FREEDOM OF INFORMATION COMMISSION
OF THE STATE OF CONNECTICUT

In The Matter of a Complaint by FINAL DECISION

The Connecticut Association of
Public School Superintendents,

Complainant

against Docket #FIC 2017-0230

Police Bureau of Identification,
State of Connecticut, Department
of Emergency Services and Public
Protection; and State of Connecticut,
Department of Emergency Services
and Public Protection,

Respondents April 11, 2018

The above-captioned matter was heard as a contested case on June 6, 2017, 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, by letter dated November 17, 2016, the complainant made a request to the respondents to inspect or obtain copies of records related to an audit of the respondent department's State Police Bureau of Investigation ("SPBI") concerning the assessment of fees with regard to background checks of public school district volunteers, and requested that the records be provided on a rolling basis. The complainant specifically requested the following:

a. "any and all results of any audit of the State Police Bureau of Identification's operations performed by any state or federal agency since January 1, 2010 that relates to or refers to the assessment of fees for fingerprinting;

b. any and all records, including interagency or intra-agency memoranda or letters, advisory opinions, recommendations, or reports regarding and/or interpreting the results of any such audit; and

c. any and all records describing and/or relating to agency policies or procedures adopted in connection with or in response to any such audit concerning the assessment of fees for background checks of public school district volunteers."

3. It is found that the respondents informed the complainant, by letter dated November 17, 2016, that it would be contacted as soon as possible regarding the results of the search and potential fees.

4. It is found, after no further correspondence was received from the respondents, that, by letter dated March 20, 2017 to the respondents, the complainant reminded the respondents of its November 17, 2017 request. It is found also that by letter dated March 30, 2017, the complainant was informed by an attorney of the respondent department's Legal Affairs Unit, Attorney Rau, that the unit would be dedicating an hour per week to responding to the November 17, 2016 request, but noted that an estimation on the time of completion could not be provided.

5. It is found that, then, in an April 13, 2017 telephone conversation with Attorney Rau, the complainant indicated that the priority was to obtain the audit results that correlated with the SPBI's change in position regarding fee assessment for background checks.

6. By letter dated April 26, 2017, and filed on April 28, 2017, the complainant appealed to this Commission alleging that the respondents violated the Freedom of Information ("FOI") Act by failing to comply with its request.

7. 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.

8. 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.

9. 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."

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

11. It is found that at the time of the complainant's appeal to this Commission, the respondents had not provided any records responsive to the complainant's request.

12. It is found, however, that on May 24, 2017, the complainant received 3004 pages of records purportedly in response to its November 17, 2016 request. It is found that 222 pages were redacted without explanation, a log or an index of the claimed exemptions. It is found that the respondents also provided the complainant with a copy of a 2008 audit guide, which the complainant contended at the hearing was outside of the scope of the request.

13. It is found that the employee who maintained, and was ultimately responsible for compiling, the records responsive to the complainant's request, Ms. Jones, was also responsible for: the administration of the FBI's audit program for every public agency and private contractor within the state of Connecticut that can receive name based or fingerprint based criminal history reports; responding to and resolving agency issues regarding criminal history reports; site surveys for all criminal justice agencies within the state of Connecticut; and responding to most of the SPBI's FOI and subpoena requests. Ms. Jones also serves as the SPBI's FBI liaison.

14. It is found that Ms. Jones became aware of the complainant's November 16, 2016 request on December 22, 2016 and began compiling records responsive to the request at that time. It is found that during the month of January 2017, Ms. Jones had over 300 audits to perform which took 95% of her time and were high priority projects. It is found that during the month of February 2017, Ms. Jones was out of the office on agency related business. It is found that during the month of March 2017, she was able to commit more time to responding to the complainant's request, but was frequently interrupted responding to agencies with issues regarding requested criminal history reports.

15. It is found that Ms. Jones was able to compile a volume of records which she forwarded for review to the respondent department's Legal Affairs Unit on April 28, 2017, which records were reviewed by Attorney Rau as indicated in paragraph 4, above. As found in paragraph 12, above, the complainant was provided with those records on May 24, 2017.

16. At the hearing on this matter, the complainant contended that the respondents failed to promptly comply with its request, specifically with the request for the audit results, in violation of the disclosure provisions of the FOI Act.

17. The respondents contended, at the hearing on this matter, that the time it was taking to comply with the complainant's request was reasonable in light of the limited staffing within both the SPBI and the Legal Affairs Unit, and that the respondents had not acted in bad faith. The respondents contended that the complainant simply did not understand the scope of its request, and that it may have been broader than it had intended. The respondents contended that they had not violated any of the disclosure provisions of the FOI Act.

