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FREEDOM OF INFORMATION



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Virginia Brown,
Complainant(s)
against

Notice of Meeting

Docket #FIC 2015-055

Comptroller, State of Connecticut, Office of the
Comptroller; and State of Connecticut, Office of the
Comptroller,

Respondent(s)

November 17, 2015

Transmittal of Proposed Final Decision

In accordance with Section 4-179 of the Connecticut General Statutes, the Freedom of Information Commission hereby transmits to you the proposed finding and decision prepared by the hearing officer in the above-captioned matter.

This will notify you that the Commission will consider this matter for disposition at its meeting which will be held in the Freedom of Information Commission Hearing Room, 18-20 Trinity Street, 1st floor, Hartford, Connecticut, at **2 p.m. on Wednesday, December 16, 2015**. At that time and place you will be allowed to offer oral argument concerning this proposed finding and order. Oral argument shall be limited to ten (10) minutes. For good cause shown, however, the Commission may increase the period of time for argument. A request for additional time must be made in writing and should be filed with the Commission **ON OR BEFORE December 4, 2015**. Such request **MUST BE (1) copied to all parties, or if the parties are represented, to such representatives, and (2) include a notation indicating such notice to all parties or their representatives.**

Although a brief or memorandum of law is not required, if you decide to submit such a document, an **original and fourteen (14) copies** must be filed **ON OR BEFORE December 4, 2015**. **PLEASE NOTE: Any correspondence, brief or memorandum directed to the Commissioners by any party or representative of any party MUST BE (1) copied to all parties, or if the parties are represented, to such representatives, (2) include a notation indicating such notice to all parties or their representatives and (3) be limited to argument. NO NEW EVIDENCE MAY BE SUBMITTED.**

If you have already filed a brief or memorandum with the hearing officer and wish to have that document distributed to each member of the Commission, it is requested that **fifteen (15) copies** be filed **ON OR BEFORE December 4, 2015**, and that **notice be given to all parties or if the parties are represented, to their representatives, that such previously filed document is being submitted to the Commissioners for review.**

By Order of the Freedom of
Information Commission

W. Paradis
Acting Clerk of the Commission

Notice to: Todd Steigman, Esq.
Colleen B. Valentine, Esq., Ann E. Lynch, Esq.
and Josephine Graff, Esq.

2015-11-17/FIC# 2015-055/Trans/wrbp/JE/PSP/TAH

FREEDOM OF INFORMATION COMMISSION
OF THE STATE OF CONNECTICUT

In the Matter of a Complaint by

Report of Hearing Officer

Virginia Brown,

Complainant,

Docket # FIC 2015-055

against

Comptroller, State of Connecticut,
Office of the Comptroller; and State
of Connecticut, Office of the Comptroller,

Respondents

November 14, 2015

The above-captioned matter was heard as a contested case on September 14, 2015, and October 23, 2015, at which times the complainant and respondents appeared, stipulated to certain facts and presented testimony, exhibits and argument on the complaint.

Prior to the September 14, 2015 hearing, the respondents moved to quash four of five subpoenas issued by the complainant and served on Comptroller Kevin Lembo, Deputy Comptroller P. Martha Carlson, Division Director Brenda Halpin and Division secretary Mary Lynch. The respondents did not move to quash the complainant's subpoena of Attorney Natalie Braswell who was present and offered testimony at the October 23, 2015 hearing. At the conclusion of the October 23rd hearing, the Hearing Officer granted the motion to quash with respect to the appearance of Comptroller Lembo, Deputy Comptroller Carlson, Division Director Halpin and Ms. Lynch.

On October 27, 2015, the complainant submitted an unsolicited after-filed exhibit to which the respondents objected. Such exhibit has not been considered by the hearing officer, but has been marked as Complainant's Exhibit I: Affidavit of Amy J. Schwarzkopf, for identification purposes, only.

On November 10, 2015, pursuant to an order of the hearing officer, the respondents submitted three after-filed exhibits which have been marked as Respondents' Exhibit 1: Brenda Halpin's Calendar (with redactions) (from June 2014 - January 2015) and Respondents' Exhibit 2: Affidavit and Supplemental Affidavit of Natalie Braswell (dated November 9, 2015 and November 12, 2015, respectively).

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 and email dated June 2, 2014, the complainant, who was at that time employed as an attorney at the respondent Office of the State Comptroller (“OSC”), made a request to the respondents for copies of the following:

INTERNAL AND EXTERNAL COMMUNICATIONS

Request No. 1 - All internal and external communications, which includes, but is not limited to, electronic communications prepared, owned, used, received or retained on state computers, personal computers and all personal phones used to conduct state business, to and/or from Kevin Lembo, P. Martha Carlson (“Marti”), Natalie Braswell, Brenda Halpin and Colin Newman from July 1, 2012 to the present that refer to Ice Miller.

Request No. 2 - All internal and external communications, which includes, but is not limited to, electronic communications prepared, owned, used, received or retained on state computers, personal computers and all personal phones used to conduct state business, to and/or from Kevin Lembo, P. Martha Carlson (“Marti”), Natalie Braswell, Brenda Halpin and Colin Newman from July 1, 2012 to the present that refer to Internal Revenue Code §§415(b) and/or 401(a)(17).

Request No. 3 - All internal and external communications, which includes, but is not limited to, electronic communications prepared, owned, used, received or retained on state computers, personal computers and all personal phones used to conduct state business, to and/or from Kevin Lembo, P. Martha Carlson (“Marti”), Natalie Braswell, Brenda Halpin and Colin Newman from July 1, 2012 to the present that refer to the Medical Examining Board and/or its current and/or past board members.

