

STATE OF CONNECTICUT
FREEDOM OF INFORMATION COMMISSION

In the Matter of a Complaint by

FINAL DECISION

Sheri Speer,

Complainant

against

Docket # FIC 2022-0473

Corporation Counsel, Office of Corporation
Counsel, City of Norwich; Office of
Corporation Counsel, City of Norwich; and
City of Norwich,

Respondents

September 27, 2023

The above-captioned matter was heard as a contested case on July 13, 2023, and August 24, 2023, at which times the complainant and the respondents appeared, stipulated to certain facts, and presented testimony, exhibits and argument on the complaint.

On August 30, 2023, the respondents submitted an after-filed exhibit, which has been marked as Respondents' Exhibit 1 (after-filed): Affidavit of Michael E. Driscoll. On September 5, 2023, the complainant objected to the Respondents' Exhibit 1 (after-filed). The undersigned hearing officer accepted the affidavit as a full exhibit over such objection (but see the findings in paragraphs 22 through 25 of the findings below).

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 letter dated September 13, 2022, the complainant requested that the respondents provide her with copies of the following records:

[a.] A copy of all invoices sent to the City of Norwich and Norwich Public Utilities dated between January 1, 2012 and the present.

[b.] A copy of all checks and payments received from the City of Norwich and Norwich Public Utilities dated between January 1, 2012 and the present.

[c.] A copy of all insurance policies provided to the City of Norwich and Norwich Public Utilities dated between January 1, 2012 and the present.

[d.] A copy of all payments received by you or your office for legal fees and costs relating to your representation of the City of Norwich or Norwich Public Utilities between January 1, 2012 and the present.

[e.] A copy of all emails, faxes, documents and communications sent to or received by you by the City of Norwich and Norwich Public Utilities regarding Sheri Speer, and/or a Bankruptcy Case assigned docket number 14-21007.

[f.] Copies of all payments made to you by the Superior Court and/or state marshals as a consequence of any collections matter you prosecuted for the City of Norwich and/or Norwich Public Utilities between January 1, 2012 and the present.

3. It is found that the respondents did not acknowledge the complainant's request, described in paragraph 2, above.

4. By letter dated October 10, 2022, and filed with the Commission on October 13, 2022, the complainant appealed to this Commission alleging that the respondents violated the Freedom of Information ("FOI") Act by failing to comply with the request described in paragraph 2, above.

5. By motion dated and received on June 21, 2023, the respondents moved to dismiss the complaint for lack of subject matter jurisdiction, contending that: (a) the complainant's request described in paragraph 2, above, was made to a private entity, namely Brown Jacobson, P.C., that is not a "public agency," and, therefore, is not subject to the FOI Act; (b) two of the three respondents named in the caption to the case, "Corporation Counsel, Office of Corporation Counsel, City of Norwich" and "Office of Corporation Counsel, City of Norwich" do not exist; and (c) the complainant's request was not made to any of the captioned respondents.

6. On July 12, 2023, the complainant filed an objection to the respondents' motion to dismiss, contending that she properly sent the records request described in paragraph 2, above, to the Corporation Counsel for the City of Norwich at the address provided on its website, which is Brown Jacobson P.C., 22 Courthouse Square, Norwich, CT 06360.

7. It is found that the complainant's records request described in paragraph 2, above, was mailed to the following address:

Brown Jacobson PC
PC 22 Courthouse Square
Norwich, CT 06360

8. It is found that the complainant addressed the records request described in paragraph 2, above, to “whom it may concern,” and stated in her records request, in relevant part, the following: “Please regard this as a request pursuant to the Freedom of Information Act. It is directed toward you and your attorneys as officials of the City of Norwich in your public capacity acting as such.”

9. It is found that, by resolution dated December 21, 2021, the City of Norwich appointed “Attorney Michael E. Driscoll, of the firm of Brown Jacobson P.C., as the Corporation Counsel for the City of Norwich.”

10. It is found that, by the same resolution described in paragraph 9, above, the City of Norwich appointed Attorney Aimee L. Siefert, of the firm of Brown Jacobson P.C., as Assistant Corporation Counsel, and authorized six additional attorneys from Brown Jacobson P.C. to Assist Attorney Driscoll and Attorney Siefert in carrying out their duties.