18. At the hearing on this matter, Ms. Jones testified that she understood the complainant's request, and specifically the portion of the request described in paragraph 2b, above, to be a voluminous request seeking all the documents that would explain "the why" behind the audit in question. It is found that Ms. Jones' understanding in this regard was reasonable, based on the complainant's desire to "better understand the position of the SPBI regarding the assessment of fees for fingerprinting employees and volunteers of local and regional boards of education," as stated in its November 17, 2016 letter of request.

19. However, Ms. Jones, according to her testimony, did not believe it was appropriate to provide the audit results to the complainant prior to providing all of the documentation that preceded the audit results because she wanted the complainant to have all the records in the order in which they were created and/or became relevant to the process so that the audit results would be provided, in what she believed to be, the proper context.

20. It is found that the complainant had indicated that obtaining a copy of the audit results was a priority and, in fact, was the first document listed in its request. It is also found that the audit results were readily available at the time of the complainant's request. It is found, therefore, that the decision to withhold that record was not reasonable.

21. In addition, it is found that it took five weeks for the complainant's request to be forwarded to Ms. Jones. It is found that none of the respondents' witnesses could explain why it took over a month to forward the complainant's request to the sole person within the respondent department who could compile the responsive records. In this regard, it is found that the respondents unreasonably delayed compliance with the complainant's request.

22. Based on the findings in paragraph 20 and 21, above, it is concluded that the respondents violated the provisions of §§1-210(a) and 1-212(a), G.S., by failing to promptly comply with the complainant's request.

23. In addition, the complainant requested a review of the records that were redacted and withheld.

24. The respondents provided the records described in paragraph 12, above, for in camera inspection, which records have been identified as IC 2017-0230-1, pages 001 through 137; IC 2017-0230-2, pages 001 through 127; IC 2017-0230-3 and IC 2017-0230-4, pages 001 through 158; IC 2017-0230-5, pages 001 through 150; IC 2017-0230-6, pages 001 through 130 ; IC 2017-0230-7, pages 001 through 146; IC 2017-0230-8, pages 001 through 178; IC 2017-0230-9, pages 001 through 180; IC 2017-0230-10, pages 001 through 180; IC 2017-0230-11 and IC 2017-0230-12, pages 001 through 195; IC 2017-0230-13, pages 001 through 169; and IC 2017-0230-14 pages 001 through 131.

25. The respondents contended that the following records are exempt from disclosure pursuant §1-210(b)(1), G.S.:

a. IC 2017-0230-2, pages 57-59, and 62-66;

b. IC 2017-0230-3 and IC 2017-0230-4, pages 11-23, 36-38, 63-72, 75-78, 97, 113, and 136-137;

c. IC 2017-0230-5, pages 24-60, 63-73, 77-82, 108-116, and 132-137;

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

> 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....

27. In 1980, the Connecticut Supreme Court interpreted the phrase "preliminary drafts and notes" in the FOI Act. See Wilson v. FOIC, 181 Conn. 324 (1980) ("Wilson"). The Wilson court ruled that "preliminary drafts or notes reflect that aspect of an agency's function that precedes formal and informed decision making. . . . It is records of this preliminary, deliberative and predecisional process that . . . the exemption was meant to encompass." Wilson, 181 Conn. at 332. In addition, the Wilson court interpreted the phrase "preliminary drafts and notes" in the FOI Act as identical to the deliberative process privilege found in 5 U.S.C. §552(b)(5) of the federal Freedom of Information Act, with the exception that, under Connecticut's FOI Act, the public agency carried the

additional burden to show that "the public interest in withholding such document clearly outweighs the public interest in disclosure." See Wilson, 181 Conn. at 333-340.

28. The year following Wilson, the Connecticut General Assembly adopted Public Act 81-431, which added to the FOI Act the language now codified in §1-210(e)(1).

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

> Notwithstanding the provisions of [§1-210(b)(1), G.S.], 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.

30. At the hearing on this matter, the respondents testified, and it is found, that the in camera records identified in paragraph 25, above, are draft versions of memoranda of understanding with different boards of education that were being developed according to certain federal statutes so that those boards could obtain the criminal history record information they were seeking of volunteers and other contracted employees through the Connecticut On-Line Law Enforcement Communications Teleprocessing (COLLECT) system which also provides access to two national systems: National Crime Information Center (NCIC) and International Justice and Public Safety Information Sharing Network (NLETS).

31. After careful review of the in camera records, it is found that the in camera records identified in paragraph 25, above, are preliminary drafts within the meaning of §1-210(b)(1), G.S.