Request No. 4 - All internal and external communications, which includes, but is not limited to, electronic communications prepared, owned, used, received or retained on state computers, personal computers and all personal phones used to conduct state business, to and/or from Kevin Lembo, P. Martha Carlson (“Marti”), Natalie Braswell, Brenda Halpin and Colin Newman from July 1, 2012 to the present that refer to class action case – Bouchard v. State Employees Retirement Commission.

Request No. 5 - All internal and external communications, which includes, but is not limited to, electronic communications prepared, owned, used, received or retained on state computers, personal computers

and all personal phones used to conduct state business, to and/or from Kevin Lembo, P. Martha Carlson (“Marti”), Natalie Braswell, Brenda Halpin and Colin Newman from July 1, 2012 to the present that refer to the Pension modular contract with Accenture, including, but not limited to (i) Request for Information, (ii) Request for Proposal, (iii) Selection Committee and/or (iv) Richard (“Rich”) Hegwood.

Request No. 6 - All internal and external communications, which includes, but is not limited to, electronic communications prepared, owned, used, received or retained on state computers, personal computers and all personal phones used to conduct state business, to and/or from Kevin Lembo, P. Martha Carlson (“Marti”), Natalie Braswell, Brenda Halpin and Colin Newman from July 1, 2012 to the present that refer to the 2013 Early Retirement Incentive.

Request No. 7 - All internal and external communications, which includes, but is not limited to, electronic communications prepared, owned, used, received or retained on state computers, personal computers and all personal phones used to conduct state business, to and/or from Kevin Lembo, P. Martha Carlson (“Marti”), Natalie Braswell, Brenda Halpin and Colin Newman from July 1, 2012 to the present that refer to the Qualification and Voluntary Correction Plan for the Alternate Retirement Plan.

Request No. 8 - All internal and external communications, which includes, but is not limited to, electronic communications prepared, owned, used, received or retained on state computers, personal computers and all personal phones used to conduct state business, to and/or from Mary Lynch, Peggy Gray, Colin Newman, Amy Schwarzkopf and Annette Sadlowski from October 1, 2012 to the present that refer to me by name, initials and/or job title (i.e., staff attorney, Division counsel, etc.).

Request No. 9 - All internal and external communications, which includes, but is not limited to, electronic communications prepared, owned, used, received or retained on state computers, personal computers and all personal phones used to conduct state business, to and/or from Kevin Lembo, P. Martha Carlson (“Marti”), Natalie Braswell, Brenda Halpin and/or Colin Newman that refer to Nancy Brouillet from July 1, 2012 to the present.

Request No. 10 - All internal and external communications, which includes, but is not limited to, electronic communications prepared, owned, used, received or retained on state computers, personal computers

and all personal phones used to conduct state business, to and/or from Kevin Lembo, P. Martha Carlson ("Marti"), Natalie Braswell, Brenda Halpin and/or Colin Newman that refer to Nicole Dorman from July 1, 2012 to the present.

Request No. 11 - All internal and external communications, which includes, but is not limited to, electronic communications prepared, owned, used, received or retained on state computers, personal computers and all personal phones used to conduct state business, to and/or from Kevin Lembo, P. Martha Carlson ("Marti"), Natalie Braswell, Brenda Halpin and/or Colin Newman to/and from Attorney Robert Krzys from July 1, 2012 to the present.

Request No. 12 - All internal and external communications, which includes, but is not limited to, electronic communications prepared, owned, used, received or retained on state computers, personal computers and all personal phones used to conduct state business, to and/or from Kevin Lembo, P. Martha Carlson ("Marti"), Natalie Braswell, Brenda Halpin and Colin Newman from July 1, 2012 to the present that refer to the Social Security Administration Death Master File.

Request No. 13 - All internal and external communications, which includes, but is not limited to, electronic communications prepared, owned, used, received or retained on state computers, personal computers and all personal phones used to conduct state business, to and/or from Kevin Lembo, P. Martha Carlson ("Marti"), Natalie Braswell, Brenda Halpin and Colin Newman from July 1, 2012 to the present that refer to the Request for Information for Legal Services for the State Employees Retirement Commission issued on February 25, 2013.

Request No. 14 - All internal and external communications, which includes, but is not limited to, electronic communications prepared, owned, used, received or retained on state computers, personal computers and all personal phones used to conduct state business, to and/or from Kevin Lembo, P. Martha Carlson ("Marti"), Natalie Braswell, Brenda Halpin and Colin Newman from July 1, 2012 to the present that refer to the Request for Proposal for Legal Services for the State Employees Retirement Commission issued on September 20, 2013.

Request No. 15 - All internal and external communications, which includes, but is not limited to, electronic communications prepared, owned, used, received or retained on state computers, personal computers and all personal phones used to conduct state business, to and/or from

Kevin Lembo, P. Martha Carlson (“Marti”), Natalie Braswell, Brenda Halpin and Colin Newman from July 1, 2012 to the present that refer to the Request for Proposal for Legal Services for the State Employees Retirement Commission – Mainly Internal Revenue Code Matters issued on March 7, 2014.

Requests No. 1 through 15 exclude all internal and external communications generated by me or received by me.

ALL OTHER PUBLIC RECORDS AND/OR FILES

Request No. 16 - All other public records and/or files in the possession of Kevin Lembo, P. Martha Carlson (“Marti”), Natalie Braswell, Brenda Halpin and Colin Newman from July 1, 2012 to the present, including, but not limited to all memos, documents and/or letters, that refer to Ice Miller.