11. It is found that, on its website, the Corporation Counsel for the City of Norwich identifies its physical address as follows:

22 Courthouse Sq.
c/o Brown Jacobson P.C.
Norwich, CT 06360

12. At the hearing on July 13, 2023, the respondents contended that only Attorney Driscoll is the Corporation Counsel for the City of Norwich, not Brown Jacobson P.C. The respondents contended further that, because the complainant did not include Attorney Driscoll’s name on the September 13, 2022 records request when she mailed such request to Brown Jacobson P.C., her complaint should be dismissed.

13. It is found that the respondents’ assertion that the complainant did not send her request to the Corporation Counsel for the City of Norwich because she mailed it to the address provided but did not include Attorney Driscoll’s name is disingenuous and contravenes important policy objectives of the FOI Act. See Perkins v. Freedom of Information Commission, 228 Conn. 158, 166-68 (1993) (noting that, “[a]s a practical matter, the FOIA is used repeatedly by members of the public who are unschooled in technical, legalistic language distinctions,” and that, in light of the public policy expressed by the FOI Act, the act should be construed so as to avoid overly formal and legalistic requirements).¹

14. It is concluded that the complainant properly mailed her records request to the mailing address provided on the Corporation Counsel for the City of Norwich’s website. It is further found that there was no dispute that Attorney Driscoll received such request.

¹ With respect to the respondents’ contention that the Corporation Counsel, Office of the Corporation Counsel, City of Norwich does not exist, such a claim is befuddling given the City of Norwich’s resolution appointing Attorney Michael E. Driscoll, of the firm of Brown Jacobson P.C., to be the Corporation Counsel for the City of Norwich. Nevertheless, at the hearing on July 13, 2023, the respondents did not advance this argument.

15. Accordingly, for the reasons set forth above, the hearing officer denied the respondents' motion to dismiss at the July 13, 2023 hearing on the matter and such denial is reaffirmed herein.

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

17. 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 . . . (3) receive a copy of such records in accordance with section 1-212.

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

19. It is concluded that the requested records, to the extent that they exist and are maintained by the respondents, are public records within the meaning of §§1-200(5) and 1-210(a), G.S.

20. It is found that under cover letter dated August 21, 2023, the respondents provided the complainant with copies of 53 pages of records responsive to the requests described in paragraphs 2[b] and 2[d], above. It is found that the respondents informed the complainant that they did not have records responsive to the requests described in paragraphs 2[c] and 2[f], above. In addition, it is found that the respondents informed the complainant that any records responsive to the request described in paragraph 2[e], above, would be exempt from disclosure as “privileged” and under §1-210(b)(2) (claiming that the disclosure of the records would constitute “invasions of the privacy and perhaps the business relations of the law firm and its attorneys with no legitimate overriding public interest in public disclosure”). It is also found that the respondents informed the complainant that searching for any records responsive to the request described in paragraph 2[e], above, would be unreasonably burdensome.

21. At the hearing on August 24, 2023, the respondents reiterated the contentions contained in the August 21, 2023, letter described in paragraph 20, above. It is found that Attorney Driscoll, who has served as Corporation Counsel for the City of Norwich since 2001,

also reiterated, in his affidavit marked as Respondents' Exhibit 1 (after-filed), the same contentions contained in the August 21, 2023 letter described in paragraph 20, above.

22. It is found, however, that the respondents did not offer any witnesses at the hearing on August 24, 2023 despite the hearing officer's request that they do so at the July 13th hearing. Thus, no evidence was presented at the hearings in the matter regarding the manner and scope of the respondents' search for records or in support of the respondents' claimed exemptions to disclosure.

23. It is also found that, although Attorney Driscoll's Affidavit describes very limited aspects of the respondents' search for records responsive to the requests described in paragraphs 2[a], 2[b], 2[c], 2[d] and 2[f], above, it fails to sufficiently detail the nature and scope of the respondents' search for such records.

24. It is finally found that the respondents failed to prove that they performed a diligent and thorough search for all of the records requested by the complainant described in paragraphs 2[a], 2[b], 2[c], 2[d] and 2[f], above.

