

FREEDOM OF INFORMATION COMMISSION
OF THE STATE OF CONNECTICUT

In the Matter of a Complaint by

FINAL DECISION

Claire Bessette and The New London Day,

Complainants

against

Docket #FIC 2017-0528

General Manager, Norwich Public Utilities
Commission; and Norwich Public Utilities
Commission,

Respondents

February 14, 2018

The above-captioned matter was heard as a contested case on November 13, 2017, at which time the complainants 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 June 7, 2017, the complainants requested “any documentation” concerning a “sexual harassment or other complaint ... against James M. Sullivan, who was chairman of the respondent commission at the time.” The complainants indicated that they had learned that there had been a financial settlement and that “this incident prompted Mr. Sullivan to resign his board seat in October 2015.” In particular, the complainants sought “financial payment records, the amount of payment, and which entity made the payment.” It is found that the complainants also requested a copy of any investigation report that was completed.
3. It is found that on August 28, 2017, the respondents denied the complainants’ request, claiming that any records were exempt pursuant to §1-210(b)(2), G.S.
4. By letter filed September 7, 2017, the complainants appealed to this Commission, alleging that the respondents violated the Freedom of Information (“FOI”) Act by failing to provide them with copies of the records they 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 the records requested by the complainants are public records within the meaning of §§1-200(5), 1-210(a), and 1-212(a), G.S.

9. The respondents claim that §1-210(b)(2), G.S., exempts all responsive records from mandatory disclosure.

10. Section 1-210(b)(2), G.S., provides in relevant part that nothing in the FOI Act shall require disclosure of “...personnel or medical files and similar files the disclosure of which would constitute an invasion of personal privacy...”

11. The Supreme Court set forth the test for the exemption contained in §1-210(b)(2), G.S., in Perkins v. Freedom of Information Commission (“Perkins”), 228 Conn. 158, 175 (1993). The claimant must first establish that the files in question are personnel, medical or similar files. Second, the claimant must show that disclosure of the records would constitute an invasion of personal privacy. In determining whether disclosure would constitute an invasion of personal privacy, the claimant must establish both of two elements: first, that the information sought does not pertain to legitimate matters of public concern, and second, that the disclosure of such information is highly offensive to a reasonable person.

12. Section 1-214(b), G.S., provides, in relevant part:

Whenever a public agency receives a request to inspect or copy records contained in any of its employees’ personnel or medical files and similar files and the agency reasonably believes that the disclosure of such records would legally constitute an invasion of privacy, the agency shall immediately notify in writing (1) each employee concerned . . . Nothing herein shall require an agency to withhold from disclosure the contents of personnel or medical files and similar files when it does not reasonably believe that such

disclosure would legally constitute an invasion of personal privacy.

13. Section 1-214(c), G.S. provides, in relevant part:

A public agency which has provided notice under subsection (b) of this section shall disclose the records requested unless it receives a written objection from the employee concerned or the employee's collective bargaining representative, if any, within seven business days from the receipt by the employee or such collective bargaining representative of the notice or, if there is no evidence of receipt of written notice, not later than nine business days from the date the notice is actually mailed, sent, posted or otherwise given. Each objection filed under this subsection shall be on a form prescribed by the public agency, which shall consist of a statement to be signed by the employee or the employee's collective bargaining representative, under the penalties of false statement, that to the best of his knowledge, information and belief there is good ground to support it and that the objection is not interposed for delay. Upon the filing of an objection as provided in this subsection, the agency shall not disclose the requested records unless ordered to do so by the Freedom of Information Commission pursuant to section 1-206.

14. It is found that the records concern allegations of sexual harassment. The respondents timely notified both the individual who filed the complaint and James Sullivan, the person against whom the complaint was filed. Each party filed a written objection, but did not otherwise follow the requirements of §1-214(c), G.S., as outlined above.

15. Neither Sullivan nor the complaining witness in the sexual harassment allegation appeared at hearing in this matter, although the respondents provided notice of such hearing.

16. Following the hearing, the respondents submitted for in camera inspection a settlement agreement and the notice it provided to the complaining witness. The settlement agreement shall be referenced herein as IC-2017-0528-1 through IC-2017-0528-10 and the notice shall be referenced herein as IC-2017-0528-11 through IC-2017-0528-14.

17. With respect to IC-2017-0528-11 through IC-2017-0528-14, it is found that such notices are not within the scope of the complainant's request.

18. Upon careful examination of IC-2017-0528-1 through IC-2017-0528-10, it is found that such records are "personnel ... or similar files" within the meaning of §1-210(b)(2), G.S.

19. The respondents were guided by Rocque v. FOIC, 255 Conn. 651 (2001), which considered whether disclosure of records of an investigation of alleged sexual harassment by a public employee against a co-worker would constitute an invasion of personal privacy within the

meaning of §1-210(b)(2), G.S. In Rocque, both the public employee and the complaining witness objected to disclosure of the records. The Court held, under the specific facts of that case, “that the only portions of [the] two documents that are exempt are those portions identifying the complainant or containing sexually explicit information.” Id. 664.