Request No. 17 - All other public records and/or files in the possession of Kevin Lembo, P. Martha Carlson (“Marti”), Natalie Braswell, Brenda Halpin and Colin Newman from July 1, 2012 to the present, including, but not limited to all memos, documents and/or letters, that refer to Internal Revenue Code §§415(b) and/or 401(a)(17).

Request No. 18 - All other public records and/or files in the possession of Kevin Lembo, P. Martha Carlson (“Marti”), Natalie Braswell, Brenda Halpin and Colin Newman from July 1, 2012 to the present, including, but not limited to all memos, documents and/or letters, that refer to the Medical Examining Board and/or its current and/or past board members.

Request No. 19 - All other public records and/or files in the possession of Kevin Lembo, P. Martha Carlson (“Marti”), Natalie Braswell, Brenda Halpin and Colin Newman from July 1, 2012 to the present, including, but not limited to all memos, documents and/or letters, that refer to class action case – Bouchard v. State Employees Retirement Commission.

Request No. 20 - All other public records and/or files in the possession of Kevin Lembo, P. Martha Carlson (“Marti”), Natalie Braswell, Brenda Halpin and Colin Newman from July 1, 2012 to the present, including, but not limited to all memos, documents and/or letters, that refer to the Pension modular contract with Accenture, including, but not limited to (i) Request for Information, (ii) Request for Proposal, (iii) Selection Committee and/or (iv) Richard (“Rich”) Hegwood.

Request No. 21 - All other public records and/or files in the possession of Kevin Lembo, P. Martha Carlson ("Marti"), Natalie Braswell, Brenda Halpin and Colin Newman from July 1, 2012 to the present, including, but not limited to all memos, documents and/or letters, that refer to the 2013 Early Retirement Incentive.

Request No. 22 - All other public records and/or files in the possession of Kevin Lembo, P. Martha Carlson ("Marti"), Natalie Braswell, Brenda Halpin and Colin Newman from July 1, 2012 to the present, including, but not limited to all memos, documents and/or letters, that refer to the Qualification and Voluntary Correction Plan for the Alternate Retirement Plan.

Request No. 23 - All other public records and/or files in the possession of Kevin Lembo, P. Martha Carlson ("Marti"), Natalie Braswell, Brenda Halpin and Colin Newman from July 1, 2012 to the present, including, but not limited to all memos, documents and/or letters, that refer to the Social Security Administration Death Master File.

Request No. 24 - All other public records and/or files in the possession of Mary Lynch, Peggy Gray, Colin Newman, Amy Schwarzkopf and Annette Sadlowski from October 1, 2012 to the present, including, but not limited to all memos, documents and/or letters, that that [sic] refer to me by name, initials and/or job title (i.e., staff attorney, Division counsel, etc.).

Request No. 25 - All other public records and/or files in the possession of Kevin Lembo, P. Martha Carlson ("Marti"), Natalie Braswell, Brenda Halpin and Colin Newman from July 1, 2012 to the present, including, but not limited to all memos, documents and/or letters, that refer to Nancy Brouillet from July 1, 2012 to the present.

Request No. 26 - All other public records and/or files in the possession of Kevin Lembo, P. Martha Carlson ("Marti"), Natalie Braswell, Brenda Halpin and Colin Newman from July 1, 2012 to the present, including, but not limited to all memos, documents and/or letters, that refer to Nicole Dorman from July 1, 2012 to the present.

Request No. 27 - All other public records and/or files in the possession of Kevin Lembo, P. Martha Carlson ("Marti"), Natalie Braswell, Brenda Halpin and Colin Newman from July 1, 2012 to the present, including, but not limited to all memos, documents and/or letters, that refer to Attorney Robert Krzys from July 1, 2012 to the present.

Request No. 28 - All other public records and/or files in the possession of Kevin Lembo, P. Martha Carlson (“Marti”), Natalie Braswell, Brenda Halpin and Colin Newman from July 1, 2012 to the present that refer to the Request for Information for Legal Services for the State Employees Retirement Commission issued on February 25, 2013.

Request No. 29 - All other public records and/or files in the possession of Kevin Lembo, P. Martha Carlson (“Marti”), Natalie Braswell, Brenda Halpin and Colin Newman from July 1, 2012 to the present that refer to the Request for Proposal for Legal Services for the State Employees Retirement Commission issued on September 20, 2013.

Request No. 30 - All other public records and/or files in the possession of Kevin Lembo, P. Martha Carlson (“Marti”), Natalie Braswell, Brenda Halpin and Colin Newman from July 1, 2012 to the present that refer to the Request for Proposal for Legal Services for the State Employees Retirement Commission – Mainly Internal Revenue Code Matters issued on March 7, 2014.

Request No. 31 - All outlook calendar professional appointments/meetings for Kevin Lembo, P. Martha Carlson (“Marti”), Natalie Braswell, Brenda Halpin, Colin Newman, Annette Sadlowski and Amy Schwarzkopf from April 1, 2012 to the present. [emphasis in original].

3. It is found that, by email dated June 2, 2014, the respondents acknowledged receipt of the complainant’s June 2, 2014 request (“June 2nd request”), described in paragraph 2, above, and informed the complainant that such request was forwarded to the appropriate division for processing.

4. It is found that, by email dated June 30, 2014, the complainant informed Natalie Braswell, Assistant Comptroller and General Counsel at the OSC, that she took the respondents’ lack of a response to be a denial of her June 2nd request and that she would be filing an appeal with the Commission. The complainant requested that, if there was some reasonable explanation for Attorney Braswell’s oversight, then she should let the complainant know by the end of the day.

