

FREEDOM OF INFORMATION COMMISSION
OF THE STATE OF CONNECTICUT

In the Matter of a Complaint by

FINAL DECISION

Mark Wozar,

Complainant

against

Docket #FIC 2022-0095

Commissioner, State of Connecticut,
Department of Children and Families; and
State of Connecticut, Department of
Children and Families,

Respondents

February 8, 2023

The above-captioned matter was heard as a contested case on October 17, 2022, at which time the complainant and the respondents appeared 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 January 27, 2022, the complainant requested the following records:
 - (a) “[a]ny and all reports (to include correspondence with a third party, I believe named Maximus,) involving my investigations for and relating to allegations of”:
 - i. hostile work environment;
 - ii. fraud; and
 - iii. waste.
 - (b) “[a]ny and all electronic correspondence from all parties dealing with this matter”.
3. It is found that, by email dated the same day, the respondents acknowledged the complainant’s records request and forwarded the request to the appropriate staff within the respondent agency.
4. By letter of complaint, dated February 25, 2022, the complainant appealed to this Commission, alleging that the respondents violated the Freedom of Information (“FOI”) Act by failing to provide the records, described in paragraph 2, above.

5. 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 1-218, whether such data or information be handwritten, typed, tape-recorded, videotaped, printed, photostated, photographed or recorded by any other method.

6. Section 1-210(a), G.S., provides, in relevant part:

[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.

7. Section 1-212(a), G.S., provides, in relevant part: “[a]ny person applying in writing shall receive, promptly upon request, a plain, facsimile, electronic or certified copy of any public record.”

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

9. With regard to the request described in paragraph 2(a), above, it is found that, by letter dated April 11, 2022, the respondents disclosed to the complainant an unredacted copy of a report entitled, CT-KIND Investigation Results Document (“CT-KIND report”).

10. At the hearing in this matter, the respondents testified, and it is found, that the CT-KIND report is the only record responsive to the complainant’s request, described in paragraph 2(a), above. It is therefore found that the respondents disclosed all records responsive to such request.

11. With regard to the request described in paragraph 2(b), above, it is found that, by emails dated April 11, 2022, May 27, 2022, June 6, 2022, and July 18, 2022, the respondents provided to the complainant copies of responsive records. It is also found that the respondents redacted certain information from such records.

12. The respondents testified, and it is found, that the records described in paragraph 11, above, represent all records responsive to the complainant’s request, described in paragraph 2(b), above. The respondents also testified that the redacted portions of the records are exempt from disclosure, pursuant to §§1-210(b)(10) and 1-210(b)(20), G.S.

13. At the hearing in this matter, the complainant challenged the redactions described in paragraph 11, above, and argued that the claimed exemptions were not properly applied to the records at issue.

14. Pursuant to an order of the hearing officer, the respondents submitted to the Commission an unredacted copy of the records for an in camera inspection, along with an in camera index.¹ Such records were submitted by the respondents on December 13, 2022 and shall be identified hereinafter as IC-2022-0095-1 through IC-2022-0095-1940.

15. On the in camera index, the respondents contended that the information redacted from the in camera records is exempt from disclosure under §§1-210(b)(19), 1-210(b)(20) and 5-225², G.S., the attorney-client privilege, and the federal Privacy Act. The respondents also contended that some redacted records were “exempt” because they are outside the scope of the request.

16. With regard to the respondents’ claim that certain redacted portions of the in camera records, as indicated on the in camera index, contained information exempt from disclosure pursuant to §1-210(b)(19), G.S., such statute provides, in relevant part, that nothing in the FOI Act shall be construed to require disclosure of:

[r]ecords when there are reasonable grounds to believe that disclosure may result in a safety risk, including the risk of harm to any person, any government-owned or leased institution or facility or any fixture or appurtenance and equipment attached to, or contained in, such institution or facility ... Such reasonable grounds shall be determined (A) (i) by the Commissioner of Administrative Services, after consultation with the chief executive officer of an executive branch state agency, with respect to records concerning such agency.... (Emphasis added.)

17. Section 1-210(d), G.S., provides, in relevant part:

[w]henever a public agency ... receives a request from any person for disclosure of any records described in subdivision (19) of subsection (b) of this section under the Freedom of Information Act, the public agency shall promptly notify the Commissioner of Administrative Services ... of such request in the matter prescribed by such commissioner, before complying with the request as

¹ The respondents represented that the in camera submission consisted of an unredacted and redacted version of all responsive records, not just the records they claimed are exempt from disclosure. (See footnote number 3, below.)

² Although, on the in camera index, the respondents cited “CGS 5-25”, it appears they intended to cite to §5-225, G.S.

required by the Freedom of Information Act ... If the commissioner, after consultation with the chief executive officer of the applicable agency ... believes the requested records is exempt from disclosure pursuant to subdivision (19) of subsection (b) of this section, the commissioner may direct the agency to withhold such records from such person (Emphasis added.)

