

FREEDOM OF INFORMATION COMMISSION
OF THE STATE OF CONNECTICUT

In the Matter of a Complaint by

FINAL DECISION

Adam Osmond,

Complainant

against

Docket #FIC 2023-0636

William Tong, Attorney General,
State of Connecticut, Office of
the Attorney General; and
State of Connecticut, Office
of the Attorney General,

Respondents

November 20, 2024

The above-captioned matter was heard as a contested case on August 12, 2024, at which time 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, by email dated June 7, 2023, the complainant requested that the respondents provide him with a copy of the following records:
 - a. All emails (including all attachments), texts, memos, and notes pertaining to myself or any of my cases produced or received between 07/01/2008 and 06/07/2023 by any attorneys handling my cases or complaints and their respective supervisors and managers;
 - b. All emails (including all attachments), texts, memos, and notes regarding the whistleblower complaints I filed against the Department of Economic and Community Development (DECD) and the Department of Children and Families (DCF). These should be any documents produced between 07/01/2008 and 06/07/2023 by attorneys handling my cases or complaints and their

supervisors and managers;

- c. All communications between Richard Gordon and any representative from the Attorney General's office pertaining to any of my cases;
- d. All documents sent or received by the Attorney General's office that relate to me;
- e. Any research conducted about me by any attorney who has handled my cases or complaints, as well as their supervisors and managers, covering the time period from 07/01/2008 and 06/07/2023;
- f. All emails (including all attachments), texts, or other documents exchanged between anyone at DECD and the Attorney General's office pertaining to DECD's Lending Partners and delinquent loans;
- g. All policies, regulations, and documents related to your agency's procedures before defending any State agency or state employee accused of discrimination and whistleblower retaliation;
- h. Detailed records of any databases or other mechanisms that your agency utilizes to track discrimination and whistleblower cases your office handles in defense of state agencies or state employees. This includes all fields in the database;
- i. Any research or analysis conducted by your agency regarding its diversity from 07/01/2008 and 06/07/2023;
- j. Any documents related to initiatives or efforts made to increase diversity within your agency; and
- k. All EEO¹ Application Tracking Data Chart forms or sheets that indicate the race and gender of all applicants for all A&R positions that your agency has filed from 07/01/2008 and 06/07/2023.

3. It is found that, by letter dated June 14, 2023, the respondents acknowledged the complainant's request. It is further found that the respondents informed the complainant that:

¹ The Commission notes that "EEO" is an acronym for Equal Employment Opportunity.

...we are in the process of searching and gathering documentation which may be responsive to your request. Once the documents are gathered, if any, we must then conduct a review of said documents to determine if statutory exemptions to disclosure may apply to some or all of the documents. Please note that this is an extensive search which may take several months. Also, once the documents are gathered, we will notify you of all copying costs and will require payment prior to forwarding the documents. We will contact you to keep you apprised of the progress of this request; however, if you would like to limit or redefine this request in any manner, please let me know.... (Emphasis supplied).

4. It is found that, by email dated July 7, 2023, the complainant responded to the respondents' acknowledgement as follows:

...I understand that the request may be difficult to fulfill, and I am willing to modify it to make the process more manageable for your team. As you are more familiar with the specific content and organization of the information I seek, I would greatly appreciate your advice on how best to limit or redefine my request.... I look forward to your guidance....

5. It is found that, by email dated July 10, 2023, the complainant informed the respondents that:

...To help streamline the process, please note the following clarifications to my request:

- a. As for court files, I am not seeking any pleadings, briefs, memoranda or other documents which have already been filed in courts, the FOI Commission, or the CHRO....
- b. Regarding the email search, I am specifically interested in all emails and their respective attachments that pertain to me.

To expedite this process, I would greatly appreciate receiving the documents on a rolling basis—that is, as each document (item # of my request from [2.a to 2.k, above]) is identified and cleared, I would like to receive it, rather than waiting for the entire search and review process to be completed....