32. It is also found that the in camera records identified in paragraph 25, above, reflect the input from several members of the respondents' staff with respect to the memoranda of understanding and were part of the drafting process. It is found that while the in camera records identified in paragraph 25, above, are interagency memoranda comprising part of the process by which governmental decisions and policies are formulated, they are also preliminary drafts of memoranda, prepared by a member of the staff of a public agency, which were subject to revision prior to submission to or discussion among the members of such agency within the meaning of §1-210(e)(1), G.S.

33. Consequently, it is found that the in camera records identified in paragraph 25, above, are exempt from disclosure, and it is concluded that the respondents did not violate the FOI Act by withholding such records from disclosure.

34. The respondents contended, at the hearing on this matter and in the in camera index, that names and dates of birth contained in the following records are exempt from mandatory disclosure pursuant §1-210(b)(3)(H), G.S.[1]:

a. IC 2017-0230-6, pages 20-36;

b. IC 2017-0230-7, page 106;

c. IC 2017-0230-8, pages 128-132, and 171;

d. IC 2017-0230-9, pages 100-102;

e. IC 2017-0230-10, pages 8-9;

f. IC 2017-0230-11 and IC 2017-0230-12, page 68; and

g. IC 2017-0230-13, pages 39-41.

35. Section 1-210(b)(3)(H), G.S., provides that nothing in the FOI Act shall require the disclosure 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 . . . uncorroborated allegations subject to destruction pursuant to section 1-216...."

36. Section 1-216, G.S., provides:

> Except for records the retention of which is otherwise controlled by law or regulation, records of law enforcement agencies consisting of uncorroborated allegations that an individual has engaged in criminal activity shall be reviewed by the law enforcement agency one year after the creation of such records. If the existence of the alleged criminal activity cannot be corroborated within ninety days of the commencement of such review, the law enforcement agency shall destroy such records.

[1] The Commission notes that, while the index to the in camera records indicates that the exemption being claimed is §1-210(b)(3)(G), G.S., which provides an exemption for "the name and address of the victim of a sexual assault under section 53a-70, 53a-70a, 53a-71, 53a-72a, 53a-72b or 53a-73a, voyeurism under section 53a-189a, or injury or risk of injury, or impairing of morals under section 53-21, or of an attempt thereof...," it is clear in the description section of the index as well as in the testimony provided at the contested case hearing, that the respondents intended to cite to §1-210(b)(3)(H), G.S.

37. At the hearing on this matter, the respondents testified, and it is found, that among the records that were considered to be responsive to the complainant's request were records that contained the names of individuals whose criminal history records were being checked for employment by some of the school boards/districts. The respondents testified, and it is found, that those are the names, and associated dates of birth, that were redacted from the in camera records identified in paragraph 34, above, pursuant to §1-210(b)(3)(H), G.S.

38. It is found, however, that the respondents failed to prove that the redacted information in the in camera records would result in the disclosure of uncorroborated allegations subject to destruction pursuant to section 1-216. In addition, it is found, upon careful review of the in camera records, that the records are not sufficient on their face to establish that the exemption is applicable, because the records do not contain any allegations.

39. Consequently, it is found that the redacted information in the in camera records as identified in paragraph 34, above, is not exempt from disclosure pursuant §1-210(b)(3)(H), G.S. It is concluded, therefore, that the respondents violated the FOI Act by withholding such information from disclosure.

40. The respondents contended that the following records are exempt from disclosure pursuant §1-210(b)(10), G.S.:

a. IC 2017-0230-1, pages 2, 17, 27, 34, 37-39, 40-44, 46, 48-49, ¾ of 53, 59-61, 79, and 112;

b. IC 2017-0230-2, pages 1, 17-18, 36, 56, and 60-62;

c. IC 2017-0230-3 and IC 2017-0230-4, pages 2, 4-7, 10, 17-23, 26-28, 41-42, 48-51, 58, 63-72, 75-78, 97, 113, and 136-137;

d. IC 2017-0230-5, pages 24-60, 86-89, 95, 102, 108-116, 132-137, and 144-147;

e. IC 2017-0230-6, pages 10-11, 45-50, 52, 60-61, 63-72, 108, and 124;

f. IC 2017-0230-11 and IC 2017-0230-12, pages 5-8, 21-22, 28, 30-33, 35-36, 38, 40, 43-45, 46, 49, 68, 74-75, 80, 97, 100-101, 106, 123-124 and 135; and

g. IC 2017-0230-14, pages 17 - 18, 31 - 34, 39 - 42, 45 - 46 and 128;

41. Section 1-210(b)(10), G.S., provides in relevant part that nothing in the FOI Act shall require the disclosure of:

> . . . communications privileged by the attorney-client relationship ... or any other privilege established by the common law or the general statutes, including any such records, tax returns, reports or communications that were created or made prior to the establishment of the applicable privilege under the common law or the general statutes . . . .