5. It is found that, by email dated June 30, 2014, Attorney Braswell informed the complainant that she had been out of the office, with limited access to email and voicemail, that her lack of response should not be construed as a denial of the complainant’s June 2nd request, and that the complainant could anticipate a response shortly.

6. It is also found that, by letter dated June 30, 2014, Attorney Braswell informed the complainant that, upon the respondents’ review of the complainant’s June 2nd request and consideration of the broad scope of such request, the volume of records requested, the time and number of personnel required to comply with the request and the time constraints for completion

of other work, including other freedom of information requests and a voluminous discovery request, they had to prioritize compiling the necessary documents to ensure prompt compliance with the June 2nd request. The respondents anticipated that each individual from whom the complainant sought documents would have approximately two hours per week to complete a search for the requested records given their normal work duties. In addition, it was anticipated that the respondents would need to review thousands of emails and other records to determine if they were responsive to the complainant's request and review the documents for possible exemptions from disclosure under §1-210, G.S. Attorney Braswell also informed the complainant that if she would like to prioritize her request(s) and/or narrow the scope of her June 2nd request, the respondents could provide her with an initial installment of those prioritized items as they became available beginning July 30, 2014. If she was unable to prioritize or narrow her request, the respondents could provide the documents to her as they became available in monthly installments.

7. It is found that on July 29, 2014, via email, the respondents provided the complainant with 85 pages of documents in response to her June 2nd request, free of charge, and informed her that another installment would be sent the following month. A second installment of documents was provided to the complainant on August 29, 2014, free of charge.

8. It is found that, by letter dated September 5, 2014, the complainant inquired as to the status of her June 2nd request and informed Attorney Braswell that while providing responsive documents to her June 2nd request “in installments” is reasonable for a few months, [she] would expect full compliance no later than October 31, 2014.”

9. It is found that, by letter dated September 5, 2014 to the complainant, Attorney Braswell restated her remarks in her June 30th communication, described in paragraph 6, above. Attorney Braswell also noted that the respondents had not received any communication from the complainant prioritizing and/or narrowing her request and subsequently began providing her with records in monthly installments as responsive records became available. In addition, Attorney Braswell informed the complainant that she could not confirm that the complainant's June 2nd request would be fully complied with by October 31, 2014, as it was difficult to predict how much time it would take each employee to complete their search, and the time it would take to review the documents for possible exemptions from disclosure under §1-210, G.S.

10. It is found that, by letter dated September 10, 2014, the complainant informed the respondents that she believed that there was no need to further narrow the scope of, or prioritize, the items in her June 2nd request because such request listed 31 separate enumerated requests in which each separate numbered item identified a specific topic and a set group of individuals. The complainant acknowledged that she agreed to accept their response in “installments,” but it was unreasonable for the respondents to expect those installments to go on indefinitely. In addition, the complainant informed the respondents that they had provided less than half of the requested 31 items and they were not responding to the request in any particular order nor was it clear that they were fully complying with any particular item listed. The complainant further informed the respondents that given the amount of time the respondents had to comply with her request, their failure to be in full compliance by October 31, 2014, constituted an unreasonable delay. The complainant also requested that the respondents provide the requested records in the

order that the enumerated requests appeared, and that a complete response was one that provided all of the responsive records relating to the specific topic and set group of individuals in that particular request number.

11. It is found that on September 30, 2014, October 31, 2014 and December 1, 2014, via regular mail, the respondents provided the complainant with additional documents in response to her June 2nd request, free of charge. It is found that in a letter accompanying the respondents' December 1st installment, they informed the complainant that "[w]e will be sending your last installment shortly."

12. It is found that, by letter dated December 30, 2014, the complainant informed the respondents that there were a significant number of responsive documents in the respondents' possession that they had yet to provide. She noted that the respondents were still not responding to her request in any particular order, and it was unclear whether they were fully complying with any particular item listed. The complainant requested that the respondents advise her as to when she could expect their full compliance with her June 2nd request.

13. It is found that, by letter dated January 7, 2015, the complainant requested that the respondents provide her with any records and/or files that had not been previously provided to her in response to her June 2nd request. It is found that the January 7, 2015 request ("January 7th request"), as described by the complainant at the September 14, 2015 hearing, "renewed" and was "identical" to the June 2nd request. The Commission also notes that in the complainant's post-hearing brief she contends that the respondents "continue to improperly withhold public records that are responsive to the complainant's June 2, 2014 Freedom of Information request" (emphasis added) and explicitly states that the January 7th request "was not a new Freedom of Information request. Rather, it renewed the original June 2, 2014 request" (emphasis in the original). See Complainant, Virginia Brown's Post-Hearing Brief (pages 1, 4). Accordingly, for the purposes of this matter, the records sought in the January 7th request were for the same categories of documents, from the same individuals and within the same fixed period of time (*i.e.*, up to June 2, 2014) as in the June 2nd request.

14. It is found that, by email dated January 7, 2015, the respondents acknowledged receipt of the complainant's January 7th request, described in paragraph 13, above, and informed her that such request was forwarded to the appropriate division for processing.

15. It is found that on or about January 16, 2015, the respondents provided the complainant with the final installment of documents responsive to the complainant's requests, free of charge. It is found that, in a letter accompanying such installment, the respondents informed the complainant that, to date, they had provided her with thousands of pages of documents that, to the best of their knowledge, fully complied with her request. Any records that were not provided were determined by the respondents to be exempt from disclosure pursuant to §§1-210(b)(1), 1-210(b)(2), 1-210(b)(4), 1-210(b)(13) and 52-146r, G.S. In addition, the respondents requested that, if there were specific records that the complainant believed she had not received, she should let the respondents know which records were missing and they would make every attempt to get those records to her provided that such records were not exempt from disclosure.

