addition, the respondents submitted redacted copies of the records that they claimed were exempt from disclosure and/or "non-responsive" to the January 17<sup>th</sup> request.<sup>6</sup>

20. With regard to the respondents' claim that certain in camera records (Record Ref. ## 1 through 041<sup>7</sup>) were exempt from disclosure pursuant to §5-237, G.S., such statute provides that:

[a]ny employee in the classified service shall have the right, at reasonable times during office hours, to inspect his service ratings, as shown by the records of the Department of Administrative Services or of the department, agency or institution in which such employee is employed....

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<sup>5</sup> The in camera indices for the October 23, 2020, January 7, 2021, and August 3, 2021 in camera submissions shall herein be referred to as "in camera Index No. 1", "in camera Index No. 2" and "in camera Index No. 3", respectively.

<sup>6</sup> Based upon a review of the redacted and unredacted copies of the records submitted in camera, the Commission notes that the correct record reference numbers for Record Ref. ## 9540 (lines 1-15, 23-33, 40, 46, 52), 10694 (lines 5, 7-11), and 15145 through 15459 (all) are: Record Ref. ## 9640 (1-15, 23-33, 40, 46, 52), 10695 (lines 5, 7-11), and 15145 through 15149 (all), respectively.

<sup>7</sup> Record Ref. ##1 through 041 were described on in camera Index No.1 as "State Employee Performance Appraisals."

21. In Personnel Director, Department of Income Maintenance v. FOIC, 214 Conn. 312, 320-321 (1990), the Supreme Court concluded that §§5-225 and 5-237, G.S., provide a statutory exemption to the disclosure provisions of §1-210(a), G.S., and specifically limit access to service ratings of State employees in classified service to the employee who is the subject of such rating. See also Docket #FIC 2015-028; Geelan v. Commissioner, State of Connecticut, Department of Rehabilitation Services, et. al. (September 24, 2015); Docket #FIC 2014-032; Daly v. Commissioner, State of Connecticut, Department of Correction (November 19, 2014); and Docket #FIC 2010-185; Roberto v. Nicholson, Commissioner, State of Connecticut, Department of Revenue Services, et. al. (November 17, 2010).

22. At the October 23, 2020 hearing, Lorraine Vittner, a Human Resources Specialist with the Department of Administrative Services (“DAS”) who performs Human Resource functions for the respondents, testified that the state employees who are the subject of the records at issue,<sup>8</sup> are all classified service employees. She also testified that performance evaluations for non-supervisory, non-managerial employees are the same as service ratings. In addition, at the January 7, 2021 hearing, Sheri Grzyb, a Statewide Human Resources Program Manager with DAS, testified that performance evaluations or Performance Assessment Recognition System (PARS) for managers are the same as service ratings.

23. Based upon the testimony provided at the hearing and upon careful inspection of in camera records Record Ref. ## 1 through 041, it is found that such records constituted service ratings of classified state employees and are therefore exempt from disclosure pursuant to §5-237, G.S. It is concluded that the respondents did not violate §§1-210(a) and 1-212(a), G.S., by withholding such records from the complainant.<sup>9</sup>

24. With respect to the respondents’ claim that certain in camera records (Record Ref. ## 5739 through 5744<sup>10</sup>), are exempt from disclosure pursuant to §1-210(b)(10), G.S., such statute permits a public agency to withhold from disclosure records of “communications privileged by the attorney-client relationship.”

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

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<sup>8</sup> It is found that the complainant was provided copies of the performance appraisals/service ratings for Ms. Bosse, her client. At the hearing, the complainant testified that such records are not at issue.

<sup>9</sup> On in camera Index No. 1, the respondents also claimed that certain portions of Record Ref. ## 1 through 041 were exempt from disclosure pursuant to §1-210(b)(2), G.S. However, in light of the conclusion reached in paragraph 23, above, the Commission need not address any further claims of exemption with respect to such records.

<sup>10</sup> Record Ref. ## 5739 through 5744 were described on in camera Index No. 2 as “Draft Answer to Karen Bosse’s CHRO complaint”.

26. 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....

27. 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, 260 Conn. 149.

