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# FREEDOM OF INFORMATION



Connecticut Freedom of Information Commission • 18-20 Trinity Street, Suite 100 • Hartford, CT 06106  
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Hardie Burgin,  
Complainant(s)  
against

Notice of Meeting

Docket #FIC 2012-089

Chief, Police Department, Town of East  
Hampton; and Police Department, Town of East  
Hampton,

Respondent(s)

November 9, 2012

### 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 12, 2012**. 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 November 30, 2012**. 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, the Commission requests that an **original and fourteen (14) copies** be filed **ON OR BEFORE November 30, 2012**. **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 **fourteen (14) copies** be filed **ON OR BEFORE November 30, 2012**, 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: Hardie Burgin  
Jean M. D'Aquila, Esq.

11/9/2012/FIC# 2012-089/Trans/wrbp/KKR/TCB

FREEDOM OF INFORMATION COMMISSION  
OF THE STATE OF CONNECTICUT

In the Matter of a Complaint by

Report of Hearing Officer

Hardie Burgin,

Complainant

against

Docket #FIC 2012-089

Chief, Police Department, Town of  
East Hampton; and Police Department,  
Town of East Hampton,

Respondents

November 9, 2012

The above-captioned matter was heard as a contested case on July 27, 2012, at which time the complainant and the respondents appeared 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 undated letter received by the respondents on January 20, 2012, the complainant made a request for (a) all emails of East Hampton Police Chief Matthew Reimondo and Sergeant Timothy Dowty, from May 15, 2011 through September 30, 2011; and (b) all written communication between Chief Reimondo or Sgt. Dowty and Dave Hebert from May 15, 2011 through September 30, 2011.
3. It is found that, by letter dated January 23, 2012, the respondents informed the complainant that they had received his request and intended to comply. It is also found that they explained that the requested records would need to be reviewed to determine whether any exemptions to disclosure applied, and that the review process would "take some time." It is further found that, by letter dated January 25, 2012, the respondents supplemented their January 23<sup>rd</sup> response by informing the complainant that there were no records responsive to the request, described in paragraph 2(b), above, with regard to Chief Reimondo. However, it is found that the respondents did not respond to the request, described in paragraph 2(b), above, with regard to Sgt. Dowty.
4. By email dated and filed February 16, 2012, the complainant appealed to this Commission, alleging that the respondents violated the Freedom of Information (FOI) Act by failing to comply with the request for records described in paragraph 2, above.

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, 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.

6. 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. (Emphasis added).

7. 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.”

8. It is found that the respondents conducted a thorough search for records responsive to the request, described in paragraph 2(a), above. It is found that the respondents reviewed approximately 2000 emails in response to the request for Chief Reimondo’s emails, and 281 emails in response to the request for Sgt. Dowty’s emails. It is found that, on April 26, 2012, the respondents provided copies of certain of Sgt. Dowty’s emails to the complainant, and that, on May 5, 2012, they provided to him copies of certain of Captain Reimondo’s emails.

9. However, it is found that the respondents withheld 242 of Chief Reimondo’s emails and 183 of Sgt. Dowty’s emails from the complainant, claiming that they are exempt from disclosure.

10. At the hearing in this matter, the complainant requested an in camera review of the records being claimed exempt by the respondents. The hearing officer ordered that such records be submitted for in camera review on or before August 10, 2012. The respondents requested, and were granted, without objection from the complainant, an extension of time by which to submit the in camera records, and such records were submitted for in camera review on September 14, 2012.

11. It is found that the in camera records are responsive to the request, described in paragraph 2(a), above, and consist of Chief Reimondo’s and Sgt. Dowty’s emails (the “in camera

records”). The respondents claim that Chief Reimondo’s emails are exempt from disclosure pursuant to §§1-210(b)(3), 1-210(b)(10), 1-210(b)(4), 1-210(b)(9), 1-210(b)(1), G.S., and further claim that certain other emails are “personal” in nature and therefore not public records subject to disclosure. The respondents claim that Sgt. Dowty’s emails are exempt from disclosure pursuant to §1-210(b)(3), G.S.

12. With regard to the emails described on the index as “personal”, the respondents argued that, because such emails do not pertain to the public’s business, they are not public records, as that phrase is used in §1-200(5), G.S.

