FREEDOM OF INFORMATION COMMISSION
OF THE STATE OF CONNECTICUT

In the Matter of a Complaint by FINAL DECISION

Garth Perri,

Complainant

against Docket #FIC 2023-0526

Commissioner, State of Connecticut, Department of Administrative Services; and State of Connecticut, Department of Administrative Services,

Respondents September 25, 2024

The above-captioned matter was heard as a contested case on March 28, 2024 and May 9, 2024. The respondents failed to appear at the March 28, 2024 contested case hearing and the matter was continued. The complainant and respondents appeared at the May 9, 2024 hearing, at which time the complainant and the respondents 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 electronic form dated September 22, 2023, the complainant requested copies of certain records pertaining to "CT DAS job classification Motor Vehicle Division Manager (5804MP)".

3. It is found that, by email dated September 22, 2023, the respondents acknowledged the complainant's request. It is also found that, by email dated September 26, 2023, the respondents disclosed responsive records to the complainant with redactions.

4. By letter of complaint, dated and filed October 18, 2023, the complainant appealed to this Commission, alleging that the respondents violated the Freedom of Information ("FOI") Act by failing to provide all responsive 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 concluded that the requested records are public records within the meaning of §§1-200(5) and 1-210(a), G.S.

9. At the March 28, 2024 hearing on this matter, the complainant informed the hearing officer that the only records still at issue between the parties were the redactions made to certain emails disclosed to the complainant on September 26, 2023, as described in paragraph 3, above.

10. At the May 9, 2024 hearing on this matter, the respondents represented that they withheld such portions of responsive emails pursuant to §1-210(b)(6), G.S.

11. On June 14, 2024, by order of the hearing officer, the respondents submitted to the Commission an unredacted copy of the records identified in paragraph 9, above, for an in camera inspection, along with an in camera index. Such records shall be identified hereinafter as IC-2023-0526-1 through IC-2023-0526-19.

12. On the in camera index, the respondents contended that portions of the in camera records are exempt from disclosure under §§1-210(b)(1) and 1-210(b)(6), G.S.

13. With regard to the respondents' claim that certain portions of the in camera records are exempt from disclosure pursuant to §1-210(b)(1), G.S., such provision states that disclosure is not required of "[p]reliminary drafts or notes provided the public agency has determined that the public interest in withholding such documents clearly outweighs the public interest in disclosure."

14. At the May 9, 2024 hearing on this matter, the respondents' witness testified that the attorney formerly assigned to represent the respondents in this matter had "mentioned" that §1-

210(b)(1), G.S., might also be a basis for redacting the emails described in paragraphs 9, 10 and 11, above, because such emails constitute "preliminary discussions".

15. The Supreme Court ruled in Wilson v. Freedom of Information Commission, 181 Conn. 324, 332 (1980) ("Wilson"), that:

> [w]e do not think the concept of preliminary, as opposed to final, should depend upon who generates the notes or drafts, or upon whether the actual documents are subject to further alteration....
>
> Instead the term 'preliminary drafts or notes' relates to advisory opinions, recommendations, and deliberations comprising part of the process by which government decisions and policies are formulated....
>
> ...[p]reliminary drafts or notes reflect that aspect of an agency's function that precedes formal and informal decision making. We believe that the legislature sought to protect the free and candid exchange of ideas, the uninhibited proposition and criticism of options that often precedes, and usually improves the quality of, governmental decisions. It is records of this preliminary, deliberative and predecisional process the exemption was meant to encompass.

16. The year following Wilson, the Connecticut General Assembly passed Public Act 81-431, which added to the FOI Act the language now codified in §1-210(e)(1), G.S. That provision, which narrowed the exemption for preliminary drafts or notes, provides in relevant part:

> [n]otwithstanding [§1-210(b)(1)], disclosure shall be required of:
>
> [i]nteragency 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.... (emphasis added).

17. In Van Norstrand v. Freedom of Information Commission, 211 Conn. 339, 343 (1989) ("Van Norstrand"), the Supreme Court provided further guidance regarding "preliminary drafts". Citing the dictionary definition, the court stated that the term "preliminary" means

"something that precedes or is introductory or preparatory", and "describes something that is preceding the main discourse or business." Id. According to the Court, "[b]y using the nearly synonymous words 'preliminary' and 'draft', the legislation makes it very evident that preparatory materials are not required to be disclosed". Id.