18. It is found that the respondents failed to provide any evidence or testimony that they “promptly notif[ied] the Commissioner of the Department of Administrative Services” of the complainant’s request or that such commissioner determined that disclosure may result in a safety risk, and therefore directed the respondents to withhold such records from the complainant.

19. It is therefore concluded that the respondents failed to prove that the information contained in the redacted portions of the in camera records, identified in paragraph 16, above, is exempt from disclosure pursuant to §1-210(b)(19), G.S.

20. Accordingly, it is concluded that the respondents violated the FOI Act by withholding the information contained in the portions of the in camera records, identified in paragraph 16, above.

21. With regard to the respondents’ claim that certain portions of the in camera records, as indicated on the in camera index, contain information exempt from disclosure pursuant to §1-210(b)(20), G.S., such statute provides that disclosure is not required of “[r]ecords of standards, procedures, processes, software and codes, not otherwise available to the public, the disclosure of which would compromise the security or integrity of an information technology system....” (Emphasis added.)

22. At the hearing in this matter, the respondents testified, and it is found, that some of the in camera records are related to “CT-KIND”, which is an information technology system currently under development by the respondent agency. It is also found that the agency considers such system to be proprietary software.

23. The respondents argued that §1-210(b)(20), G.S., allowed for the redaction of any “code or screen prints” related to the agency’s “proprietary software” not otherwise available to the public. Upon questioning, the respondents’ witness, Attorney Lynn Hebert, testified: “[a]nything that looked like code to me, or was a screen print, I redacted out ... I’m not a computer person.”

24. It is found that the redacted portions of the in camera records, as indicated on the in camera index, are screenshots of software or code from the agency’s information technology system, CT-KIND, and that such software or code is not otherwise available to the public. It is also found, however, that the respondents did not offer evidence as to how, or if, disclosure of the requested records “would compromise the security or integrity” of CT-KIND.

25. It is therefore found that the respondents failed to prove that disclosure of such records would compromise the security or integrity of an information system.

26. Accordingly, it is concluded that the respondents failed to prove that the information contained in the redacted portions of the in camera records, described in paragraph 24, above, is exempt from disclosure pursuant to §1-210(b)(20), G.S.

27. It is further concluded that the respondents violated the FOI Act by withholding the information contained in the portions of the in camera records, described in paragraph 24, above.

28. With regard the respondents' claim that certain portions of the in camera records contain information exempt from disclosure pursuant to §5-225, G.S., that statute provides in relevant part:

[a]ll persons competing in any examination shall be given written notice of their final earned ratings and the minimum earned rating necessary to pass the examination. Not later than thirty days after the issuance of the final earned rating, a person who has not achieved a passing rating may inspect his or her papers, markings, background profiles and other items used in determining the final earned ratings, other than examination questions and other materials constituting the examination... Not later than ten days after inspecting his or her papers, a person may, in writing, appeal to the Commissioner of Administrative Services the accuracy of his or her final earned rating, as based on the original examination paper or responses. The commissioner shall render a final decision on the person's appeal within thirty days thereafter and correct candidate lists as appropriate.

29. It is found that, on the in camera index, the respondents claimed that the name of an applicant for a position within the respondent agency is exempt from disclosure, pursuant to §5-225, G.S., and in support of their position, the respondents cited to Docket #FIC 2013-129, Adam Osmond v. Commissioner, State of Connecticut, Department of Administrative Services, et. al (October 9, 2013).

30. It is found that, in Osmond, the Commission concluded that "employment applications" for state employment, known as Form CT-HR-12, are exempt from mandatory disclosure pursuant to §5-225, G.S. However, after Osmond, the Commission, in Docket #FIC 2015-109, Natale v. Commissioner, State of Connecticut, Department of Education, et al (October 14, 2015), clarified that Form CT-HR-12 is used by the state as both an "application" and an "examination", depending on whether the position is non-competitive or competitive, respectively. The Commission concluded that Form CT-HR-12 is exempt from disclosure only when it is used as an "examination". After careful inspection of the in camera records, it is found that none of the in camera records, or any portion thereof, is an "examination" and that, §5-225, G.S., does not exempt such records, or portions thereof, from disclosure.

31. It is therefore concluded that the information contained in the redacted portions of the in camera records, described in paragraph 29, above (identified on the in camera index as page 1105³), is not exempt from disclosure pursuant to §5-225, G.S., and that the respondents violated the FOI Act by failing to disclose the records described in paragraph 29, above.

32. With regard to the respondents' claim that certain portions of the in camera records are exempt from disclosure pursuant to the attorney-client privilege, §1-210(b)(10), G.S., permits a public agency to withhold from disclosure records of "communications privileged by the attorney-client privilege."

33. 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.

34. 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. . . .

35. 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.