6. It is found that, by email dated October 9, 2023, the complainant requested that the respondents provide him with a status on the processing of his request.

7. It is found that, by email dated October 10, 2023, the respondents informed the complainant that they were still reviewing records, and that, thus far, all responsive, non-exempt records were records that the complainant already possessed, such as court documents and communications between the complainant and individuals from the respondent agency's office.

8. It is found that, by email dated December 6, 2023, the complainant requested that the respondents provide him with a status on the processing of his request.

9. It is found that, by email dated December 8, 2023, the respondents informed the complainant that they were still in the process of reviewing records. It is further found that the respondents stated that the records they had gathered were emails and documents which the complainant had already received or was copied on, which the complainant had indicated he did not want, and communications and documents sent between counsel and counsel's public agency clients, which the respondents contended were exempt from disclosure. It is further found that the respondents noted that the complainant had requested that they provide him with a privilege log and, although they were not required to create such a log, the respondents were in the process of doing so. It is further found that the respondents stated that, despite being short staffed, they believed they could provide the complainant with some of the responsive records and a partial privilege log shortly after the holidays, and that they would be able to provide the complainant with the EEO Commission records that they maintained within three weeks.

10. By email dated and filed December 11, 2023, the complainant appealed to this Commission, alleging that the respondents violated the Freedom of Information ("FOI") Act by failing to provide him with a copy of the requested records.

11. 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.

12. 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.

13. 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.”

14. 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.

15. At the hearing, while the complainant conceded that he had received some responsive records, he contended that the respondents had failed to provide him with all responsive records. He further contended that the records he had received from the respondents had not been provided to him promptly. The complainant requested that the Commission consider the imposition of a civil penalty in this case.

16. The respondents contended that, despite their best efforts to process the request in a timely fashion, the request was large; that there had been an unintentional lapse in the processing of the request; and that they were in the process of reviewing the final batch of responsive records.

17. The respondents’ Deputy Associate General/Chief of Finance and Revenue Services Section (“Deputy Associate Attorney General”) appeared and testified at the contested case hearing on behalf of the respondents.

18. Based upon the complainant’s testimony, it is found that, by the time of the contested case hearing, the complainant had received records responsive to the requests set forth in paragraphs 2.c, 2.i, 2.j, and 2.k, above, and that such requests are no longer at issue in this matter.

19. It is further found that, with regard to the request set forth in paragraph 2.h, above, the respondents provided the complainant with screen shots of all of the fields contained in the database that they use to track discrimination and whistleblower cases. It is further found that the respondents provided the complainant with a key to all of the codes contained within the screen shots. Based upon the way such request is worded, it is found that it was reasonable for the respondents to construe such request as seeking copies of all of the various database fields. Accordingly, it is found that the respondents complied with such request, and it will not be further addressed herein.

20. Based upon the testimony of respondents’ witness, it is further found that the respondents provided the complainant with all records responsive to the request set forth in paragraph 2.f, above, and that the respondents did not maintain any records responsive to the request set forth in paragraph 2.g, above. Accordingly, it is found that the respondents complied with such requests, and they will not be further addressed herein.

21. It is found that there an initial delay in the processing of the complainant's request, which delay is addressed in paragraphs 47 through 51, below.

22. It is found, however, that once the request was brought to the attention of the Deputy Associate Attorney General, it was processed promptly. In this regard, it is found that, in early June 2023, the Bureau of Information Technology ("BITS")² conducted a search for responsive electronic records, gathered *19,237 documents* potentially responsive to the request, and, on or about June 22, 2023, provided the search results to the respondents. It is found that, because the search was so broad, the Deputy Associate Attorney General was required to sort out thousands of non-responsive records and thereafter review the responsive records for exemptions. It is found that there were approximately *5,800 documents* responsive to the request, all of which had to be reviewed for possible exemptions to disclosure.

23. It is further found that, on January 30, 2024, the respondents' Assistant Deputy Attorney General searched for and provided the complainant with 77 pages of mostly hardcopy records, which originated from the respondents' Rocky Hill office.

