FREEDOM OF INFORMATION COMMISSION
OF THE STATE OF CONNECTICUT

In The Matter of a Complaint by FINAL DECISION

Richard Linquist,

Complainant

against Docket #FIC 2016-0383

Chief Executive Officer for Health
Affairs, State of Connecticut,
University of Connecticut Health
Center; and State of Connecticut,
University of Connecticut Health Center,

Respondents April 12, 2017

The above-captioned matter was heard as a contested case on August 8, 2016, December 8, 2016 and January 19, 2017, 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 May 5, 2016, the complainant sent the respondents the following request for copies of records:

> a. The full directory listings with all of the file names that were on all of my personally owned computer disks that were taken from my personally owned computers by the IT department, and
> b. Copies of all documents and communications, including but not limited to, electronic and written [records] related to my post tenure review.

3. By email dated May 21, 2016 and filed May 23, 2016, the complainant appealed to the Commission, alleging that the respondents violated the Freedom of Information ("FOI") Act by failing to provide him with copies of the records set forth in

paragraph 2.b, above.[1] Accordingly, the Commission will only address the request for records set forth in paragraph 2.b, 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.

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 the complainant is a medical doctor, employed by the respondent health center in its pathology department.

9. It is found that, in response to the request set forth in paragraph 2.b, above, the respondents disclosed seven pdf files, containing approximately 908 pages of records, some of which contained redactions.

10. At the first contested case hearing, the complainant clarified that he was challenging the redactions in the records that pertained to him, but was not challenging the redactions in the records that pertained to other doctors and medical staff.

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[1] In addition, by letter filed with the Commission on January 19, 2017, the complainant formally withdrew his appeal as it pertained to computer files maintained by the respondents.

11. Attorney Scott B. Simpson, the respondents' FOI Officer, appeared and testified at all three contested case hearings. At the start of the first contested case hearing, Attorney Simpson clarified that, in addition to the 908 pages already produced to the complainant, there could be more records responsive to the complainant's request. Attorney Simpson further clarified that some of the individuals to whom he had reached out for records had not yet responded to him.

12. By the time of the third contested case hearing, Attorney Simpson was able to report that all responsive records (some albeit with redactions) had been disclosed to the complainant, and that, since the time of the first contested case hearing, approximately 200 additional pages of records had been disclosed to the complainant.

13. It is found that the respondents' academic merit plan review is a yearly evaluative process, whereby faculty members are evaluated and receive one of the following four performance ratings: superior, acceptable, marginal and not acceptable. It is found that a faculty member's academic merit plan review can influence salary or can trigger a post-tenure review (that is, a faculty member who receives a certain number of inadequate ratings can be slated for a process involving a review of such faculty member's continued tenure with the respondent university).

14. It is found that, although the request for records in paragraph 2.b, above, only sought records concerning the complainant in connection with the respondents' "post tenure review" process, after speaking with the complainant about the request, it was clear to Attorney Simpson that the complainant was seeking records related to himself in connection with the post tenure review process as well as records related to himself in connection with the respondents' academic merit plan review process. It is found that Attorney Simpson gave the complainant's request the more expansive reading, disclosing records concerning the complainant in both processes.

15. It is found that the academic merit plan review process is a multi-step process by which a Merit Plan Executive Committee (the "MPEC"), consisting of three or ten (depending on the stage of the review) voting members and one non-voting plan administrator, review the rating of a department chair and make a recommendation to the Dean of the School of Medicine (the "Dean"). It is found that the Dean reviews the recommendation of the MPEC and then makes a final and independent annual rating decision. It is found that Dean's final rating decision can be appealed to another administrative body.

16. It is found that the complainant received all of the MPEC's unredacted recommendations to the Dean, whether such recommendations issued from a three member panel of the MPEC or the full MPEC. It is further found that the complainant received the Dean's final rating decisions without redactions.