16. It is found that, as of the time of filing of the complaint in this matter, the complainant had not specified what documents she believed were responsive to her June 2nd request that had yet to be provided to her by the respondents.

17. By email dated January 21, 2015, the complainant appealed to this Commission, alleging that the respondents violated the Freedom of Information (“FOI”) Act by failing to provide her with copies of records responsive to her January 7th request, described in paragraph 13, above.

18. Section 1-200(5), G.S., defines “public records or files” as:

any recorded data or information relating to the conduct of the public’s business prepared, owned, used, received or retained by a public agency, or to which a public agency is entitled to receive a copy by law or contract under section 1-218, whether such data or information be handwritten, typed, tape-recorded, printed, photostated, photographed or recorded by any other method.

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

Except as otherwise provided by any federal law or state statute, all records maintained or kept on file by any public agency, whether or not such records are required by any law or by any rule or regulation, shall be public records and every person shall have the right to (1) inspect such records promptly during regular office or business hours . . . (3) receive a copy of such records in accordance with section 1-212.

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

21. It is found that the records requested by the complainant are public records and must be disclosed in accordance with §§1-200(5), 1-210(a) and 1-212(a), G.S., unless they are exempt from disclosure.

22. It is found that, prior to the September 14, 2015 hearing in this matter, the respondents provided the complainant with approximately 3,100 pages of documents in response to her records request, free of charge. It is also found that the respondents provided the complainant with a log listing approximately 1,300 pages of documents which they claimed were exempt pursuant to the attorney-client privilege.

23. At the hearings in this matter and in her post-hearing brief, the complainant claimed the following: the respondents failed to perform a search for and disclose text messages from personal cellphones and records from personal computers used to conduct state business, records referring to the Medical Examining Board (“MEB”) (Requests No. 3 and 18) and documents in

the possession of Mary Lynch (Requests No. 8 and 24) that were responsive to her requests; improperly redacted Brenda Halpin's business calendar (Request No. 31); failed to provide all responsive documents through January 7, 2015;¹ relied on exemptions that are not applicable with respect to records that were withheld; and failed to provide records promptly.

24. The respondents claimed that they have provided the complainant with all records that are responsive to the complainant's request, which are not exempt from disclosure. At the October 23, 2015 hearing, Attorney Braswell, whose duties include responding to FOI requests, testified that she coordinated the response and search for records responsive to the complainant's request. She testified that she distributed, via email, a copy of the complainant's request to each of the individuals named in such request. She also provided them with instructions as to what steps to take in responding to the request, and provided specific search terms for searching for electronic records. Attorney Braswell also testified that, although she did not personally observe the searches conducted by the individuals, she did show them how to conduct the searches, including how to search their cellphones and computers. In addition, Attorney Braswell testified that she specifically asked each individual from whom records were sought if they conducted the searches as requested and whether he/she provided all documentation in response to the request using the search terms and time frames that she provided. Each individual responded in the affirmative. Attorney Braswell further testified that, prior to providing the complainant with responsive documents, she reviewed all the documents that the individuals collected to determine if the documents were exempt from disclosure.

25. With respect to the search for and disclosure of text messages from personal cellphones and records from personal computers, it is found that certain individuals listed in the complainant's request used their personal devices to conduct state business. It is found, however, that no text messages responsive to the complainant's request were found and that any documents that were created using personal computers and that were responsive to such request were already produced to the complainant. It is concluded that the respondents did not violate the FOI Act with respect to such records.

26. With respect to the search for and disclosure of records to and/or from and in possession of Mary Lynch (Requests No. 8 and 24, described in paragraph 2, above), the complainant testified that she was told on numerous occasions that Mary Lynch was instructed to monitor and keep a written log of the complainant's activities, and produced two emails (dated October 22, 2013 and January 28, 2014, respectively) addressed from Mary Lynch to Brenda Halpin that were provided to the complainant by Brenda Halpin. It is found that the respondents should have provided, at a minimum, the October 22, 2013 and January 28, 2014 emails *directly* from Mary Lynch which were responsive to Requests No. 8 and 24. It is found that the respondents did not perform a comprehensive search for records responsive to the complainant's Requests No. 8 and 24.

¹ With respect to the complainant's contention that the respondents failed to provide all responsive documents through January 7, 2015, the Commission has addressed such argument in paragraph 13 of the findings, above. Nevertheless, based on the testimonial and documentary evidence in the record, it is found that the respondents conducted and provided records to the complainant up to January 2015. A review of the records submitted in camera also evidences that the respondents searched and reviewed documents through January 7, 2015 and beyond.

27. With respect to the search for and disclosure of records referring to the Medical Examining Board (“MEB”) (Requests No. 3 and 18, described in paragraph 2, above), the complainant claimed that the respondents failed to provide her with all records, including certain monthly status reports, that “refer to” the MEB and were responsive to Requests No. 3 and 18. It is found that the OSC’s Retirement Services Division consists of several units including the Investigation & Recovery Unit and the Disability Unit.² It is also found that the respondents provided the complainant with two monthly status reports (titled “Status Report of June 2014” and “Status Report of July 2014,” respectively) from the Investigation & Recovery Unit that “refer to” the MEB which were responsive to the complainant’s Requests No. 3 and 18. The complainant contended that the Disability Unit prepared similar monthly status reports that “refer to” the MEB and which she did not receive in response to her records request. At the October 23rd hearing, Attorney Braswell testified she did not know whether the Disability Unit prepared similar monthly status reports.