25. It is concluded that the respondents violated §§ 1-210(a) and 1-212(a), G.S., by failing to prove that no other records exist that are responsive to the complainant's requests described in paragraphs 2[a], 2[b], 2[c], 2[d] and 2[f], above.

26. With respect to the request described in paragraph 2[e], above, it is found that the respondents failed to take any steps whatsoever to search for or retrieve any records responsive to such request.

27. Further, with respect to the request described in paragraph 2[e], above, the respondents maintain that it would require an unreasonably burdensome search and that the complainant's failure to frame her response with sufficient particularity made it difficult for them to determine precisely what records were requested. The respondents further claim that such request is so unclear that it would require "research" to determine which records might be "regarding" Sheri Speer and/or a Bankruptcy Case assigned docket number 14-21007.

28. In addressing the respondents' contentions described in paragraph 27, above, the Commission is guided by the Appellate Court's decision in Wilden v. Freedom of Information Commission, 56 Conn. App. 683, 686-87 (2000) wherein the Court concluded that a records request involves research if it does not specifically identify the records sought and the public agency must exercise discretion to determine whether the records sought fall within the request. The Appellate Court also concluded that "[a] records request that is simply burdensome does not make that request one requiring research." Id. at 687. (Emphasis added).

29. The Superior Court has also concluded that a burdensome request does not relieve a public agency from its obligations to comply with that request under the FOI Act. See Office of Corporation Counsel of City of Danbury v. Freedom of Infor. Comm'n, Docket No. CV-12-

6017045S, 2013 WL 5289790 (Conn. Super. Ct.) (August 23, 2013), citing Wilden v. Freedom of Information Commission, 56 Conn. App. 683 (2000).²

30. It is found that the request described in paragraph 2[e], above, specifically identifies the records sought. It is also found, based on a reasonable reading, that the request is for specific records, namely, emails, faxes, documents and communications sent to or received by the Corporation Counsel, by the City of Norwich and Norwich Public Utilities regarding Sheri Speer and/or a Bankruptcy Case assigned docket number 14-21007. It is further found that the respondents were not required to exercise discretion or analysis to comply with such request.

31. It is concluded, therefore, that the complainant's request described in paragraph 2[e], above, did not require research as that term has been defined under the FOI Act.

32. Moreover, it is found that the respondents failed to prove that a search for records responsive to the request described in paragraph 2[e], above, would be too burdensome. Regardless, as stated in paragraph 29, above, even if such request were broad and compliance therewith burdensome, the respondents would not be relieved of their obligation to promptly comply with such request pursuant to §§1-210(a) and 1-212(a), G.S.

33. The respondents also contended that any records responsive to the complainant's request described in paragraph 2[e], above, would be exempt pursuant to §1-210(b)(2), G.S., because disclosure of such records would constitute an invasion of the privacy and business relations of Brown Jacobson, P.C. and its attorneys.

34. Section 1-210(b)(2), G.S., provides that nothing in the FOI Act shall be construed to require the disclosure of "[p]ersonnel or medical files and similar files the disclosure of which would constitute an invasion of personal privacy."

35. The Supreme Court set forth the test for the exemption contained in §1-210(b)(2), G.S., in Perkins v. Freedom of Information Commission, 228 Conn. 158, 175 (1993). The claimant must first establish that the files in question are personnel, medical or similar files. Second, the claimant must show that disclosure of the records would constitute an invasion of personal privacy. In determining whether disclosure would constitute an invasion of personal privacy, the claimant must establish both of two elements; first, that the information sought does not pertain to legitimate matters of public concern, and second, that such information is highly offensive to a reasonable person.

36. In accordance with the Perkins test, the first determination is whether the records at issue constitute personnel, medical or similar files. The Commission "interpret[s] the term 'similar files' to encompass only files similar in nature to personnel or medical files. This interpretation is consistent with [the] policy of narrowly construing exceptions to the [FOI A]ct." Superintendent of Police v. Freedom of Information Commission, 222 Conn. 621, 627-28 (1992); Hartford v. Freedom of Information Commission, 201 Conn. 421, 432 n. 11 (1986).

