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Michael Aronow,
Complainant(s)
against

Executive Vice President, State of Connecticut, University of Connecticut Health Center; and State of Connecticut, University of Connecticut Health Center,
Respondent(s)

Notice of Meeting

Docket #FIC 2015-277

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, lst 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: Michael Aronow
Jeffrey M. Blumenthal, Esq.

2015-11-09/FIC# 2015-277/Trans/wrbp/VDH//TAH

FREEDOM OF INFORMATION COMMISSION
OF THE STATE OF CONNECTICUT

In the Matter of a Complaint by

Michael Aronow,

Complainant

against

Executive Vice President,
State of Connecticut, University
of Connecticut Health Center; and
State of Connecticut, University
of Connecticut Health Center,

Respondents

Report of Hearing Officer

Docket #FIC 2015-277

November 9, 2015

The above-captioned matter was heard as a contested case on August 28, 2015 and October 19, 2015, at which times 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 April 10, 2015, the complainant requested that the respondents provide him with access to the following records on a rolling basis:

a. . . . a list of all grievances or complaints filed by current or former Health Center employees or their representative Union with the Health Center administrators, The Office of Diversity and Equity, and/or other offices or committees that investigate Health Center grievances or complaints for:

i. Dr. Jay Lieberman between September 1, 2006 and May 31, 2013; and
ii. Dr. David W. McFadden between December 1, 2011 and April 10, 2015;

b. . . . all written and electronic documents relating to the grievances or complaints listed in item 1, above, including,

but not limited to, the initial complaint and the final decision:

i. For any grievances or complaints still ongoing as of April 10, [2015[1]], please also provide any related written and electronic documents between April 10, 2015 and 15 days prior[2] to full compliance with this FOIA request; and

c. . . . a list of all emails and documents that you have obtained related to the above requests, but which were excluded and the reason why they were excluded.

3. By letter dated and filed April 17, 2015, the complainant appealed to this Commission, alleging that the respondents violated the Freedom of Information ("FOI") Act by failing to provide him with access to the records described in paragraph 2, above.

4. 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, 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.

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

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[1] The Commission notes that the date stated in the actual request was "2013," however, through correspondence exchanged between the parties before the contested case hearings, the complainant clarified that the intended date was "2015."

[2] The Commission notes, and it was explained at the second contested case hearing, that the end date of the request in this case was the date of the request for access itself—April 10, 2015. See ¶2, above.

6. 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."

7. It is found that the requested records are public records within the meaning of §§1-200(5), 1-210(a), and 1-212(a), G.S.

8. It is found that, on June 17, 2015, the respondents acknowledged the complainant's request. With regard to the delay between the request for access and the acknowledgement, Dr. Scott Wetstone, the respondents' Director of Health Affairs Policy Planning and FOI Officer, testified that he inadvertently overlooked the email containing the complainant's request when he was reviewing his electronic mail. It is found that Dr. Wetstone became aware of the request and the complaint when, in early June 2015, he received the Commission's docketing letter. It is found that, once he became aware of the request, Dr. Wetstone acknowledged it.

9. With regard to the request described in paragraph 2.a, above, it is found that the complainant testified that he was in fact requesting a "list" of grievances and complaints. It is found that the respondents do not maintain any such list.

10. With regard to the request described in paragraph 2,c, above, it is found that the complainant is seeking to have the respondents create a privilege log for him. There is nothing in the FOI Act that requires the respondents to create a privilege log after denying a records request absent an order from this Commission. See Lowthert v. Gary Richards, Superintendent of Schools, Wilton Public Schools, et al., Docket #FIC 2014-276 (Apr. 8, 2015). Because the Commission has not ordered the respondents to create and provide a privilege log to the complainant, this request will not be addressed further.

11. With regard to the request described in paragraph 2.b, above, it is found that Dr. Wetstone determined that there were eighteen potential individuals in various departments throughout the university who might maintain records responsive to the request. It is found that Dr. Wetstone contacted each of these individuals to determine whether they maintained any grievances or complaints or related correspondence concerning the matters set forth in the request. Specifically, it is found that Dr. Wetstone contacted individuals in the following departments within the university: 1) The School of Medicine Dean's Offices; 2) The Office of the Executive Vice President; 3) The School of Medicine Facility Affairs Office; 4) The Human Resources Department; 5) The University's Police Department; 6) The University Medical Group (which is the university's faculty outpatient practice); 7) The Office of Diversity and Equity; 8) The Compliance and Ethics Office; 9) The Graduate Medical Education Office (which would handle a complaint raised by a medical resident); 10) The Undergraduate Medical Education Office (which could handle a complaint raised by an undergraduate student); 11) The Medical Staff Office; 12) The Research Finance Office; 13) The Research Misconduct Operation; 14) The Animal Care Operation; 15) The Individual Conflict of Interest in Research Operation; and 16) The Institution Review Board. It is further found that Dr. Wetstone explained the parameters of the request to the individuals whom he contacted and indicated that hardcopy and electronic records should be searched for

responsive records.