36. After a careful inspection of the in camera records, it is found that the portions of the records identified on the in camera index as "[a]ttorney client communication" (IC-222-0095-441 and IC-2022-0095-456) consist of email communications between employees of the respondent agency and the respondents' legal counsel; that the attorney was acting in her official capacity as legal counsel to the public agency; that the emails relate to legal advice sought by the public agency from the attorney; and that the communications were made in confidence.

³ The Commission notes that IC-2022-0095-1105 does not match the same page number in the packet of corresponding redacted records disclosed to the complainant, where it is numbered page 1104. The Commission further notes that page 1146 of the in camera records disclosed to the Commission (IC-2022-0095-1146) does not exist in the corresponding packet of redacted records disclosed to the complainant (see Order number 2, below).

37. It is therefore concluded that the information contained in the portions of the in camera records, described in paragraph 36, above, are protected by the attorney-client privilege and that the respondents did not violate §1-210(b)(10), G.S., by withholding such portions of the in camera records from the complainant.

38. With regard to the respondents' claim that the redacted portions of the in camera records contain information exempt from disclosure pursuant to the federal Privacy Act (5 U.S.C. §552a et seq.), it is found that the restrictions on disclosure apply to an "agency" as defined by 5 U.S.C. §552a(a)(1).

39. 5 U.S.C. §552a(a)(1) provides, in relevant part: "the term 'agency' means agency as defined in section 552(e) of this title." In turn, §552(e) refers to the definition provided in the federal FOI Act, which provides, in relevant part: "'agency' as defined in section 551(1) of this title includes any executive department, military department, Government corporation, Government controlled corporation, or other establishment in the executive branch of the Government (including the Executive Office of the President), or any independent regulatory agency." See Danaher, 2008 WL 4308212, at *2 ("[T]he [federal act] and the Privacy Act apply only to 'agencies' as that term is defined under 5 U.S.C. § 551(1) and § 552(e). Under these definitions, 'agency' does not encompass state agencies or bodies."). See also Docket #FIC 2016-0427, Randy Dixon v. Armando J. Perez, Chief, Police Department, City of Bridgeport, et al. (April 12, 2017); Docket #FIC 2015-373, George Martocchio v. Superintendent of Schools, Regional School District #7, et al. (February 10, 2016); Docket #FIC 2015-122, Yvette Tyson v. Chief Executive Officer, Stamford Housing Authority, City of Stamford, et al. (January 13, 2016); and Docket #FIC 2012-673, Socorro Barron v. Property Manager, Ridgefield Housing Authority, et al. (July 24, 2013).

40. It is found that the respondent are not agencies of the United States government.

41. It is therefore concluded that the federal Privacy Act does not operate to exempt from disclosure the in camera records, or portions thereof, at issue in this case. It is further concluded that the respondents violated the FOI Act by not disclosing the portions of the in camera records described in paragraph 38, above.

42. With regard to the respondents' claim that certain portions of the in camera records, as indicated on the in camera index, are "exempt" from disclosure because they fall outside the scope of the request, such records are described on the in camera index as "[s]tatements of Catherine Foley".

43. It is found that the respondents did not offer any evidence or testimony at the hearing as to why such records should be considered outside the scope of the complainant's request.

44. After a careful inspection of the in camera records, it is found that the portions of the in camera records described in paragraph 42, above, are responsive to the complainant's request.

45. It is therefore concluded that the respondents violated the FOI Act by not disclosing the portions of the in camera records described in paragraph 42, above.

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

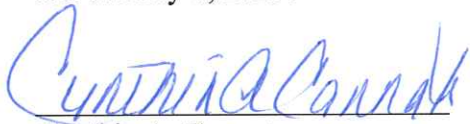
1. Forthwith, the respondents shall provide the complainant with a copy of the in camera records described in paragraphs 16, 24, 29, 38, and 42, in the findings above, free of charge.

2. Forthwith, the respondents shall provide the complainant with a copy of IC-2022-0095-1146, as identified in the copy provided to the Commission, if not previously disclosed to the complainant, free of charge.

3. Within one week of the date of the Notice of Final Decision in this matter, the respondents shall contact the Commission's public education officer to schedule training on the FOI Act.

4. Henceforth, the respondents shall strictly comply with §§1-210(a) and 1-212(a), G.S.

Approved by Order of the Freedom of Information Commission at its regular meeting of February 8, 2023.



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:

MARK WOZAR, 38 West Maxwell, West Hartford, CT 06107

COMMISSIONER, STATE OF CONNECTICUT, DEPARTMENT OF CHILDREN AND FAMILIES; AND STATE OF CONNECTICUT, DEPARTMENT OF CHILDREN AND FAMILIES, c/o Attorney Lynn Hebert, State of Connecticut, Department of Children and Families, 505 Hudson Street, Hartford, CT 06106



Cynthia A. Cannata
Acting Clerk of the Commission