42. 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.

43. 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. . . .

44. The Supreme Court has 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.

45. The Supreme Court has further stated that, "[i]n Connecticut, the attorney-client privilege protects both the confidential giving of professional advice by an attorney acting in the capacity of a legal advisor to those who can act on it, as well as the giving of information to the lawyer to enable counsel to give sound and informed advice. Olson v. Accessory Controls and Equipment Corp., et al., 254 Conn. 145, 157 (2000). As a general rule, "communications between client and attorney are privileged when made in confidence for the purpose of seeking legal advice." Id.; citation omitted.

46. At the hearing on this matter, the respondents testified, and it is found, that the redactions made to the in camera records described in paragraph 40, above, related to discussions among employees of the respondent department, many of whom were part of the legal staff. The respondents testified, and it is found, that the discussions pertain to

the fees that were required to be collected from school boards that received criminal history record information using the COLLECT system.

47. In their effort to explain the applicability of the exemption, the respondents testified that the discussions among the staff specifically related to the results of the audit conducted by the FBI which showed that some school boards were not being assessed the correct fee for the criminal background check information they were receiving for a particular type of employee but after the audit, all boards began to be assessed the correct fee for receiving such criminal history record information.

48. It is found that therefore the discussions described by the respondents at the hearing on this matter were discussions related to the "fall out" from the audit and the schools boards' reaction to what they perceived as new fees.

49. After a careful review of the in camera records, it is found that none of the in camera records identified in paragraph 40, above, are related to legal advice sought by the agency from the attorney because there is no evidence that advice was ever sought by the client. Consequently, the in camera records identified in paragraph 40, above, are not communications privileged by the attorney-client relationship within the meaning of §1-210(b)(10), G.S., and are not permissibly exempt from disclosure.

50. It is concluded, therefore, that the respondents violated the FOI Act by withholding the in camera records identified in paragraph 40, above.

51. Finally, the respondents contended that the Originating Agency Identifier number (ORI#) contained in the following records are exempt from disclosure pursuant §1-210(b)(20), G.S.:

a. IC 2017-0230-2, pages 5, and 13;

b. IC 2017-0230-3 and IC 2017-0230-4, pages 4-7, 10, 26-28, 36-38, 41-42, 48-51, 58, 63-72, 75-78, 97, 113, and 136-137;

c. IC 2017-0230-6, pages 20-36;

d. IC 2017-0230-9, pages 41, and 43; and

e. IC 2017-0230-14, page 128.

52. Section 1-210(b)(20), G.S., provides that "[n]othing in the [FOI] Act shall be construed to require disclosure of a . . . [r]ecords of standards, procedures, processes, software and codes, not otherwise available to the public, the disclosure of which would compromise the security or integrity of an information technology system...."

53. It is found that the ORI# is a code, not otherwise available to the public, the disclosure of which would compromise the security or integrity of the COLLECT System which is an information technology system within the meaning of §1-210(b)(20), G.S. It is found therefore that the ORI#s are permissibly exempt from disclosure.

54. Consequently, it is concluded that the respondents did not violate the disclosure provisions of the FOI Act by redacting the ORI#s from the in camera records.

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 provide the complainant with an unredacted copy of the in camera records identified in paragraphs 34 and 40 of the findings, above, free of charge.

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

Approved by Order of the Freedom of Information Commission at its regular meeting of April 11, 2018.

Cynthia A. Cannata
Acting Clerk of the Commission

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:

THE CONNECTICUT ASSOCIATION OF PUBLIC SCHOOL SUPERINTENDENTS, c/o Attorney Laura A. Fisher and Attorney Thomas B. Mooney, Shipman & Goodwin, LLP, One Constitution Plaza, Hartford, CT 06103

POLICE BUREAU OF IDENTIFICATION, STATE OF CONNECTICUT, DEPARTMENT OF EMERGENCY SERVICES AND PUBLIC PROTECTION; AND STATE OF CONNECTICUT, DEPARTMENT OF EMERGENCY SERVICES AND PUBLIC PROTECTION, c/o Assistant Attorney General Terrence M. O'Neill, Office of the Attorney General, 110 Sherman Street, Hartford, CT 06105

Cc: Attorney Gary R. Brochu, Shipman & Goodwin, LLP, One Constitution Plaza, Hartford, CT 06103

Cynthia A. Cannata
Acting Clerk of the Commission

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