28. It is found that the respondents did not perform a comprehensive search for the monthly status reports prepared by the Disability Unit, if any, which may be responsive to the complainant’s Requests No. 3 and 18.

29. With respect to the records which the respondents withheld from the complainant claiming that such records were exempt from disclosure or were not responsive, on October 16, 2015, prior to the second hearing in this matter and pursuant to an order of the hearing officer, the respondents submitted a “privilege log” describing or characterizing the nature of thousands of records being claimed exempt from disclosure pursuant to §§1-210(b)(1), 1-210(b)(2), 1-210(b)(10) and/or 1-210(b)(13), G.S. Subsequently, based on testimony provided by the complainant narrowing the number of records at issue in this matter and pursuant to a second order of the hearing officer, the respondents submitted 187 pages of unredacted documents to the Commission for in camera review, which are identified as IC-2015-055-1 through IC-2015-055-187.³ On the in camera index, the respondents claim that IC-2015-055-1 through IC-2015-055-56, which consist of a series of emails and attachments, are exempt pursuant to §§1-210(b)(1)

² The Commission takes administrative notice of the listing of the units in the Retirement Services Division which is posted on the Office of the State Comptroller website. See [http:// www.osc.ct.gov/rbsd/contacts.html](http://www.osc.ct.gov/rbsd/contacts.html).

³ At the hearings, the complainant testified that, for the purposes of the complaint at issue in this matter, she was not seeking records that contained specific medical information about specific individuals, nor records from Ice Miller, Robinson and Cole, Shipman and Goodwin, Rose Kallor, Helen Kemp, Virginia Brown, Daniel Klau and/or Natalie Braswell, when acting in her capacity as General Counsel, in which legal advice was sought or provided. In addition, the complainant’s attorney represented that the complainant was not seeking the records identified on the respondents’ privilege log (dated October 16, 2015) as “MEB Applications: Personal Health Information (Approx. 2,000 files)” and “MEB Notice of Decisions: Personal Health Information (Approx. 6,000 Records),” which were claimed to be exempt pursuant to §1-210(b)(2), G.S. The complainant’s attorney also represented that the complainant was not pursuing the 1,382 pages of records identified on the privilege log as “attorney-client privilege,” which were claimed to be exempt pursuant to §1-210(b)(10), G.S. Accordingly, the records which were identified on the respondents’ October 16th privilege log and claimed to be exempt pursuant to §§1-210(b)(2) and 1-210(b)(10), G.S., are no longer at issue in this matter and will not be further addressed herein.

and/or 1-210(b)(13), G.S. The respondents also claim that IC-2015-055-57 through IC-2015-055-187, which consists of Brenda Halpin's calendar, contain certain entries that are not responsive to the complainant's request.⁴ On November 10, 2015, pursuant to a third order of the hearing officer, the respondents submitted additional calendar entries for the Commission's review, which have been marked as IC-2015-055-1a through IC-2015-055-13a.

30. The Commission notes that on the respondents' October 16th privilege log, described in paragraph 29, above, the respondents claimed that drafts of a RFP for legal services (multiple versions) and drafts of a RFP for a pension module (multiple versions) were exempt from disclosure pursuant to §1-210(b)(1), G.S. However, at the October 23rd hearing in this matter, the respondents agreed to provide the complainant with unredacted copies of such drafts. Subsequently, by letters dated November 10, 2015, and November 12, 2015, respectively, on which the hearing officer was copied, the respondents informed the complainant that they were enclosing copies of the drafts for the RFPs for legal services and the pension module, which completed the respondents' production of such drafts. The Commission takes administrative notice of the respondents' November 10th and 12th letters.

31. With respect to IC-2015-055-1 through IC-2015-055-24, the respondents contend that such records are exempt under §1-210(b)(1), G.S.

32. Section 1-210(b)(1), G.S., provides that "[n]othing in the Freedom of Information Act shall be construed to require disclosure 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."

33. The Supreme Court ruled in Shew v. Freedom of Information Commission, that "the concept of preliminary [drafts or notes], as opposed to final [drafts or notes], should not depend upon...whether the actual documents are subject to further alteration..." but rather "[p]reliminary drafts or notes reflect that aspect of the agency's function that precede formal and informed decision making.... It is records of this preliminary, deliberative and predecisional process that...the exemption was meant to encompass." Shew v. Freedom of Information Commission, 245 Conn. 149, 165 (1998). In addition, once the underlying document is identified as a preliminary draft or note, "[i]n conducting the balancing test, the agency may not abuse its discretion in making the decision to withhold disclosure. The agency must, therefore, indicate the reasons for its determination to withhold disclosure and those reasons must not be frivolous or patently unfounded." State of Connecticut, Office of the Attorney General v. Freedom of Information Commission, 2011 WL 522872, *8 (Conn. Super. Ct. Jan. 20, 2011) (citations omitted).

34. With respect to IC-2015-055-1 through IC-2015-055-7, it is found that such records consist of an email with meeting minutes attached. Attorney Braswell testified that IC-2015-055-1 through IC-2015-055-7 were drafts. In addition, Attorney Braswell testified that she determined that the public interest in withholding such documents clearly outweighed the public

⁴ At the October 23rd hearing, the complainant's attorney requested that the hearing officer conduct an in camera review of Brenda Halpin's calendar. The hearing officer granted such request.

interest in disclosure because she found little value in releasing such records when the final version was publically available on the OSC's website. She also testified that she could not recall the differences between IC-2015-055-1 through IC-2015-055-7 and the final version that is publically available.