13. It is found that the respondents maintain the emails, identified on the index as “personal”, and that Chief Reimondo used town equipment to send and receive these emails. However, it is found that such emails do not pertain to the conduct of the public’s business. Moreover, unlike the emails found by this Commission to be public records in Burgin v. Chief, Police Department, Town of East Hampton, Docket #FIC 2011-704 (July 11, 2012), the emails in the present case do not reveal “an inappropriate mixing of the officer’s professional and private life”, and therefore do not “relate to the officer’s public position.” *Id.* at p.2.

14. Accordingly, after careful review of the emails identified as “personal” on the index, and under the facts and circumstances of this case, it is found that such emails are not public records within the meaning of §1-200(5), G.S., and therefore are not required to be disclosed. Thus, it is concluded that the respondents did not violate the FOI Act as alleged when they withheld such records from the complainant. However, it is found that the remainder of the in camera records are public records, within the meaning of §§1-200(5) and 1-210(a), G.S.

### **Chief Reimondo’s Emails**

15. It is found that of the 242 emails submitted for in camera inspection, 106 of them are described on the index as email correspondence from CTIC (“Connecticut Intelligence Center”). The respondents contend that the CTIC emails are exempt from disclosure pursuant to §1-210(b)(3), G.S., which permits nondisclosure of:

“[r]ecords of law enforcement agencies not otherwise available to the public which records were compiled in connection with the detection or investigation of crime, if the disclosure of said records would not be in the public interest because it would result in the disclosure of (A) the identity of informants not otherwise known or the identity of witnesses not otherwise known whose safety would be endangered or who would be subject to threat or intimidation if their identity was made known, (B) signed statements of witnesses, (C) information to be used in a prospective law enforcement action if prejudicial to such action, (D) investigatory techniques not otherwise known to the general public, (E) arrest records of a juvenile, which shall also include any investigatory files, concerning the

arrest of such juvenile, compiled for law enforcement purposes, (F) the name and address of the victim of a sexual assault or injury or risk of injury, or impairing of morals...or of an attempt thereof, or (G) uncorroborated allegations subject to destruction pursuant to section 1-216;

16. It is found that CTIC was formed in response to the September 11<sup>th</sup> attacks on the World Trade Center, and that it sends periodic emails to law enforcement agencies as a method of disseminating information to such agencies about ongoing criminal investigations, tips on active arrest warrants, terrorists, etc. It is found that such information is labeled CONFIDENTIAL for law enforcement only and is not disseminated to the public.

17. By email dated October 22, 2012, the complainant stated that he no longer wished to pursue the complaint as it pertains to the records, identified on pages 4 through 13 of the index, as "correspondence from CTIC." The Commission takes administrative notice of such email.

18. Accordingly, the Commission shall not further consider the allegations with respect to such records.

19. With regard to the emails claimed exempt pursuant to §1-210(b)(10), G.S., that provision permits an agency to withhold from disclosure records of "communications privileged by the attorney-client relationship."

20. The applicability of the exemption contained in §1-210(b)(10), G.S., is governed by established Connecticut law defining the privilege. That law is well set forth in Maxwell v. FOI Commission, 260 Conn. 143 (2002). In that case, the Supreme Court stated that §52-146r, G.S., which established a statutory privilege for communications between public agencies and their attorneys, merely codifies "the common-law attorney-client privilege as this court previously had defined it." Id. at 149.

21. Section 52-146r(2), G.S., defines "confidential communications" as:

all oral and written communications transmitted in confidence between a public official or employee of a public agency acting in the performance of his or her duties or within the scope of his or her employment and a government attorney relating to legal advice sought by the public agency or a public official or employee of such public agency from that attorney, and all records prepared by the government attorney in furtherance of the rendition of such legal advice. . . .

22. The Supreme Court has also stated that "both the common-law and statutory privileges protect those communications between a public official or employee and an attorney that are confidential, made in the course of the professional relationship that exists between the attorney and his or her public agency client, and relate to legal advice sought by the agency from the attorney." Maxwell, supra at 149.

23. Recently, the Supreme Court reaffirmed that for a communication to be privileged, all four parts of a four-part test must be met: “(1) the attorney must be acting in a professional capacity for the agency, (2) the communications must be made to the attorney by current employees for the agency, (3) the communications must relate to the legal advice sought by the agency from the attorney, and (4) the communications must be made in confidence.” Lash v. Freedom of Information Commission, 300 Conn. 516 (2011), citing Shew v. Freedom of Information Commission, 245 Conn. 159 (1998).