² In their August 21, 2023 letter, described in paragraph 20, above, as well as the Respondents' Exhibit 1 (after-filed), the respondents cite several cases to support their claim that a search is not required under the FOI Act if it is burdensome. Such cases either do not stand for the premise for which they are cited, are federal cases interpreting the federal Freedom of Information Act, or are factually distinguishable from the present case.

37. “[A] ‘personnel’ file has as one of its principal purposes the furnishing of information for making personnel decisions regarding the individual involved. If a document or file contains material, therefore, that under ordinary circumstances would be pertinent to traditional personnel decisions, it is ‘similar’ to a personnel file. Thus, a file containing information that would, under ordinary circumstances, be used in deciding whether an individual should, for example, be promoted, demoted, given a raise, transferred, reassigned, dismissed or subject to other such traditional personnel actions, should be considered ‘similar’ to a personnel file for the purposes of § [1-210](b)(2).” Connecticut Alcohol & Drug Abuse Commission v. Freedom of Information Commission, 233 Conn. 28, 41 (1995).

38. “The determination whether a file is a “personnel or medical files and similar files” requires “a functional review of the documents at issue.” Connecticut Alcohol & Drug Abuse Commission v. Freedom of Information Commission, 233 Conn. at 40-41.

39. Section 1-214, G.S., provides in relevant part that:

(b) Whenever a public agency receives a request to inspect or copy records contained in any of its employees’ personnel or medical files and similar files and the agency reasonably believes that the disclosure of such records would legally constitute an invasion of privacy, the agency shall immediately notify in writing (1) each employee concerned, provided such notice shall not be required to be in writing where impractical due to the large number of employees concerned and (2) the collective bargaining representative, if any, of each employee concerned. Nothing herein shall require an agency to withhold from disclosure the contents of personnel or medical files and similar files when it does not reasonably believe that such disclosure would legally constitute an invasion of personal privacy.

(c) A public agency which has provided notice under subsection (b) of this section shall disclose the records requested unless it receives a written objection from the employee concerned or the employee’s collective bargaining representative. . . . Upon the filing of an objection as provided in this subsection, the agency shall not disclose the requested records unless ordered to do so by the Freedom of Information Commission pursuant to section 1-206.
(Emphasis supplied.)

40. First, it is found that the respondents failed to prove that the records or files of any employees fitting the criteria referenced in §1-214, G.S., are at issue, or that they notified any

such employees of the complainant's records request described in paragraph 2[e], above, as required.

41. It is also found that the request described in paragraph 2[e], above, does not seek copies of personnel, medical or similar files. Further, it is found that the respondents failed to proffer any evidence regarding the responsive records and how such records could possibly constitute personnel, medical or similar files; indeed, the respondents have not conducted any search responsive to such request and have not submitted any records to the Commission for in camera inspection.

42. It is found, therefore, that the respondents failed to prove that any records responsive to the complainant's request described in paragraph 2[e], above, would constitute a "personnel," "medical" or "similar" file within the meaning of §1-210(b)(2), G.S. It is therefore unnecessary for the Commission to determine whether disclosure would constitute an invasion of personal privacy under the second prong of the Perkins test.

43. With respect to the respondents' contention that any records responsive to the complainant's request described in paragraph 2[e], above, are protected by the attorney-client privilege, such exemption is contained in §1-210(b)(10), G.S., and is governed by established Connecticut law defining the privilege. That law is well set forth in Maxwell v. Freedom of Infor. Comm'n, 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.

44. Section 52-146r(2), G.S., defines "confidential communications" as:

[a]ll 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...

45. A four-part test must be applied to determine whether communications are privileged: "(1) the attorney must be acting in a professional capacity for the agency; (2) the communications must be made to the attorney by current employees or officials of the agency; (3) the communications must relate to the legal advice sought by the agency from the attorney, and (4) the communications must be made in confidence." Lash v. Freedom of Information Commission, 300 Conn. 511, 516 (2011), citing Shew v. Freedom of Information Commission, 245 Conn. 149, 159 (1998).