18. Accordingly, §§1-210(b)(1) and 1-210(e)(1), G.S., together, permit nondisclosure of records of an agency's preliminary, pre-decisional, deliberative process, provided that the agency has determined that the public interest in withholding the records clearly outweighs the public interest in disclosing them and provided further that such records are not interagency or intra-agency memoranda or letters, advisory opinions, recommendations, or reports. See Shew v. Freedom of Information Commission, 245 Conn. 149, 164-166 (1998).

19. This Commission has also previously examined the definition of "note" and determined that within the meaning of §1-210(b)(1), G.S., such term refers to "a brief writing intended to assist the memory or serve as a fuller statement ... an often informal record of impressions or incidents." See Docket #FIC 2015-452, Matt Kauffman, Kathleen Megan and the Hartford Courant v. Chair, State of Connecticut, Board of Trustees, Financial Affairs Committee, University of Connecticut; and State of Connecticut, University of Connecticut, Board of Trustees, Financial Affairs Committee (February 24, 2016).

20. With respect to the "balancing test" required by §1-210(b)(1), G.S., it is well established that the responsibility for making the determination as to what is in the public interest is on the agency that maintains the records. See Van Norstrand at 345. The agency must have considered in good faith the effect of disclosure and indicated the reasons for its determination to withhold disclosure, which reasons may not be frivolous or patently unfounded. Id., citing Wilson at 339. See also People for Ethical Treatment of Animals, Inc. v. Freedom of Information Commission, 321 Conn. 805, 816-817 (2016). Thus, the only determination for the Commission to make is whether the reasons for nondisclosure given by the agency are frivolous or patently unfounded. See Lewin v. Freedom of Information Commission, 91 Conn. App. 521, 522-523 (2005); Coalition to Save Horsebarn Hill v. Freedom of Information Commission, 73 Conn. App. 89, 99 (2002).

21. Based upon a careful inspection of the in camera records described in paragraph 11, above, and the testimony of the respondents' witness at the May 9, 2024 hearing on this matter, it is found that the respondents failed to prove that such records are preliminary drafts or notes within the meaning of §1-210(b)(1), G.S. It is found, moreover, that the respondents offered no testimony or evidence at the May 9, 2024 hearing that the respondent agency made a determination that the public interest in withholding any portions of the in camera records clearly outweighed the public interest in disclosure.

22. Accordingly, it is found that the respondents failed to prove that the records described in paragraph 11, above, are exempt from disclosure pursuant to §1-210(b)(1), G.S.

23. With regard to the respondents' claim that certain portions of the in camera records described in paragraph 11, above, are exempt from disclosure pursuant to §1-210(b)(6), G.S., such provision states that disclosure is not required of "[t]est questions, scoring keys and other

examination data used to administer a licensing examination, examination for employment or academic examinations."

24. At the May 9, 2024 hearing on this matter, the respondents represented that the redactions made to the records described in paragraph 11, above, relate to revisions made to supplemental interview questions and answers used in hiring potential employees for certain job classifications.

25. In Washington v. Freedom of Information Commission, et. al., 25 Conn. L. Rptr. 334 (1999), the Superior Court concluded that, "[b]ased on the testimony at the FOIC hearing," oral board panelists' scoring sheets were "the equivalent of a scoring key" which is specifically exempted from disclosure under §1-210(b)(6), G.S.