20. The respondents did not claim that the settlement agreement submitted for in camera inspection contains any sexually explicit information; and upon careful inspection of the records, it is found that they contain no information of a sexual nature at all.

21. With respect to the identity of the complaining witness, the court in Rocque reasoned that the identity of the complainant was not a legitimate matter of public concern under the facts of that case because the disclosure of such information would do nothing to assist in the public’s understanding or evaluation of a public agency’s investigative process.

22. It is found, based on Rocque and the complaining witness’s objection to disclosure, that the identity of the complaining witness in this matter is not a legitimate matter of public concern and a reasonable person would find disclosure of such information to be highly offensive. It is concluded, therefore, that such information is permissively exempt from disclosure and the respondents did not violate the FOI Act by withholding such information.

23. The respondents, however, contended that the entire settlement agreement – not solely the complaining witness’s identity - is exempt from disclosure because the agreement does not shed light on how the respondents investigated an allegation of sexual harassment within the workplace.

24. However, it is found that there is a legitimate public concern in both the amount of money paid, if any, by or on behalf of the respondents to settle an allegation of sexual harassment and in other terms of such settlement.

25. Upon careful inspection of the in camera records, it is found that, except for the complaining witness’s identity, the settlement agreement, referenced as IC-2017-0528-1 through IC-2017-0528-10, contains information that is of legitimate public concern, and a reasonable person would not find disclosure of such information to be highly offensive. It is concluded that §1-210(b)(2), G.S., does not exempt such records from mandatory disclosure.

26. It is concluded that the respondents violated §§1-210(a) and 1-212(a), G.S., by refusing to disclose the settlement agreement to the complainant, redacted to conceal the complaining witness’s identity.

27. The respondents indicated at the hearing in this matter that in addition to the settlement agreement, they withheld other requested records pertaining to a financial settlement. The respondents stated that they withheld such records for the same reason that they withheld the requested settlement agreement. It is concluded that the respondents violated §§1-210(a) and 1-212(a), G.S., by failing to disclose such records, redacted to conceal the identity of the complaining witness.

28. Moreover, it is found that it was not reasonable for the respondents to believe that disclosure of the settlement agreement and records concerning any payment would constitute an invasion of privacy. It is found that the respondents should have redacted the complaining witness's identifying information and promptly disclosed the remainder of such records to the complainants upon their request.

29. It is concluded, therefore, that the respondents also violated §1-214(b), G.S., and the promptness requirements of §§1-210(a) and 1-212(a), G.S., by failing to disclose the other requested records pertaining to the settlement agreement.

30. With respect to the requested records that are not financial in nature, on November 27, 2017, the hearing officer ordered the respondents to submit a copy of the investigation report or other complaint for an in camera inspection.

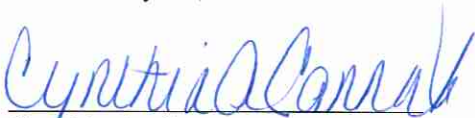
31. By email dated December 11, 2017 (marked by the hearing officer as after-filed exhibit 5 and made part of the administrative record), the respondents' attorney informed the hearing officer and the complainants that "no investigation report concerning sexual harassment or other complaint against James Sullivan' exists." The attorney also stated that the respondent General Manager was out on medical leave, but that other employees of the respondents discovered "notes that [General Manager] Bilda drafted concerning the alleged incident, which were likely drafted for purposes of a pending claim." Because the General Manager was out on leave, the attorney stated, he was unable to determine whether the respondents would claim an exemption for 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 to the complainants, free of charge, copies of all the records requested in this manner, redacted to conceal the identity of the complaining witness; however, with respect to the "notes" discovered by the respondents after the hearing in this matter, as described in the paragraph 31 of the findings of fact, above, if the respondents claim such records are exempt from disclosure, and the complainants seek to challenge the respondents' claim, the complainants may file a non-compliance appeal with the Commission for adjudication of that issue.

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

Approved by Order of the Freedom of Information Commission at its regular meeting of February 14, 2018.



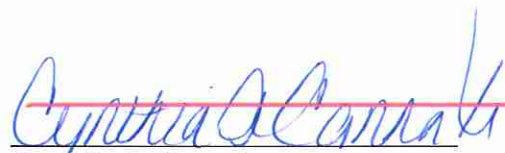
Cynthia A. Cannata
Acting Clerk of the Commission

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:

CLAIRE BESSETTE AND THE DAY, 47 Eugene O'Neill Drive, New London, CT 06320

GENERAL MANAGER, NORWICH PUBLIC UTILITIES; AND NORWICH PUBLIC UTILITIES, c/o Attorney Joseph B. Schwartz, Murtha Cullina LLP, City Place I, 185 Asylum Street, Hartford, CT 06103



Cynthia A. Cannata
Acting Clerk of the Commission