35. It is found that because the final version of the minutes is publically available and the respondents failed to provide evidence as to whether there were significant differences between IC-2015-055-1 through IC-2015-055-7 and the final version, it is found that the respondents failed to prove that IC-2015-055-1 through IC-2015-055-7 constituted a "preliminary draft[]" or note[]" within the meaning of §1-210(b)(1), G.S. It is concluded, therefore, that the respondents violated the disclosure provisions of §§1-210(a) and 1-212(a), G.S., by not providing the complainant with copies of IC-2015-055-1 through IC-2015-055-7.

36. With respect to IC-2015-055-14 through IC-2015-055-16, it is found that such records consist of an email to which a MEB physician list is attached. Attorney Braswell testified that the MEB physician list was a draft. In addition, Attorney Braswell testified that the final version of such list was available on the OSC's and Department of Administrative Services' websites, and thus determined that the public interest in withholding such documents clearly outweighed the public interest in disclosure. She also testified that she could not recall the differences between IC-2015-055-14 through IC-2015-055-16 and the publically available final version nor whether such differences were significant.

37. Because the final version of the physician list is publically available and the respondents failed to provide evidence as to whether there were significant differences between IC-2015-055-14 through IC-2015-055-16 and the final version, it is found that the respondents failed to prove that such list constituted a "preliminary draft[]" or note[]" within the meaning of §1-210(b)(1), G.S. It is concluded, therefore, that the respondents violated the disclosure provisions of §§1-210(a) and 1-212(a), G.S., by not providing the complainant with copies of IC-2015-055-14 through IC-2015-055-16.

38. With respect to IC-2015-055-8 through IC-2015-055-13, it is found that such records consist of an email (with attachment) relating to a chronology of an IRS section 415 issue. Attorney Braswell testified, and the respondents contended in their post-hearing brief, that such records relate to an on-going issue that has not yet been resolved or finalized and for which the respondents have retained counsel. Thus, the respondents believed that the public interest in withholding IC-2015-055-8 through IC-2015-055-13 clearly outweighed the public interest in disclosure.

39. Based on testimonial evidence and upon a careful review of IC-2015-055-8 through IC-2015-055-13, it is found that such records constitute preliminary drafts or notes within the meaning of §1-210(b)(1), G.S. It is further found that the respondents determined that the public interest in withholding such documents clearly outweighed the public interest in disclosure, within the meaning of §1-210(b)(1), G.S.

40. Section 1-210(e)(1), G.S., provides in relevant part that, notwithstanding the provisions of §1-210(b)(1), G.S., 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.

41. Upon a careful review of IC-2015-055-8 through IC-2015-055-13, it is found that such records are not 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, within the meaning of §1-210(e)(1), G.S. Accordingly, it is concluded that such records are permissibly exempt from disclosure pursuant to §§1-210(b)(1) and 1-210(e)(1), G.S.

42. It is concluded, therefore, that the respondents did not violate the disclosure provisions of §§1-210(a) and 1-212(a), G.S., by not providing the complainant with copies of IC-2015-055-8 through IC-2015-055-13.

43. With respect to IC-2015-055-17 through IC-2015-055-56, the respondents claim that such records are exempt pursuant to §1-210(b)(13), G.S.

44. Section 1-210(b)(13), G.S., provides “[n]othing in the Freedom of Information Act shall be construed to require disclosure of “[r]ecords of an investigation or the name of an employee providing information under the provisions of section 4-61dd [*i.e.*, whistleblower statute] or sections 4-276 to 4-280 [*i.e.*, CT False Claims Act], inclusive.” (Emphasis added).

45. The Commission notes that the Superior Court has found that “[t]he unambiguous language of §1-210(b)(13)...provides two exemptions from disclosure for ‘records of an investigation’ and ‘the name of an employee providing information’ under §4-61dd.” See State of Connecticut, Office of the Attorney General v. Freedom of Information Commission, 2011 WL 522872, *5 (Conn. Super. Ct. Jan. 20, 2011). “By simultaneously enacting the whistleblower statute and subsection 1-210(b)(13) of the Freedom of Information Act,⁵ the legislature set forth its intent to protect whistleblower identity and all records related to a whistleblower investigation.... The legislative history supports a consistent application of the whistleblower statute and the FOIA, which complement each other. The legislative history indicates that the legislature intended to protect the identity of whistleblowers and related information....” See Office of the Attorney General, Opinion No. 2002-025, 2002 WL 1747704 (Conn. A.G.) (July 24, 2002).

46. It is concluded that §1-210(b)(13), G.S., gives a public agency discretion to withhold records prepared or received by such agency relating to a whistleblower investigation. It is concluded that there is no provision in §1-210(b)(13), G.S., limiting its provisions to records of the Attorney General or the State Auditors.

⁵ See P.A. 79-599, An Act Concerning Whistle Blowing by State Employees.

47. After careful review of IC-2015-055-17 through IC-2015-055-56 and consideration of the testimonial evidence provided at the hearings in this matter, it is found that such records pertain to a whistleblower complaint and ongoing investigation.

48. It is found that IC-2015-055-17 through IC-2015-055-56 are permissively exempt from disclosure pursuant to §1-210(b)(13), G.S. It is therefore concluded that the respondents did not violate the FOI Act by withholding such records from the complainant.