17. It is found that the redactions at issue in this case concern the process by which the MPEC members deliberate with each other in order to reach a recommendation for the Dean. In other words, it is found that the complainant seeks the MPEC members' comments amongst themselves, whether such comments occur amongst a three-member panel or amongst the full membership of the MPEC. Moreover, in this case, because the

complainant requested "all documents and communications" related to his post tenure review, and Attorney Simpson subsequently determined that the complainant also wanted "all documents and communications" related to his annual MPEC reviews, it is found that the responsive documents spanned years. It is found that Attorney Simpson limited his search to the five years preceding the respondents' receipt of the request, and it is further found that the complainant found the breadth of the search acceptable.

18. It is found that the comments of panel members are collected by the non-voting member of the MPEC, Dr. Richard Simon. Dr. Simon, the Chief of Staff for John Dempsey Hospital, appeared and testified at the December 8, 2016 contested case hearing. It is found that the MPEC members who are reviewing a department chairperson's final annual rating or a post-tenure review matter, can send their initial impressions on the matter to Dr. Simon via email, or they can log into a database and record their impressions in that forum.

19. The respondents contended that the redactions were permissible pursuant to §1-210(b)(1), G.S., which provides that nothing in the FOI Act should be construed to require the disclosure of "[p]reliminary drafts or notes provided that the public agency has determined that the public interest withholding such documents clearly outweighs the public interest in disclosure."

20. In Wilson v. Freedom of Information Commission, 181 Conn. 324, 332 (1980) (Wilson), the Connecticut Supreme Court ruled that "preliminary drafts or notes reflect that aspect of an agency's function that precedes formal and informal decision making. . . . It is records of this preliminary, deliberative and predecisional process that . . . the exemption was meant to encompass."

21. The year following Wilson, the Connecticut legislature adopted Public Act 81-431, and added to the FOI Act the language now codified in §1-210(e)(1).

22. Accordingly, §1-210(b)(1), G.S., must be read in conjunction with §1-210(e)(1), G.S., which provides, in relevant part, in relevant part as follows:

> Notwithstanding the provisions of [§1-210(b)(1), G.S.], disclosure shall be required of:
>
> Interagency or intra-agency memoranda or letters, advisory opinions, recommendations or any report comprising part of the process by which governmental decisions and policies have been 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. It is found that the comments among the panel members of the MPEC precede a formal and informed recommendation to the Dean.

24. It is further found that the MPEC members' comments are "notes," with the meaning of §1-210(b)(1), G.S., and that the respondents determined[2] that the public interest in withholding the notes clearly outweighed the public interest in disclosure.

25. It is further found that the redacted portions of the requested records are not interagency or intra-agency memoranda, letters, advisory opinions, recommendations or reports, within the meaning of §1-210(e)(1), G.S.

26. It is therefore concluded that the redacted portions of the requested records are permissibly exempt pursuant to §1-210(b)(1), G.S. It is further concluded that the respondents did not violate the FOI Act as alleged in the complaint.

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

1. The complaint is dismissed.

Approved by Order of the Freedom of Information Commission at its regular meeting of April 12, 2017.

Cynthia A. Cannata
Acting Clerk of the Commission

[2] Specifically, the respondents determined that in order to execute their roles as MPEC members, MPEC members must review, comment, debate and assess their fellow faculty members' performances in an atmosphere which permits candor, frank discussion, and thoughtful assessment, and, that, while the Dean can access the electronic database and the email system where the member's initial impressions are recorded, such access did not change the fact that public disclosure of the records would have a chilling effect on the member's willingness to provide the candid assessments necessary to ensure an objective evaluation process.

PURSUANT TO SECTION 4-180(c), G.S., THE FOLLOWING ARE THE NAMES OF EACH PARTY AND THE MOST RECENT MAILING ADDRESS, PROVIDED TO THE FREEDOM OF INFORMATION COMMISSION, OF THE PARTIES OR THEIR AUTHORIZED REPRESENTATIVE.

THE PARTIES TO THIS CONTESTED CASE ARE:

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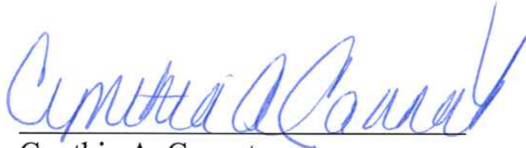

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