24. After careful review of the in camera records, it is found that the following emails are **exempt** from disclosure pursuant to the attorney-client privilege:

Date: 6/6/11

Received: 3:25 (59 KB) email ONLY; 3:32 (10 KB); 3:33 (13 KB); 3:33 (12 KB); 3:41 (12 KB); 3:47 (8 KB)

Date: 6/7/11

Received: 8:07 (87 (KB)

Date: 6/16/11

Received: 3:47 (135 KB)<sup>1</sup>; 3:59 (27 KB) second email on the page ONLY

Date: 7/5/11

Received: 10:23 (5 KB); 10:26 (8 KB)

Date: 7/25/11

Received: 3:22 (27 KB); 3:29 (514 KB) email and attachment; 3:33 (154 KB) email and attachment; 3:38 (157 KB) email and attachment; 3:46 (83 KB) email and attachment; 3:47 (83 KB) email and attachment; 3:55 (84 KB) email and attachment; 4:54 (88 KB) email and attachment<sup>2</sup>; 6:00 (5 KB)

Date: 7/26/11

Received: 3:47 (84 KB); 3:48 (17 KB); 3:49 (15 KB); 3:50 (20 KB)

Date: 8/8/11

Received: 1:00 (9 KB); 1:50 (35 KB)<sup>3</sup>

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<sup>1</sup> There are two entries on the index with the same date and time received. The emails are identical and, accordingly, both are exempt and may be withheld.

<sup>2</sup> There are two entries on the index with the same date and time received. The emails are identical and, accordingly, both are exempt and may be withheld.

<sup>3</sup> There are two entries on the index with the same date and time received. The emails are identical and, accordingly, both are exempt and may be withheld.

Date: 8/10/11

Received: 10:50 (397 KB) final column ONLY; 10:53 (399 KB) final column ONLY

Date: 8/17/11

Received: 9:23 (261 KB); 9:26 (264 KB) email ONLY; 10:12 (20 KB) email ONLY; 11:14 (19 KB); 11:16 (24 KB)

Date: 9/28/11

Received: 11:16 (11 KB); 3:05 (32 KB)

Date: 9/29/11

Received: 1:32 (100 KB) email ONLY; 2:13 (99 KB)

Date: 9/30/11

Received: 8:57 (139 KB) email ONLY; 10:09 (264 KB) email ONLY; 10:12 (22 KB); 11:16 (24 KB) email and attachments; 12:18 (139 KB) second email of two ONLY; 2:29 (60 KB) email and attachment; 2:31 (30 KB); 3:00 (24 KB); 3:01 (65 KB) email and attachment; 3:06 (68 KB); 3:27 (28 KB); 3:38 (61 KB) email ONLY

25. Accordingly, it is concluded that the respondents did not violate the FOI Act as alleged by withholding the records, described in paragraph 24, above, from the complainant.

26. The respondents claimed several emails between Chief Reimondo and an investigator hired by the town to conduct an internal affairs investigation within the police department also are exempt from disclosure pursuant to the attorney-client privilege. Although it is found that the investigator also is an attorney, the respondents offered no evidence, nor is it evident on the face of the internal affairs report itself, that the respondents hired such investigator to provide legal advice, or that he provided legal advice, to the respondents. Thus, this case is distinguishable from Shew v. Freedom of Information Commission, 245 Conn. 149 (1998), in which the Supreme Court concluded that the attorney-client privilege extended to a report prepared by a law firm hired to conduct an investigation of a police chief, but where the investigators/lawyers also provided legal advice to the town. See also Bestoff v. Town Clerk, Town of Avon, Docket #FIC 2012-679 (July 8, 2012) (report prepared by investigator hired by law firm retained by town found to be exempt as attorney-client privileged because it was provided to law firm for purpose of facilitating legal advice); (Anderson v. Superintendent of Schools, Derby Public Schools, Docket #FIC 2009-166 (March 10, 2012), (report compiled by consultant hired by law firm representing town found to be attorney-client privileged where such report was necessary to give the legal advice sought by town). Accordingly, it is found that the following emails and attachments are **not exempt** from disclosure pursuant to 1-210(b)(10), G.S.