24. Thereafter, it is found that the Deputy Associate Attorney General disclosed batches of responsive electronic records to the complainant in late May 2024; early July 2024; late July 2024; and early August 2024.

25. It is found that the Deputy Associate Attorney General subsequently realized that the electronic records he had disclosed to the complainant in late May 2024 were missing certain attachments. It is found that the Deputy Associate Attorney General provided the complainant with such records again, after ensuring that all non-exempt attachments were included in the disclosure.

26. Thereafter, it is found that the complainant reported to the respondents that the batches of records he had received in early July 2024; late July 2024; and early August 2024 were also missing certain attachments. It is found that the Deputy Associate Attorney General provided the complainant with all such records once more, again ensuring that all non-exempt attachments were included in the disclosure.

27. It is found that, at the time of the contested case hearing, the Deputy Associate Attorney General indicated that he had one more batch of records to review to complete his review of the 5,800 responsive documents. The Deputy Associate Attorney General represented that he would be able to review and disclose all remaining, non-exempt records to the complainant by early September 2024 and, thereafter, deliver to the Commission, for in camera inspection, all records that the respondents claimed exempt from disclosure.

28. It is found that, at the time of the contested case hearing, the respondents' Assistant Deputy Attorney General had spent over 80 hours processing this request; the respondents' Deputy Associate Attorney General had spent at least 50 hours processing this request; and the respondents' Deputy Associate Attorney General's intern had spent approximately 40 hours processing this request.

² BITS is currently the agency within the state responsible for conducting electronic records searches.

29. On September 11, 2024, the respondents submitted the records that they claimed were partially exempt from disclosure to the Commission for in camera inspection. Such records shall be identified as IC-2023-0636-1 through IC-2023-0636-419.

30. It is found that, by September 11, 2024, the respondents had completed their review of all responsive records and provided the complainant with all records that they believed were not exempt from disclosure. Based on the testimony of the Deputy Associate Attorney General, it is further found that, in total, the respondents provided the complainant with approximately *8,000 – 9,000 pages of non-duplicate records, free of charge*.

31. The respondents contended that some of the records that they withheld from the complainant are exempt from disclosure pursuant to §1-210(b)(1), G.S. (preliminary drafts).

32. Section 1-210(b)(1), G.S., provides, in relevant part, that the FOI Act shall not require the disclosure of:

Preliminary drafts or notes provided the public agency has determined that the public interest in withholding such documents clearly outweighs the public interest in disclosure....

33. Section 1-210(e)(1), G.S., additionally provides, in relevant part, that:

(e) Notwithstanding the provisions of subdivision (1)... of subsection (b) of this section, disclosure shall be required of:

(1) Interagency or intra-agency memoranda or letters, advisory opinions, recommendations or any report comprising part of the process by which governmental decisions and policies are formulated, except disclosure shall not be required of a preliminary draft of a memorandum, prepared by a member of the staff of a public agency, which is subject to revision prior to submission to or discussion among the members of such agency....

34. Based upon the testimony of the Deputy Assistant Attorney General, it is found that the respondents determined that the public interest in withholding the draft documents clearly outweighed the public interest in disclosure. In this regard, it is found that the respondents determined that the release of various draft records, including draft briefs and pleadings³, would be confusing to the public, making it difficult to determine what documents

³ Based upon the testimony of the Deputy Assistant Attorney General, the hearing officer did not order the respondents to submit the records claimed exempt from disclosure pursuant to §1-210(b)(1), G.S., to the Commission for in camera inspection.

were the respondents' final products. It is further found that the respondents' reasons for withholding such records were not frivolous or patently unfounded. Moreover, based upon the testimony of the Deputy Assistant Attorney General, it is found that such draft records were interagency or intra-agency draft memoranda comprising part of the process by which governmental decisions and policies are formulated. It is further found, however, that such memoranda were prepared by a member of the staff of a public agency and were subject to revision prior to submission to or discussion with or among a member or members of a public agency, within the meaning of §1-210(e)(1), G.S.

