

FREEDOM OF INFORMATION COMMISSION
OF THE STATE OF CONNECTICUT

In the Matter of a Complaint by

FINAL DECISION

Steven Lance, Hope Metcalf and Allard K.
Lowenstein International Human Rights
Clinic,

Complainants

against

Docket #FIC 2018-0067

Commissioner, State of Connecticut,
Department of Correction; and State of
Connecticut, Department of Correction,

Respondents

November 14, 2018

The above-captioned matter was heard as a contested case on August 28, 2018, 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 January 23, 2018, the complainants requested copies of all records pertaining to the transfer of their client, Ira Alston, from the custody of the respondents to the custody of the Virginia Department of Corrections, pursuant to the Interstate Corrections Compact.
3. It is found that, on January 26, 2018, the respondents acknowledged the complainants' request.
4. By letter filed February 9, 2018, 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 all 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. It is found that, on March 29 and October 2, 2018, the respondents provided responsive records to the complainants. It is found that the respondents redacted information from some of the records based on claims of exemption pursuant to §§1-210(b)(10) and 1-210(b)(18), G.S.

10. Section 1-210(b), G.S., provides in pertinent part:

Nothing in the Freedom of Information Act shall be construed to require disclosure of:

(10) Records ... or communications privileged by the attorney-client relationship,

...

(18) Records, the disclosure of which the Commissioner of Correction, ... has reasonable grounds to believe may result in a safety risk, including the risk of harm to any person or the risk of an escape from, or a disorder in, a correctional institution or facility under the supervision of the Department of Correction ... Such records shall include, but are not limited to:

...

(G) Logs or other documents that contain information on the movement or assignment of inmates or staff at correctional institutions or facilities[.]

11. Following the hearing in this matter, the respondents submitted three pages of records for in camera inspection. Such records shall be referenced herein as IC-2018-0067-1 through IC-2018-0067-3.

12. The respondents claim that §1-210(b)(18), G.S., exempts from disclosure information contained in IC-2018-0067-1 and IC-2018-0067-2 and identified on the Index as of the “first name of staff members” and “information regarding the transfer of inmates.”

13. The complainants do not contest, and it is found, that the respondent commissioner has reasonable grounds to believe that disclosure of the first names of respondent staff may result in a safety risk, within the meaning of §1-210(b)(18), G.S.

14. It is concluded, therefore, that such information, as indicated on the Index, is exempt from mandatory disclosure.

15. With respect to “information regarding the transfer of inmates,” it is found upon careful inspection of such records – i.e., IC-2018-1 lines 8-27 and IC-2018-2 lines 5-23 – that such records contain information on the movement of Ira Alston to the custody of the Virginia Department of Correction. The respondents testified and it is found that such records pertain to the protocols to be followed to effect a smooth and safe transition of custody. It is found, and the complainants do not contest, that the respondent commissioner has reasonable grounds to believe that disclosure of such information may result in a risk to safety and security within the correctional institution.

16. It is concluded, therefore, that §1-210(b)(18)(G), G.S., exempts IC-2018-1 lines 8-27 and IC-2018-2 lines 5-23 from mandatory disclosure.

17. The respondents redacted “information re gang affiliation” and Security Risk Group information from IC-2018-3 lines 20-21. The complainants do not contest that the respondent commissioner has reasonable grounds to believe that disclosure of such information may result in a safety risk within the meaning of §1-210(b)(18), G.S.

18. It is concluded, therefore, that IC-2018-3 lines 20-21 are exempt from mandatory disclosure.

19. The respondents’ Index states that IC-2018-3 lines 23-32 contain “information regarding another inmate[.]” The Commission has previously determined that the respondent commissioner has reasonable grounds to believe that disclosure of information about another inmate to a requesting inmate may result in a risk of harm, within the meaning of §1-210(b)(18), G.S. See Goode v. Commissioner, Docket 2015-353. Moreover, it is found that IC-2018-3 lines 23-32 do not pertain to the transfer of Ira Alston and therefore are not responsive to the complainants’ request.

20. It is concluded, therefore, that the respondents did not violate the FOI Act by withholding IC-2018-3 lines 23-32 from the complainants.

21. The respondents claim that §1-210(b)(10), G.S., exempts IC-2018-0067-3 lines 13-19 as records of “attorney-client communication[.]”¹

22. 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.

23. 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...

24. Our Supreme Court has stated that a four-part test must be applied to determine whether communications are privileged: “(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 or officials of 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. 511, 516 (2011), citing Shew v. Freedom of Information Commission, 245 Conn. 149, 159 (1998).