49. With respect to IC-2015-055-57 through IC-2015-055-187 and IC-2015-055-01a through IC-2015-055-13a, it is found that such records consist of Brenda Halpin's calendar.⁶ Based upon a careful review of such records, it is found that, except for the entries described in paragraphs 50, 51 and 52, below, the unredacted calendar entries in IC-2015-055-57 through IC-2015-055-187 and IC-2015-055-01a through IC-2015-055-13a do not specifically relate to Brenda Halpin's "professional appointments/meetings," and therefore are not responsive to the complainant's Request No. 31, described in paragraph 2, above. Accordingly, the respondents did not violate the FOI Act when they withheld such entries from the complainant.

50. Based upon a careful review of the unredacted calendar entries, it is found that the following entries relate to Brenda Halpin's "professional appointments/meetings" and therefore are responsive to the complainant's Request No. 31:

IC-2015-055-126 (1st column, 2nd row, 1st entry);
IC-2015-055-126 (2nd column, 2nd row, 1st entry);
IC-2015-055-137 (1st column, 1st row, 7th entry) and
IC-2015-055-174 (2nd column, 2nd row, 3rd entry).⁷

51. Based upon a careful review of the unredacted calendar entries, it is found that the following entries are incomplete: IC-2015-055-178 (2nd column, 2nd row, 14th entry); IC-2015-055-180 (2nd column, 2nd row, 14th entry); IC-2015-055-183 (1st column, 3rd row, 14th entry); and IC-2015-055-184 (2nd column, 2nd row, 14th entry). It is found that the respondents have failed to prove that such entries are outside the scope of the complainant's Request No. 31.

52. Based upon a careful review of the unredacted calendar entries, it is found that the respondents have failed to prove that the following entries are outside the scope of the complainant's Request No. 31:

IC-2015-055-186 (1st column, 2nd row, 1st entry);

⁶ The Commission notes that redacted copies of Brenda Halpin's calendar were marked as Joint Exhibit 17 and Respondents' Exhibit 1 in this matter.

⁷ The respondents submitted the unredacted calendar without providing specific line references on the in camera records. The hearing officer therefore supplied column and row references, in pencil, on the in camera records, in an effort to avoid confusion regarding the entries which are responsive to the complainant's Request No. 31, but were withheld from the complainant.

IC-2015-055-186 (1st column, 3rd row, 1st entry);
IC-2015-055-186 (2nd column, 2nd row, 1st entry),
IC-2015-055-186 (2nd column, 3rd row, 1st and 4th entries);
IC-2015-055-187 (1st column, 1st row, 1st entry);
IC-2015-055-187 (1st column, 2nd row, 1st entry);
IC-2015-055-187 (1st column, 3rd row, 1st entry);
IC-2015-055-187 (2nd column, 1st row, 1st entry); and
IC-2015-055-187 (2nd column, 2nd row, 1st entry).

53. It is found that the respondents failed to provide the complainant with the calendar entries, described in paragraphs 50, 51 and 52, above; therefore, the respondents violated the provisions of the FOI Act.

54. With respect to whether the respondents promptly provided responsive records to the complainant, 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 (Notice of Final Decision dated January 11, 1982), the Commission advised that the word “promptly,” as used in §1-210(a), G.S., means quickly and without undue delay, taking into consideration all of the factors presented by a particular request.

55. 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.

56. It is found that the respondents did not unduly delay responding to the complainant’s records request. Given the volume of the request, the complainant’s decision not to narrow and/or prioritize her 31-part request and her decision not to identify, prior to the September 14th hearing in this matter, records that she believed were responsive but which the respondents had not provided in response to her request, it is found that the respondents’ production of approximately 3,100 pages of records, in installments, over a six month period was reasonable. Accordingly, it is found that, based on the facts and circumstances of this case, the respondents’ response was prompt. Accordingly, the respondents did not violate the promptness requirements under the FOI Act in this matter.

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

1. The respondents shall forthwith undertake a search for the records described in paragraph 26 of the findings, above, and provide copies of any responsive records to the complainant, free of charge. If the respondents do not locate any records responsive to the

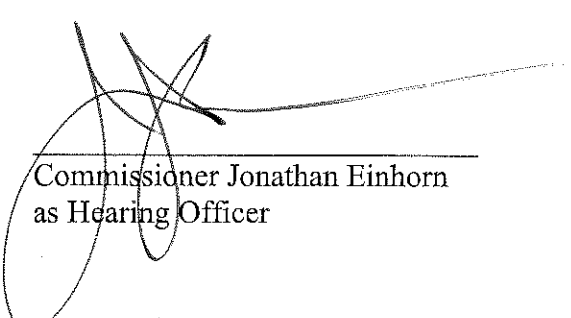
complainant's request, the respondents shall provide the complainant with an affidavit detailing the results of their search.

2. The respondents shall forthwith undertake a search for monthly status reports prepared by the Disability Unit within the OSC's Retirement Services Division as described in paragraph 27 of the findings, above, and provide copies of such records, if any, to the complainant, free of charge. If the respondents do not locate any records responsive to the complainant's request, the respondents shall provide the complainant with an affidavit detailing the results of their search.

3. The respondents shall forthwith provide the complainant with unredacted copies of IC-2015-055-1 through IC-2015-055-7 and IC-2015-055-14 through IC-2015-055-16 as described in paragraphs 34 and 36 of the findings, above, free of charge.

4. The respondents shall forthwith provide the complainant with the unredacted calendar entries described in paragraphs 50, 51 and 52 of the findings, above, free of charge.

5. In addition, if the respondents have not already done so, they are hereby ordered to provide the complainant with copies of the draft RFP for legal services and draft RFP for the pension module described in paragraph 30 of the findings, above, free of charge.



Commissioner Jonathan Einhorn
as Hearing Officer