12. It is found that Dr. Wetstone's search yielded three complaints and related records responsive to the request described in paragraph 2.b, above. It is found that one complaint concerned one of the doctors identified in the request, and two complaints concerned the other doctor identified in the request. It is further found that the two complaints concerning one of the doctors arose out of the same set of facts (sometimes referred to as the "related complaints").

13. Upon review of the responsive records, it is found that Dr. Wetstone determined that he should recuse himself as the person responsible for reviewing and, if necessary, redacting the responsive records. It is found that this determination was based on the fact that Dr. Wetstone had been an initial contact person for the two individuals that ultimately filed the two related complaints against one of the doctors. Accordingly, it is found that Dr. Wetstone asked Attorney Rachael Krinsky-Rudnick, the respondent university's Assistant Director of Compliance and Privacy, if she could step in and conduct the legal review of the records, and Attorney Krinsky-Rudnick agreed to do so.

14. It is found that, at or around the time of the August 28, 2015 contested case hearing, the single complaint was disclosed to the complainant.

15. Attorney Krinsky-Rudnick, who had been engaged in other projects that the time of Dr. Wetstone's request, indicated at the first contested case hearing that she required additional time to complete her review of the two related complaints and records. In order to allow Attorney Krinksy-Rudnick such time, the contested case hearing was continued.

16. Attorney Krinsky-Rudnick appeared and testified at the October 19, 2015 contested case hearing.

17. It is found that, during the time between the two contested case hearings, the respondents disclosed a 168 page PDF file of responsive records to the complainant. It is found that all of the records concerning the single complaint discussed in paragraph 14, above, were contained on the PDF disclosed to the complainant.

18. In addition, with regard to the related complaints, it is found that the respondents' final reports in these matters were disclosed to the complainant.[3] It is found that the investigations regarding the related complaints took place in and by different divisions within the respondent university. One investigation was handled by the respondents' Labor Relations Department (the "labor relations investigation"), while the other investigation was handled by the respondents' Office of Diversity and Equity (the "ODE investigation").

[3] The Commission notes that one of the final reports disclosed to the complainant was dated July 21, 2015 and, therefore, fell outside the scope of the request. However, because the respondents understood that this was a report that the complainant did in fact desire, they provided it to him despite the date range of the underlying FOI request.

19. The respondents' withheld eleven pages on the grounds that such pages are the personal notes of the investigator assigned to conduct the labor relations investigation. The respondents withheld an additional twenty-four pages on the grounds that such pages are the personal notes of the investigator assigned to conduct the ODE investigation.

20. The respondents claimed that the records they withheld are exempt from disclosure pursuant to §1-210(b)(1), G.S.

21. Section 1-210(b)(1), G.S., provides, in relevant part, that nothing in the FOI Act shall be construed to require disclosure of:

> (1) 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....

22. In addition, §1-210(e)(1), G.S., provides, in relevant part, that "[n]otwithstanding the provisions of subdivisions (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.

23. In Strillacci v. FOI Commisson, No. CV-08-4018129-S, 2009 WL 1334821 (Conn. Super. Ct. Apr. 20, 2009), the court upheld the Commission's final decision that a list containing notes jotted down as a memory aide by the Chief of Police, consisting of his own thoughts, interpretations, and comments about lawsuits filed against him and the officers in his department, was a "note" within the meaning of §1-210(b)(1), G.S., but that such note was not preliminary, and therefore must be disclosed. Citing Shew v. FOI Commission, 245 Conn. 149, 165 (1998), the court explained that a document is "preliminary" if it "precedes formal and informed decision making. . . . It is a record of this preliminary, deliberative and predecisional process that we conclude the exemption was meant to encompass." Strillacci, 2009 WL 1334821, at *2. The note in question in Strillacci was a completed document to be used by the Chief of Police in the course of his public duties. The document was not expected to be modified nor did it contain information 'not required or germane' to its ultimate purpose. Id. at *3.

24. The respondents contended that ordering the disclosure of either investigators' personal notes would lead to their investigators carefully filtering and limiting what they write down in the context of an investigation. They further contend that such a disclosure

order could also result in witnesses being less candid with the investigators. In addition, the respondents contend that, because many of their investigations—such as the investigations at issue in this case—are complex and take place over the course of many months, the result of an investigator taking limited notes or receiving limited witness assistance would compromise the investigative process and, in the end, result in a final determination that is less comprehensive.

25. The complainant contended that, by allowing investigators to keep their personal notes private, the public can never be sure that all of the relevant allegations raised during the course of an investigation are fully and fairly addressed in a final decision. In addition, the complainant moved, without objection, to have the Commission conduct an in camera inspection of the records claimed to be exempt. Such motion was granted.

26. On October 22, 2015, the respondents submitted the records at issue to the Commission for an in camera inspection (the "in camera records"). The in camera records will be referred to as follows: IC-2015-277-1 through IC-2015-277-11 (the labor relations records) and IC-2015-277-12 through IC-2015-277-35 (the ODE records).