35. Accordingly, it is concluded that the respondents did not violate the disclosure provisions of §§1-210(a) and 1-212(a), G.S., when they declined to disclose the draft records to the complainant.⁴

36. Next, the respondents contended that portions of the in camera records are exempt from disclosure pursuant to the provisions of §1-210(b)(10), G.S., which section permits an agency to withhold from disclosure records of "communications privileged by the attorney-client relationship" or "any other privilege established by the common law," which in this case the respondents contended is the attorney work product doctrine.

37. With regard to the claim of exemption pursuant to the attorney-client privilege, §52-146r(b), G.S., provides that "[i]n any civil or criminal case or proceeding or in any legislative or administrative proceeding, all confidential communications shall be privileged, and a government attorney shall not disclose any such communications unless an authorized representative of the public agency consents to waive the privilege and allow disclosure."

38. Section 52-146r(a)(2), G.S., defines "confidential communications" to mean:

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.

39. In Maxwell v. Freedom of Info. Comm'n, 260 Conn. 143, 149 (2002), the Connecticut Supreme Court held that §52-146r, G.S., "merely codif[ies] the common law attorney-client privilege as this court previously defined it." The Court further 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

⁴ The Commission notes that final versions of the draft documents have been released to the complainant.

and relate to legal advice sought by the agency from the attorney.” Id.

40. The Supreme Court has adopted a four part test to determine whether communications are subject to the attorney client privilege: “(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.” Shew v. Freedom of Info. Comm’n, 245 Conn. 149, 159 (1998). “The burden of establishing the applicability of the privilege rests with the party invoking it.” Harrington v. Freedom of Info. Comm’n, 323 Conn. 1, 12, (2016) (“Harrington”). If it is clear from the face of the records, extrinsic evidence is not required to prove the existence of the attorney-client privilege.” Lash v. Freedom of Info. Comm’n, 300 Conn. 511, 516-17 (2011).

41. Moreover, in Connecticut, the attorney-client privilege protects both the confidential giving of professional advice by an attorney acting in the capacity of a legal advisor to those who can act on it, as well as the giving of information to the lawyer to enable counsel to give sound and informed advice....The privilege fosters full and frank communications between attorneys and their clients and thereby promote[s] the broader public interests in the observation of law and [the] administration of justice.” PSE Consulting, Inc. v. Frank Mercede & Sons, Inc., 267 Conn. 279, 329–30 (2004).

42. It is found that, while the respondents submitted 419 pages to the Commission for in camera inspection, only certain pages within the submission contained redactions pursuant to the attorney-client privilege. The respondents included the pages that did not contain redactions with the in camera submission so that the records could be read in context.

43. Upon careful in camera inspection, it is found that, with the exception of the redactions contained in IC-2023-0636-110, the redacted portions of the in camera records are communications between public officials or employees of a public agency acting in the performance of their duties or within the scope of their employment and government attorneys. It is further found that such records relate to legal advice sought by the public agency clients, and that the legal advice provided has not been waived. It is therefore found that, with the exception of the redactions contained in IC-2023-0636-110, the redacted portions of the in camera records are communications privileged by the attorney-client relationship.

44. It is concluded that, with the exception of the redactions contained in IC-2023-0636-110, the respondents did not violate the disclosure requirements of §§1-210(a) and 1-212(a), G.S., when they declined to disclose the in camera record to the complainant without redactions.

45. It is found that the redactions contained in IC-2023-0636-110 are not responsive to the complainant’s request and therefore will not be further addressed herein.

46. Because the Commission has determined that, with the exception of IC-2023-0636-110, the redacted portions of the in camera records are exempt from disclosure pursuant to the

attorney-client privilege, the Commission need not address the respondents' claim of exemption pursuant to the work product doctrine.

