



FREEDOM OF INFORMATION



Connecticut Freedom of Information Commission • 18-20 Trinity Street, Suite 100 • Hartford, CT 06106
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Colonial Health and Rehab Center,
Complainant(s)
against

Notice of Meeting

Docket #FIC 2015-242

Commissioner, State of Connecticut, Department of
Public Health; and State of Connecticut, Department of
Public Health,

Respondent(s)

November 9, 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: Joseph Rodowicz, Esq.
Daniel Shapiro, Esq.

2015-11-09/FIC# 2015-242/Trans/wrbp/LFS//TAH

FREEDOM OF INFORMATION COMMISSION
OF THE STATE OF CONNECTICUT

In the Matter of a Complaint by

Report of Hearing Officer

Colonial Health and Rehab Center,

Complainant

against

Docket #FIC 2015-242

Commissioner, State of Connecticut,
Department of Public Health; and State of
Connecticut, Department of Public Health,

Respondents

October 30, 2015

The above-captioned matter was heard as a contested case on September 29, 2015, 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 on March 5, 2015, the complainant requested:

[a] Copies of all decisions, orders and/or rulings in any administrative, court or other proceeding that support in any manner whatsoever DPH's position that '*The Department has lost several cases because it is not clearly spelled out in the law that the nursing home administrator should be held responsible for actions*' as stated in DPH's Minor and Technical Legislative Proposals for the Year 2015, dated October 1, 2014[;] and

[b] Any and all documents, records communications notes, meeting minutes, drafts, amendments, and other information concerning DPH's legislative agenda described in Minor and Technical Legislative Proposals for the Year 2015... that specifically reference, pertain to, concern or relate to (i) DPH's statement that '*The Department has lost several cases because it is not clearly spelled out in the law that the nursing home administrator should be held responsible for*

actions' and/or (ii) the DPH's legislative proposal to allegedly address same.

(Emphasis added.)

3. It is found that on March 9, 2015, the respondents acknowledged receipt of the complainant's request, and informed the complainant that the Department of Public Health ("DPH") "is determining whether we possess the referenced documents."

4. By letter filed March 30, 2015, the complainant appealed to this Commission, alleging that the respondents violated the Freedom of Information ("FOI") Act by failing to provide copies of the records it requested.

5. Section 1-200(5), G.S., provides:

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

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

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

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

8. It is found that all the records requested by the complainant, if maintained by the respondents, are public records within the meaning of §§1-200(5), 1-210(a), and 1-212(a), G.S.

9. It is found that on April 6, 2015, the respondents provided to the complainant a copy of the legislative proposal packet from the commissioner of DPH to the General Assembly's Public Health Committee, dated January 20, 2015, and informed the complainant that they did not maintain any other records responsive to the complainant's request.

10. It is found that the legislative proposal packet of January 20, 2015, contained a proposed amendment to §19a-511, G.S., which would explicitly hold a "nursing home

administrator responsible for the quality and safety of all services provided in the licensed nursing home.”

11. It is found that in support of the proposed amendment described in paragraph 10, above, DPH stated: “During some investigations, the Department has found that a nursing home administrator should be held liable for certain findings. *The Department has lost several cases because it is not clearly spelled out in the law that the nursing home administrator should be held responsible for actions.* (Emphasis added.)”

12. It is found that the respondents’ assertion that DPH “lost several cases” was first included in the respondents’ legislative proposal package of October 1, 2014, again in the package of December 15, 2014, and finally in the package of January 20, 2015, that the respondents provided to the complainant.

13. It is found that each of the three legislative packages was prefaced by a cover memorandum from the Commissioner of DPH. It is also found that each included a page indicating that the proposed amendment to §19a-511, G.S., was analyzed and drafted by Wendy Furniss, who is chief of the Healthcare Quality and Safety Branch of DPH.