Date: 7/6/11

Received: 7:54 (176 KB)

Date: 8/9/11

Received: 1:42 (100 KB); 10:38 (10 KB); 1:49 (16 KB); 3:48 (KB)

Date: 9/21/11  
Received: 7:09 (19 KB);

Date: 9/22/11  
Received: 3:46 (162 KB)

27. With regard to the following emails and/or attachments claimed exempt pursuant to 1-210(b)(10), G.S., it is found that the respondents failed to prove the applicability of such exemption, because such emails and/or attachments either: are not between the attorney and the client, or because they do not relate to legal advice sought by the agency from the attorney:

Date: 6/6/11  
Received: 3:25 (59 KB) attachment ONLY

Date: 6/7/11  
Received: 8:13 (34 KB)<sup>4</sup>

Date: 6/8/11  
Received: 10:49 (37 KB)<sup>5</sup>; 3:23 (28 KB)<sup>6</sup>

Date: 6/9/11  
Received: 3:44 (31 KB)

Date: 6/16/11  
Received: 3:59 (27 KB) first email of two

Date: 6/21/11  
Received: 11:22 (134 KB)

Date: 6/23/11  
Received: 6:35 (95 KB) neither email nor attachment

Date: 7/5/11  
Received: 10:23 (7 KB)

Date: 7/6/11  
Received: 7:54 (176 KB)

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<sup>4</sup> There are two entries on the index with the same date and time received. The emails are identical and, accordingly, neither are exempt and neither may be withheld.

<sup>5</sup> There are two entries on the index with the same date and time received. The emails are identical and, accordingly, neither are exempt and neither may be withheld.

<sup>6</sup> There are two entries on the index with the same date and time received. The emails are identical and, accordingly, neither are exempt and neither may be withheld.



Date: 9/21/11  
Received: 7:09 (19 KB)

Date: 9/22/11  
Received: 3:46 (162 KB) neither email nor attachment

Date: 9/26/11  
Received: 12:03 (67 KB) neither email nor attachment<sup>7</sup>; 12:14 (70 KB) neither email nor attachment; 12:55 (70 KB)

Date: 9/29/11  
Received: 3:46 (100 KB) attachment not privileged; 2:00 (99 KB) neither email nor attachment

Date: 9/30/11  
Received: 3:38 (61 KB) attachment not privileged

28. Accordingly, it is found that the emails described in paragraph 27, above, are **not exempt** from disclosure pursuant to the attorney-client privilege, §1-210(b)(10), G.S.

29. With regard to the respondents' §1-210(b)(4), G.S., claim of exemption, that provision permits a public agency to withhold "[r]ecords pertaining to strategy and negotiations with respect to pending claims or pending litigation to which the public agency is a party until such litigation or claim has been finally adjudicated or otherwise settled." The respondents contend that the following in camera records are exempt from disclosure pursuant to §1-210(b)(4), G.S.:

Date: 6/6/11  
Received: 3:25 (59 KB) attachment ONLY

Date: 7/5/11  
Received: 10:23 (7 KB)

Date: 7/6/11  
Received: 7:54 (176 KB)

30. It is found that the respondents did not offer evidence at the hearing in this matter that the in camera records described in paragraph 29, above, pertain to strategy and negotiations with respect a pending claim or pending litigation to which the public agency is a party. Moreover, it is not clear from the records themselves that they pertain to strategy and negotiations with respect a pending claim or pending litigation. Accordingly, it is found that the respondents failed to prove the applicability of §1-210(b)(4), G.S., to the records at issue.

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<sup>7</sup> There are two entries on the index with the same date and time received. The emails are identical and, accordingly, neither are exempt and neither may be withheld.

31. With regard to the respondents' §1-210(b)(9), G.S., claim of exemption, that provision permits a public agency to withhold "[r]ecords, reports and statements or negotiations with respect to collective bargaining." After careful review of the in camera records, it is found that the following records are **exempt** from disclosure pursuant to §1-210(b)(9), G.S.:

Date: 6/16/11  
Received: 3:47 (135 KB)<sup>8</sup> attachment ONLY

Date: 6/21/11  
Received: 11:22 (134 KB) attachment ONLY

Date: 7/21/11  
Received: 6:23 (48 KB)<sup>9</sup> email and attachment

32. Accordingly, it is concluded that the respondents did not violate the FOI Act as alleged when they withheld the records, described in paragraph 31, above, from the complainant.