46. It is found that the respondents failed to provide any evidence regarding the four-part test described in paragraph 45, above, regarding any records responsive to the request described

in paragraph 2[e], above; as stated previously, the respondents have not conducted any search responsive to such request and have not submitted any records to the Commission for in camera inspection.

47. It is found, therefore, that the respondents failed to prove that any records responsive to the complainant's request described in paragraph 2[e], above, would be protected by the attorney-client privilege or any other privilege.³

48. It is concluded, therefore, that that the respondents violated §§1-210(a) and 1-212(a), G.S., by failing to promptly comply with the complainant's request described in paragraph 2[e], above.

49. With respect to the complainant's claim that the records were not provided to her "promptly," the Commission has held that the meaning of the word "promptly" is a particularly fact-based question. In Advisory Opinion #51, In the Matter of a Request for Declaratory Ruling, Third Taxing District of the City of Norwalk, Applicant (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 consideration all of the factors presented by a particular request.

50. 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 importance to the public of completing the other agency business without the loss of the personnel time involved in complying with the request. In addition, common sense and good will ought to be the guiding principles.

51. It is found that the respondents did not make any effort to search and gather records responsive to the complainant's request described in paragraph 2, above, until, at least, ten months after the date of such request.

52. The respondents contended that, because the complainant mailed the request described in paragraph 2, above, to Brown Jacobson, P.C., they believed they were not required to conduct a search for responsive records. As noted above, such argument is disingenuous. Nevertheless, it is found that the respondents failed to provide the complainant with any responsive records until 39 days after their motion to dismiss was denied by the hearing officer. It is found that the respondents failed to provide any evidence regarding a justification for the additional 39-day delay or any of the promptness factors, including, for example, the time and personnel required to comply with the request, the time constraints under which the respondents were required to complete other work, or the respondents' other priorities.

³ In their August 21, 2023 letter, described in paragraph 20, above, as well as Attorney Driscoll's affidavit, the respondents also claimed that any responsive records would be exempt as "work product or otherwise protected communications." It is found that the respondents also failed to provide any evidence or legal analysis with regard to such claim. Assuming, without deciding, that such a claim would constitute a valid exemption to disclosure pursuant to the FOI Act, it is found that the respondents failed to prove it.

53. It is therefore concluded that the respondents violated the promptness provisions of §§1-210(a) and 1-212(a), G.S.

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

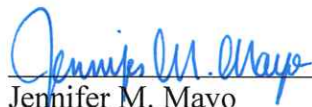
1. Within forty-five days of the date of the Notice of Final Decision in this matter, the respondents shall perform a diligent and thorough search for all records responsive to the request described in paragraph 2 of the findings, above, and provide an affidavit to the complainant and to the Commission detailing the nature and scope of the search. If no responsive records are located with respect to any individual item set forth in paragraph 2 of the findings, above, the respondents shall so state in the affidavit. If responsive records are located, the respondents shall so state in the affidavit and immediately provide copies of such records to the complainant, free of charge.

2. If the respondents claim that any of the new found responsive records constitute privileged attorney-client communications, they shall provide a privilege log identifying each of the records claimed to be exempt and the legal basis for such claimed exemption within forty-five days of the date of the Notice of Final Decision in this matter.

3. If the respondents fail to comply with the timelines set forth in paragraphs 1 and 2 of this order, or the complainant takes issue with exemptions claimed, the complainant may file an appeal with the Commission and such appeal will be afforded expedited treatment.

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

Approved by Order of the Freedom of Information Commission at its regular meeting of September 27, 2023.



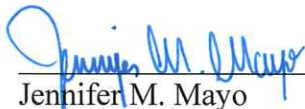
Jennifer M. Mayo
Acting Clerk of the Commission

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:

SHERI SPEER, 151 Talman Street, Norwich, CT 06360

CORPORATION COUNSEL, OFFICE OF CORPORATION COUNSEL, CITY OF NORWICH; OFFICE OF CORPORATION COUNSEL, CITY OF NORWICH; AND CITY OF NORWICH, c/o Attorney Michael P. Carey, Suisman Shapiro Wool Brennan Gray & Greenberg PC, P.O. Box 1591, New London, CT 06320



Jennifer M. Mayo
Acting Clerk of the Commission