25. As a general rule, “communications between client and attorney are privileged when made in confidence for the purpose of seeking legal advice.” (Citation omitted.) Olson v. Accessory Controls and Equipment Corp., et al., 254 Conn. 145, 157 (2000). Although Connecticut courts have recognized that “statements made in the presence of third parties are usually not privileged because there is then no reasonable expectation of privacy,” they have also recognized that “the presence of certain third parties . . . who are agents or employees of an attorney or client, and who are necessary to the consultation, will not destroy the privilege.” Id.

26. It is found, based on testimony from the hearing, that IC-2018-0067-3 lines 13-19, contain a communication by email from Counselor Aldi, an employee of the respondent Department of Correction, to Counselor Osden who is also an employee of the Department, in order to facilitate the transfer of Ira Alston to the custody of the Virginia Department of Corrections.

¹ The respondents’ Index also claimed such records were exempt as “attorney work product;” however, because the respondents did not submit evidence to support such claim of exemption and did not raise such claim either at the hearing or in their post-hearing brief, it will not be considered herein.

27. Upon careful inspection of IC-2018-0067-3 lines 13-19, it is found that part of Counselor Aldi's email contains advice communicated to him by the Connecticut assistant attorney general assigned to the Department of Correction.

28. It is found that Counselor Aldi's communication with the assistant attorney general is a confidential communication within the meaning of §52-146r(2), G.S.

29. It is also found that it was necessary for Counselor Aldi to convey to Counselor Osden the legal advice contained in the confidential communication.

30. It is found, however, that such confidential communication is limited to IC-2018-0067-3 line 14 words 16 and 17, through IC-2018-0067-3 line 17 words 1-12.²

31. The complainants suggest that the privileged communication may concern the respondents' alleged unlawful retaliation against Alston for filing many lawsuits against the respondents, and that such unlawful retaliation would destroy the privilege otherwise attached to the communication. Upon careful inspection of IC-2018-0067-3 line 14 words 16 and 17, through IC-2018-0067-3 line 17 words 1-12, however, it is found that the content of such records does not provide a basis for disclosure as the complainants suggest.

32. It is found that the remainder of the redactions to IC-2018-0067-3 lines 13-19 do not contain a communication between Counselor Aldi and the assistant attorney general, but instead reflect Counselor Aldi's effort to communicate information about Ira Alston to Counselor Osden in order to begin the process of arranging an involuntary out of state placement. It is found, therefore, that the respondents did not prove that the following records are privileged communications: IC-2018-0067-3 line 13 word 5 through IC-2018-0067-3 line 14 word 15, and IC-2018-0067-3 line 17 word 13 through IC-2018-0067-3 line 19 word 4.

33. It is concluded, therefore, that §1-210(b)(10), G.S., does not exempt from disclosure the records referenced in paragraph 32, above.

34. The respondents' Index also claims that §1-210(b)(18), G.S., exempts from disclosure the records referenced in paragraph 32, above. It is found, however, that, except as described in paragraph 35, below, the respondents submitted no evidence in support of their claim that the respondent commissioner has reasonable grounds to believe that disclosure of such information may result in a safety risk. It is found, therefore, that the respondents failed to prove the claimed exemption, except as described in paragraph 35, below.

35. It is found that IC-2018-0067-3 line 13 word 12 is exempt pursuant to §1-210(b)(18), G.S., as information regarding gang affiliation.

36. It is concluded that, other than the record referenced in paragraph 35, above, the respondents violated the §§1-210(a) and 1-212(a), G.S., by failing to provide to the complainants the records referenced in paragraph 32, above.

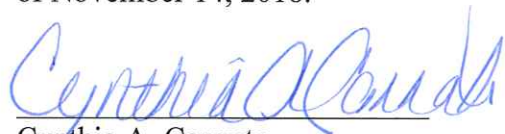
² For ease of reference, the hearing officer numbered the words beginning at the left margin of each line.

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 a copy of IC-2018-0067-3 redacted in accordance with this decision.

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

Approved by Order of the Freedom of Information Commission at its regular meeting of November 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:

STEVEN LANCE, HOPE METCALF AND ALLARD K. LOWENSTEIN
INTERNATIONAL HUMAN RIGHTS CLINIC, Yale Law School, P.O. Box 208215,
New Haven, CT 06520-8215

COMMISSIONER, STATE OF CONNECTICUT, DEPARTMENT OF
CORRECTION; AND STATE OF CONNECTICUT, DEPARTMENT OF
CORRECTION, c/o Attorney Nicole Anker and Attorney Tracie C. Brown, Department of
Correction, 24 Wolcott Hill Road, Wethersfield, CT 06109



Cynthia A. Cannata
Acting Clerk of the Commission