26. The Commission has interpreted Washington to mean that certain oral examination data for employment positions are exempt from disclosure pursuant to §1-210(b)(6), G.S. See Docket #FIC 2000-501, Randal Edgar et al. v. Paul Sequeira, Superintendent of Schools, Waterbury Public Schools (March 28, 2001) (scores assigned by interviewers to each candidate for the position of superintendent of schools constitute examination data used to administer an examination for employment within the meaning of §1-210(b)(6), G.S.); Docket #FIC 2001-006, Dennis Murray v. Director of Personnel, City of Hartford (April 11, 2001) (scoring sheets of each oral board panelist for each candidate constitute examination data within the meaning of §1-210(b)(6), G.S.); Docket #FIC 2003-377, Joseph R. Casey, Jr. v. Commissioner, State of Connecticut, Department of Correction (April 14, 2004) (forms containing questions asked by the interview panel, candidates' responses, ratings given by the interview panel members and any comments made by such members constitute test questions, scoring keys and other examination data used to administer an examination for employment within the meaning of §1-210(b)(6), G.S.); Docket #FIC 2008-525, David Glidden and the Connecticut State Employees Association v. Commissioner, State of Connecticut, Department of Environmental Protection, Human Resources Division; and State of Connecticut, Department of Environmental Protection, Human Resources Division (July 22, 2009) (interviewer notes, interview questions, and interview reports and recommendations for hiring/promotions constitute test questions, scoring keys and other examination data within the meaning of §1-210(b)(6), G.S.); Docket #FIC 2009-123, Richard Malley v. Commissioner, State of Connecticut, Department of Environmental Protection; and State of Connecticut, Department of Environmental Protection (February 24, 2010) (DEP interviewer's report and recommendations for hiring or promotion constitute examination data used to administer an examination for employment within the meaning of §1-210(b)(6), G.S.); Docket #FIC 2013-064, Alireza Jamalipour v. Commissioner, State of Connecticut, Department of Transportation; and State of Connecticut, Department of Transportation (September 25, 2013) (recommendations for selection, or the explanation for the selection or non-selection of the candidates included in an Interview Selection Report were permissively exempt from disclosure pursuant to §1-210(b)(6), G.S.); Docket #FIC 2014-197, George Winter v. Commissioner, State of Connecticut, Department of Motor Vehicles; and State of Connecticut, Department of Motor Vehicles (January 14, 2015) (oral interview questions, scores, rankings and the criteria used in development of the questions constitute test questions, scoring keys and other examination data used to administer an examination for employment within the meaning of §1-210(b)(6), G.S.); and Docket #FIC 2017-0730, Joseph Dinegar v.

Superintendent, State of Connecticut, Connecticut Technical High School System; and State of Connecticut, Connecticut Technical High School System (June 27, 2018) (the scoring rubric, test questions, responses to test questions, interview questions, interviewer notes/evaluations, and scoring keys for candidates for employment constitute test questions, scoring keys and other examination data used to administer an examination for employment within the meaning of §1-210(b)(6), G.S.).

27. Based upon a careful inspection of the in camera records described in paragraph 11, above, it is found that the following portions of such records constitute test questions, scoring keys and other examination data used to administer an examination for employment within the meaning of §1-210(b)(6), G.S.: IC-2023-0526-15 (line 7, word 2 through line 10, word 4); and IC-2023-0526-16 (line 4, word 13 through line 12 in its entirety).

28. It is concluded therefore that the records described in paragraph 27, above, are permissively exempt from disclosure pursuant to §1-210(b)(6), G.S. Accordingly, it is concluded that the respondents did not violate §§1-210(a) or 1-212(a), G.S., with respect to such records, as alleged by the complainant.

29. It is also found, however, based upon a careful inspection of the in camera records described in paragraph 11, above, that the following portions of such records do not constitute test questions, scoring keys or other examination data used to administer an examination for employment within the meaning of §1-210(b)(6), G.S.: IC-2023-0526-14; IC-2023-0526-15 (line 7, word 1; line 10, word 5 through line 11 in its entirety; and line 18); and IC-2023-0526-16 (line 4, words 1 through 12; and line 13).

30. It is concluded therefore that the portions of the in camera records described in paragraph 29, above, are not exempt from disclosure pursuant to §1-210(b)(6), G.S. Accordingly, it is concluded that the respondents violated the disclosure provisions of §§1-210(a) and 1-212(a), G.S., by withholding such records from the complainant.

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

1. Within seven (7) days of the Notice of Final Decision in this matter, the respondents shall provide the complainant with unredacted copies of the in camera records described in paragraph 29 of the findings, above, free of charge.

2. Henceforth, the respondents shall strictly comply with the 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 25, 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:

GARTH PERRI, 411 Brainard Hill Road, Higganum, CT 06441

COMMISSIONER, STATE OF CONNECTICUT, DEPARTMENT OF ADMINISTRATIVE SERVICES; AND STATE OF CONNECTICUT, DEPARTMENT OF ADMINISTRATIVE SERVICES, c/o Attorney Michael Barrera, Department of Administrative Services, 450 Columbus Blvd., Suite 1501, Hartford, CT 06103 and Attorney Ernestine Y. Weaver, 450 Columbus Blvd., Suite 1501, Hartford, CT 06103

Jennifer M. Mayo
Acting Clerk of the Commission

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