28. As a general rule, “communications between client and attorney are privileged when made in confidence for the purpose of seeking legal advice.” (Citation omitted). Olson v. Accessory Controls and Equipment Corp., et al., 254 Conn. 145, 157 (2000). Although Connecticut courts have recognized that “statements made in the presence of third parties are usually not privileged because there is then no reasonable expectation of privacy,” they have also recognized that “the presence of certain third parties . . . who are agents or employees of an attorney or client, and who are necessary to the consultation, will not destroy the privilege.” Id.

29. At the hearings, the respondents testified that Record Ref. ## 5739 through 5744 consisted of a draft legal pleading which was prepared in response to Ms. Bosse's CHRO complaint, and on which the respondents were requested by counsel to provide comment. It is found that such document (with comments) was emailed,<sup>11</sup> as an attachment, to the following individuals, respectively: Catherine H. Smith, former commissioner of the respondents; Susan Shellard, chief administrative officer for the respondents and Ms. Bosse's supervisor; Kristen Pepin, an attorney and labor relations manager assigned to the respondents by DAS; Colleen Valentine, an assistant attorney general representing the respondents before CHRO; and Lorraine Vittner, the human resources officer assigned to the respondents by DAS.

30. In addition, by affidavit, Ms. Shellard attested that she was emailed Record Ref. #5739 through 5744 “for purposes of legal consultation,” and believed that, as Ms. Bosse's supervisor, her participation in the preparation of the answer was necessary.” By affidavit, Ms. Smith attested that her comments as well as the review of those comments by the agency human resources officer and the labor relations manager, were also “necessary for legal consultation” with respondents' counsel as she prepared the answer to the CHRO complaint.

31. Based upon the evidence in the record and careful in camera inspection, it is found that Record Ref. ## 5739 through 5744 was a communication transmitted in confidence between attorney(s) for the respondents and public official(s) and/or employee(s) acting within the scope

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<sup>11</sup> An unredacted copy of such emails was marked as Respondents' Exhibit 15 (after-filed).

of their employment. It is also found that such records related to legal advice sought by the respondents or in furtherance of the rendition of such legal advice, within the meaning of §§1-210 (b)(10) and 52-146r(2), G.S. It is further found that the respondents have not waived their claim of privilege with respect to Record Ref. ## 5739 through 5744. It is found that such record is exempt from disclosure pursuant to §1-210(b)(10), G.S. Accordingly, it is concluded that the respondents did not violate §§1-210(a) and 1-212(a), G.S., by withholding such record from the complainant.<sup>12</sup>

32. With respect to the respondents' claim that certain in camera records, or portions thereof,<sup>13</sup> were withheld because they are "non-responsive" to Items 1 and 6 of the January 17<sup>th</sup> request, it is found that such records do not refer to or mention Karen Bosse.<sup>14</sup> It is therefore found that such records are non-responsive to Items 1 and 6 of the January 17<sup>th</sup> request and need not be disclosed to the complainant in connection with this matter.

33. Accordingly, it is concluded that the respondents did not violate §§1-210(a) and 1-212(a), G.S., by withholding the records described in paragraph 32, above, from the complainant.<sup>15</sup>

34. With respect to the complainant's contention that the respondents' response was unreasonably delayed, in Advisory Opinion #51, In the Matter of a Request for Declaratory Ruling, Third Taxing District of the City of Norwalk, Applicant (Notice of Final Decision dated January 11, 1982), the Commission advised that the word "promptly," as used in §1-210(a), G.S., means "quickly and without undue delay, taking into account all of the factors presented by a particular request." The advisory opinion goes on to describe some of the factors that should be considered in weighing a request for records against other priorities: the volume of records requested; the time and personnel required to comply with a request; the time by which the person requesting records needs them; the time constraints under which the agency must complete its other work; the importance of the records to the requester, if ascertainable; and the

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<sup>12</sup> On the in camera Index, the respondents claimed that Record Ref.## 5739 through 5744 was also exempt from disclosure pursuant to §1-210(b)(1), G.S. However, in light of the conclusion in paragraph 31, above, there is no need to address any further exemption.