33. However, it is found that the following in camera records are not records, reports and statements or negotiations with respect to collective bargaining, as contemplated by the statute. Accordingly, it is found that the following records are **not exempt** from disclosure pursuant to §1-210(b)(9), G.S.:

Date: 6/7/11  
Received: 8:13 (34 KB)<sup>10</sup>

Date: 6/8/11  
Received: 10:49 (37 KB)<sup>11</sup>; 3:23 (28 KB)<sup>12</sup>

Date: 6/9/11  
Received: 3:44 (31 KB)

Date: 6/16/11  
Received: 3:59 (27 KB) first email of two

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<sup>8</sup> There are two entries on the index with the same date and time received. The emails are identical and, accordingly, both are exempt and may be withheld.

<sup>9</sup> There are three entries on the index with the same date and time received. The emails are identical and, accordingly, all are exempt and may be withheld.

<sup>10</sup> There are two entries on the index with the same date and time received. The emails are identical and, accordingly, neither are exempt and neither may be withheld.

<sup>11</sup> There are two entries on the index with the same date and time received. The emails are identical and, accordingly, neither are exempt and neither may be withheld.

<sup>12</sup> There are two entries on the index with the same date and time received. The emails are identical and, accordingly, neither are exempt and neither may be withheld.

Date: 6/21/11  
Received: 11:22 (134 KB) email

34. With regard to the respondents' §1-210(b)(1), G.S., claim of exemption, that provision permits a public agency to withhold "[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."

35. The respondents contend that the following in camera records are exempt from disclosure pursuant to §1-210(b)(1), G.S. :

Date: 6/23/11  
Received: 6:35 (95 KB) email and attachment

Date: 8/9/11  
Received: 1:49 (16 KB); 3:48 (KB)

Date: 8/17/11  
Received: 9:26 (265 KB) attachment; 10:12 (20 KB) attachment

Date: 9/21/11  
Received: 7:09 (19 KB)

Date: 9/22/11  
Received: 3:46 (162 KB) email and attachment

Date: 9/26/11  
Received: 12:03 (67 KB) email and attachment<sup>13</sup>; 12:14 (70 KB) email and attachment; 12:55 (70 KB)

Date: 9/30/11  
Received: 8:57 (139 KB) attachment; 10:09 (264 KB) attachment; 12:18 (139 KB); 3:38 (61 KB) attachment

36. At the hearing in this matter, the respondents did not offer evidence from which it could be found that the public agency determined that the public interest in withholding the in camera records clearly outweighs the public interest in disclosure of such records.

37. Accordingly, it is concluded that the respondents failed to prove the applicability of §1-210(b)(1), G.S., to the records described in paragraph 35, above.

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<sup>13</sup> There are two entries on the index with the same date and time received. The emails are identical and, accordingly, neither are exempt and neither may be withheld.

38. Based upon the foregoing, it is concluded that the respondents violated the FOI Act in failing to disclose the records, described in paragraphs 26, 27, 29, 33 and 35, above, to the complainant.

### **Sgt. Dowty's Emails**

39. The respondents contend that all of Sgt. Dowty's emails are exempt from disclosure pursuant to §1-210(b)(3), G.S.

40. It is found that, although there are a total of 181 emails, many of them are duplicates. It is further found that such emails consist of communications from CTIC, as described in paragraph 15, above, or other confidential law enforcement information, not otherwise available to the public. Thus, it is found that such emails are **exempt** from disclosure pursuant to §1-210(b)(3), G.S.

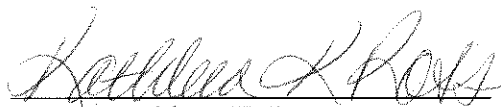
41. Accordingly, it is found that the respondents did not violate the FOI Act as alleged in withholding the in camera records described in paragraph 40, above, from the complainant.

42. With regard to the records, described in paragraph 2(b), above, as they pertain to Sgt. Dowty, it is found that, at the time of the hearing in this matter, the respondents had located three responsive records, but had not yet reviewed such records for possible exemptions or provided copies of such records to the complainant. According to the respondents, the failure to have promptly provided the complainant with copies of such records was an oversight. Nevertheless, it is found that the respondents violated the FOI Act in failing to provide the complainant with copies of such records.

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 provide a copy of the in camera records described in paragraphs 26, 27, 29, 33, 35 and 42, above, at no cost.

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



Kathleen K. Ross  
as Hearing Officer