14. It is found that the respondents’ proposed amendment to §19a-511, G.S., was incorporated verbatim into §1 of HB 6887 of the 2015 Session. It is found that HB 6887 was introduced and referred to the Public Health Committee on February 24, 2015.

15. At the hearing in this matter, the respondents admitted that the statement included in each of the three legislative proposals --- “[t]he Department has lost several cases because it is not clearly spelled out in the law that the nursing home administrator should be held responsible for actions --- was “a mistake.” The respondents conceded that DPH did not lose any cases for the reason they claimed.

16. Nevertheless, it is found that the respondents provided no evidence that they informed the complainant of their mistake at any time before the hearing in this matter. Indeed, as late as May 4, 2015, the respondents sent a letter to the complainant, stating:

The Department has appropriately responded to your request. As you are aware, on April 6, 2015, the Department sent you all of the documents in its possession that are responsive to your request. The Department does not possess any additional documents that are responsive to your request, and the Department did not withhold any documents in its possession by claiming that they are privileged.

17. The Commission takes administrative notice of the HB 6887’s history in the 2015 legislative session. It is found that HB 6887 received a public hearing before the Public Health Committee on March 18, 2015, but was not voted out of committee and so did not become law. It is found that the respondent Commissioner submitted written and oral testimony in support of HB 6887, including the proposal to explicitly hold nursing home administrators responsible for

actions. It is found that the Commissioner did not repeat at that time that DPH needed the change because it lost several cases; but she also did not correct her agency's previous misrepresentations in either her written or oral testimony to the legislature.

18. In light of the respondents' false representations to the General Assembly, and in light of the respondents' failure to inform the complainant (and, apparently, the General Assembly) of their mistake, while telling the complainant only that they maintained no other responsive records, the Commission completely and unequivocally rejects the respondents' argument at the hearing in this matter that the complainant's persistence in pursuing its FOI appeal constituted "harassment."

19. With respect to the complainant's request for any records that relate to the statement about lost cases or DPH's legislative proposal to address the issue of lost cases, described in paragraph 2.b, above, the complainant's challenge the respondents' assertion that they maintain nothing responsive to the request, such as written communications or drafts, other than the legislative proposals sent by the Commissioner of DPH to the legislature.

20. It is found that the Branch chief, Ms. Furniss, included the statement about lost cases based on her understanding of the situation. It is found that to prepare the legislative proposals, she reviewed laws and regulations. It is found that she conferred with staff. It is found that she drafted the proposal in long hand, which she gave to her secretary, who entered it into her computer, forwarded it to the Commissioner and to DPH's government relations personnel, and then destroyed the long hand draft. Ms. Furniss testified that she did not know whether she wrote the whole proposal herself, whether any member of her staff contributed to the report, or whether she asked anyone about "lost cases." Ms. Furniss also did not know whether the FOI liaison or IT staff searched her computer or any other computers, including that of the Commissioner, government liaison personnel, or Ms. Furniss's secretary, for records responsive to the complainant's request. It is found that Ms. Furniss did not search for any records.

21. The respondents submitted no testimony other than that of Ms. Furniss.

22. It is found, based on a reasonable inference, that the respondents maintain responsive records other than the legislative proposals provided to the General Assembly.

23. It is found that the respondents failed to prove that they conducted a thorough and diligent search for records responsive to the complainant's request.

24. Accordingly, it is concluded that the respondents violated §§1-210(a) and 1-212(a), G.S., as alleged, by failing to provide all the responsive records they maintained at the time of the complainant's request.


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

1. Forthwith the respondents shall conduct a diligent search for records responsive to the complainant's request. If any records are discovered, the respondents shall provide them to the

complainant, free of charge. If no records are discovered, the respondents shall promptly inform the complainant.

2. At the conclusion of the search, the respondents shall execute an affidavit by each person or person(s) who conducted the search, detailing the scope and extent of the search for responsive records. The respondents shall promptly provide such affidavit(s) to the complainant.

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


Lisa Fein Siegel
as Hearing Officer