<sup>13</sup> Based upon a review of the redacted and unredacted copies of the records submitted in camera, the Commission notes that although the following information was claimed to be "non-responsive" on in camera Indices No. 2 and 3, similar information contained elsewhere in the in camera submission was not claimed to be "non-responsive", nor was it redacted from the redacted copies of the in camera records: Record. Ref. ## 6175 (lines 38-47), 10705 (line 10), 10707 (line 34) and 11047 (lines 59-61).

<sup>14</sup> The Commission notes that although the respondents have not claimed that lines 43-47 of Record Ref. #11047 were exempt from disclosure and/or non-responsive, similar information was claimed and found to be non-responsive as such records do not refer to or mention Karen Bosse (e.g., lines 44-48 of Record Ref. #11066).

<sup>15</sup> On in camera Index No.3, the respondents claimed that Record Ref. ## 8184 through 8186 (all), 8197 through 8199 (all), 15145 through 15449 (all), 15471 through 15473 (all), 15710 (line 6) and 15712 (all) were also exempt from disclosure pursuant to §5-225, G.S. However, in light of the conclusion in paragraph 33, above, there is no need to address the applicability of such exemption.



importance to the public of completing the other agency business without the loss of the personnel time involved in complying with the request.

35. It is found that Ms. Knight is the individual primarily responsible for compiling records responsive to and coordinating responses (with a staff attorney in the respondents' Legal Department) to records requests. It is found that at the time of the January 17<sup>th</sup> request, there were eight records requests pending and that subsequent to January 2020, the respondents received an additional 28 requests. It is found that Ms. Knight worked continuously on the January 17<sup>th</sup> request and produced records on a rolling basis. It is found that contemporaneous with the January 17<sup>th</sup> request, Ms. Knight was also working on the state's production of documents (approximately 11,626 pages) in a federal lawsuit brought against the respondents by the complainant's client, Ms. Bosse.

36. In addition, Ms. Knight testified that the delay in responding to the complainant's January 17<sup>th</sup> request was due, in part, to the fact that she was out of the office on medical leave and had assumed that the complainant had forwarded the January 17<sup>th</sup> request to Attorney Kurker-Stewart as instructed in the automatic out of office reply. She also testified that the COVID-19 pandemic has made it difficult to process records requests given the restrictions on being in the office.

37. While the Commission recognizes that not all responsive records had been provided to the complainant as of the time of the contested case hearings in this matter, it is found that the respondents did a significant amount of work to produce the volume of records that were disclosed to the complainant. It is also found that the delay in responding to the January 17<sup>th</sup> request was caused, in part, by the complainant's own conduct as described in paragraph 4, above. It is found, based on all of the evidence and the entire record in this case, that the respondents have been appropriately responsive to the complainant's request and have made reasonable efforts to promptly comply with a voluminous records request.

On the basis of the record concerning the above-captioned matter, and the specific facts and circumstances of the case, which indicate that the respondents were, and remain, committed to processing the complainant's records request and providing records responsive to such request, no order is recommended.

Approved by Order of the Freedom of Information Commission at its regular meeting of January 12, 2022.



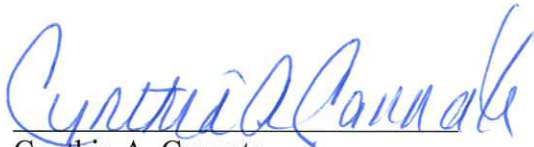
Cynthia A. Cannata  
Acting Clerk of the Commission

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:

**CLAIRE HOWARD**, Madsen, Prestley & Parenteau, LLC, 402 Asylum Street, Hartford, CT 06103

**COMMISSIONER, CONNECTICUT DEPARTMENT OF ECONOMIC COMMUNITY DEVELOPMENT; AND CONNECTICUT DEPARTMENT OF ECONOMIC COMMUNITY DEVELOPMENT**, c/o Assistant Attorney General James W. Caley, State of Connecticut, Office of the Attorney General, 165 Capitol Avenue, Hartford, CT 06106



Cynthia A. Cannata  
Acting Clerk of the Commission