27. After a careful in camera inspection, it is found that the following records are preliminary notes within the meaning of §1-210(b)(1), G.S.: IC- 2015-277-1 through IC-2015-277-11, IC-2015-277-13, IC-2015-277-22 through IC-2015-277-25, and IC-2015-277-35.

28. Unlike the note in Strillacci, the notes identified in paragraph 27, above, are not completed documents, but rather are abbreviated notations concerning the steps that the assigned investigators have taken (and are going to take) in an investigative process. It is found that, while some of the notes (IC-2015-277-1 through IC-2015-277-11) are handwritten, while the other notes (IC-2015-277-13, IC-2015-277-22 through IC-2015-277-25, and IC-2015-277-35) are typed into a software program, the basic character of both sets of notes is the same—these are brief written comments created by the investigators to be able to keep track of witness statements and concerns, impressions of credibility, theories of investigation, and possible next steps, while at the same time moving their respective investigations forward.

29. It is further found that the respondents made the necessary determination that "the public interest in withholding such [preliminary notes] clearly outweighs the public interest in disclosure," within the meaning of §1-210(b)(1), G.S. It is found such determination was based on the following considerations: the notes were taken by the investigators while conducting their respective investigations for the purpose of being able to recall relevant and important details at the time the final investigative reports were written; the notes were, at all times, for the investigators' own personal use; and the respondents were concerned that their investigators would be too focused on the content or nature of their personal notes, and curtail or forego their note taking if they knew that such notes would later be subject to disclosure.

30. Accordingly, it is concluded that, with regard to the records listed in paragraph 27, above, the respondents did not violate the FOI Act when they declined to disclosure such records.

31. However, it is found that the following records are not preliminary notes (or preliminary drafts) within the meaning of §1-210(b)(1), G.S.: IC-2015-277-12, IC-2015-277-14 through IC-2015-277-21, and IC-2015-277-26 through IC-2015-277-34, but rather are completed communications between the investigators and other individuals.

32. It is found that many of the communications identified in paragraph 31, above, have nothing to do with any substantive aspect of the investigations, but rather deal with scheduling issues. Moreover, it is found that the "personal use" aspect of the preliminary notes described in paragraphs 28 and 29, above, is not present for the records identified in paragraph 31, above, because these are communications that, by their very nature, have been circulated between at least two individuals. Finally, while the respondents contend that witnesses and others speaking to their investigators are provided with the assurance that such communications will be kept confidential, records that have been disclosed to the complainant by the respondents in this case belie such contention: "ODE advised the witness of ODE's protocols and procedures and provided her with an explanation of its investigative process. The witness was informed that there would be no guarantee of confidentiality and that information she shared with ODE would be reflected in its Findings and Recommendations." See Compl's Ex. F.

33. Accordingly, it is concluded that the respondents violated §§1-210(a) and 1-212(a), G.S., when they declined to disclose the records listed in paragraph 31, above, to the complainant.

34. In response to the complainant's contention that respondents failed to conduct a thorough search, it is found that the search conducted by Dr. Wetstone was broad and exhaustive. See ¶ 11, above. In addition, it is found that, as a result of the complainant's contention with regard to the sufficiency of the search, which was raised during the first contested case hearing, Attorney Krinsky-Rudnick went back and investigated whether the respondent university's labor relations department might maintain responsive records that had somehow been overlooked. It is found that such office's databases were searched for any grievance, complaint, or other related records pertaining to the doctors identified in the request. No additional records were located. In sum, there is no evidence that suggests that the respondents maintain any additional responsive records.

35. With regard to the complainant's contention that the disclosure in this case was not completed promptly, the 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 statements requested; the amount of personnel time necessary to comply with the request; the time by which the requester needs the information contained in the statements; 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.

36. It is found that the oversight described in paragraph 8, above, was inadvertent and was not an attempt to delay or avoid processing the request in this case. Dr. Wetstone testified convincingly that no benefit or advantage accrues to the respondents by purposefully ignoring an FOI request. In addition, Dr. Wetstone expressly acknowledged his regret for having overlooked this FOI request. While it is found that there was a significant delay between the request for records and the disclosure of records, it is further found that once the respondents realized that a request had been made and overlooked, they did an exhaustive search for records, dealt with an unexpected conflict of interest, and disclosed the records as quickly as possible.

37. In addition, this Commission recognizes that the respondents have other high priority work that must be handled, including work involving patient care and safety; the training of medical, dental, and undergraduate students; and other student and faculty related matters. In addition, it is found that this year alone, the respondents have processed eleven FOI requests from this complainant, in addition to multiple other FOI requests from various other individuals.

38. In sum, because the failure to promptly handle this request was based on human error, the Commission does not believe that an explicit finding that the respondents violated the promptness requirement of the FOI Act will serve any purpose other than to point out what the respondents have already candidly admitted.

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

1. The respondents shall provide the complainant with a copy of the records identified in paragraph 31 of the findings, free of charge.

Valicia Dee Harmon

Valicia Dee Harmon
as Hearing Officer