47. Finally, with regard to whether the respondents have acted promptly in responding to the instant request, this Commission has previously opined that the word "promptly" in §1-210, G.S., means "quickly and without undue delay, taking into account all of the factors presented by a particular request . . . [including] the volume of records requested; the amount of personnel time necessary to comply with the request; the time by which the requester needs the information contained in the records; 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 loss of the personnel time involved in complying with the request." See FOI Commission Advisory Opinion #51 (Jan. 11, 1982). The Commission also recommended in Advisory Opinion #51 that, if immediate compliance is not possible, the agency should explain the circumstances to the requester.

48. It is found that many of the requests set forth in paragraph 2, above, seek records pertaining to certain matters occurring "between July 1, 2008 and June 7, 2023." See ¶¶ 2.a, 2.b, 2.e, 2.i, and 2.k, above. The Commission notes that such requests require the respondents to search for responsive records spanning fourteen years, eleven months and six days. It is found that completing the process of searching for, reviewing, and redacting all records responsive to the requests set forth in paragraph 2, above, was an enormous task. It is further found that the respondents completed such task.

49. It is found, however, that when the complainant's request was received on or around June 7, 2023, the Assistant Deputy Attorney General reviewed it, determined that it would be best to have it handled by a particular Assistant Attorney General who was an electronic discovery expert, and she forwarded the request to him. In June 2023, it is found that the Assistant Attorney General created and forwarded search terms and search parameters to BITS. It is further found that BITS conducted the search and, on June 23, 2023, returned to the Assistant Attorney General the search results consisting of 19,237 potentially responsive *documents*. It is found, however, that, before the search results were returned, the Assistant Attorney General received a commissioner appointment at a different public agency. It is further found that, the search results were not actively reviewed until April 2024, when this matter was brought to the attention of the Deputy Associate Attorney General. It is found that the Deputy Associate Attorney General processed and reviewed the search results himself. It is further found that while the Assistant Attorney General who defined the terms and parameters of the search was fluent in the Everlaw E-Discovery Software, which the respondents use to make redactions, the Deputy Associate Attorney General had to take a class in order to learn how to use the software before he could make redactions in the records.

50. It is further found that, while the Deputy Associate Attorney General was processing the complainant's request, he was also tasked with supervising nine subordinate attorneys, reviewing state appellate court and federal court briefs, reviewing contracts, responding to requests for advice on handling other FOI requests, as well as assisting the Attorney General on various legal matters.

51. However, it is also found that the provision of records to the complainant in response to his request was not completed until approximately fourteen months following the respondents' receipt of the request. Although the respondents had reasons that led to the delay, as set forth in paragraphs 49 and 50, above, compliance with the complainant's request was not prompt.

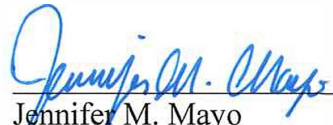
52. Based on the facts and circumstances of this case, it is concluded therefore that the respondents unintentionally violated the promptness requirements of §§1-210(a) and 1-212(a), G.S.

53. The Commission, in its discretion, declines to consider the imposition of civil penalties against the respondents.

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

1. Henceforth, the respondents shall strictly comply with the promptness 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 November 20, 2024.



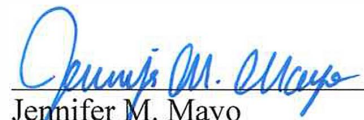
Jennifer M. Mayo
Acting Clerk of the Commission

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:

ADAM OSMOND, PO Box 1162, Farmington, CT 06034

WILLIAM TONG, ATTORNEY GENERAL, STATE OF CONNECTICUT, OFFICE OF THE ATTORNEY GENERAL; AND STATE OF CONNECTICUT, OFFICE OF THE ATTORNEY GENERAL, c/o Assistant Attorney General Philip Miller, Office of the Attorney General, 165 Capitol Avenue, Hartford, CT 06106 and Associate Attorney General Antoria Howard, Office of the Attorney General, 165 Capitol Avenue, Hartford, CT 06106


Jennifer M. Mayo
Acting Clerk of the Commission