

FREED OM OF INFORMATION COMMISSION
OF THE STATE OF CONNECTICUT

In the Matter of a Complaint by

FINAL DECISION

Christine Cieplinski,

Complainant

Docket # FIC 2018-0078

against

Executive Director, State of Connecticut,
University of Connecticut Health Center;
and State of Connecticut, University of
Connecticut Health Center,

Respondents

October 24, 2018

The above-captioned matter was heard as a contested case on April 13, 2018, at which time the complainant and the respondents appeared, stipulated to certain facts, and presented testimony, exhibits and argument on the complaint. The respondents submitted the disputed records for in camera inspection. The parties stipulated that the evidence in Docket #FIC 2017-0625, *Cieplinski v. UConn Health Center et al.* would be made evidence in this matter.

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. By letter of complaint filed February 16, 2018, the complainant appealed to the Commission, alleging that the respondents denied her January 18, 2018 request for certain public records.
3. It is found that the complainant made a January 18, 2018 request for all the underlying documentation in an investigation report by Bruce Gelston, "including but not limited to the statements of individuals interviewed, any notes, documents reviewed and/or relied upon, salary data, position postings, etc."
4. It is found that Bruce Gelston, Compliance Investigations Associate for the respondents, investigated an allegation by the complainant in this matter that she had been discharged from the University of Connecticut in retaliation for protected conduct.
5. It is found that Gelston's report was issued on September 12, 2017, and that a copy of the report itself (which is not the subject of this complaint) was at some point provided to the complainant.

6. It is found that the respondents searched for the requested records by approaching the report's author, Bruce Gelston. The attorney responsible for FOI matters for the respondents had half a dozen conversations with Mr. Gelston, and concluded that no one else had any responsive records.

7. It is found that the respondents provided 51 pages of responsive records on March 9, 2018, and an additional 87 pages on April 11, 2018.

8. It is found that the respondents withheld 47 pages of records. The respondents also redacted another two pages, but ultimately provided them to the complainant in unredacted form. The 47 withheld pages were submitted to the Commission for an in camera inspection, and will be referred to herein as IC-2018-0078-01 through IC-2018-0078-47.

9. Section 1-200(5), G.S., defines "public records or files" as:

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.

10. 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.

11. Section 1-212(a), G.S., provides in relevant part that "any person applying in writing shall receive, promptly upon request, a plain, facsimile, electronic or certified copy of any public record."

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

13. The respondents contended that the 47 pages of withheld records are exempt from disclosure pursuant to §1-210(b)(1), G.S., which provides that disclosure is not required of "[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...."

14. The Supreme Court ruled in Shew v. Freedom of Information Commission, that "the concept of preliminary [drafts or notes], as opposed to final [drafts or notes], should not depend upon...whether the actual documents are subject to further alteration..." but rather "[p]reliminary drafts or notes reflect that aspect of the agency's function that precede formal and informed decision making.... It is records of this preliminary, deliberative and predecisional process that...the exemption was meant to encompass." Shew v. Freedom of Information

Commission, 245 Conn. 149, 165 (1998), citing Wilson v. Freedom of Information Commission, 181 Conn. 324, 332 (1989). In addition, once the underlying document is identified as a preliminary draft or note, “[i]n conducting the balancing test, the agency may not abuse its discretion in making the decision to withhold disclosure. The agency must, therefore, indicate the reasons for its determination to withhold disclosure and those reasons must not be frivolous or patently unfounded.” State of Connecticut, Office of the Attorney General v. Freedom of Information Commission, 2011 WL 522872, *8 (Conn. Super. Ct. Jan. 20, 2011) (citations omitted).

15. 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), G.S.

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

Notwithstanding the provisions of subdivisions (1) and (16) of subsection (b) of this section, 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....

17. It is found that in camera document IC-2018-0078-01 consists of a draft of an organizational chart.

18. It is found that the respondents failed to prove that they determined that the public interest in withholding the draft organizational chart clearly outweighs the public interest in disclosure.

19. Accordingly, it is concluded that IC-2018-0078-01 is not permissibly exempt from disclosure pursuant to §1-210(b)(1), G.S.

20. It is found that in camera documents IC-2018-0078-02 through IC-2018-0744-37 consist of notes taken by Gelston concerning his investigation. It is found that Gelson used the notes as a memory aid in writing his report, and that the notes were in preparation for his report.

21. It is also found that the respondents determined that the public interest in withholding Gelston’s notes clearly outweighed the public interest in disclosure. Specifically, the respondents determined that the release of the notes would harm the investigatory process. According to the respondents, the disclosure of the notes would have a chilling effect on the investigator’s note taking, and might cause the investigator not to take notes.

22. Additionally, it is found that in camera documents IC-2018-0078-02 through 37 are not interagency or intra-agency memoranda or letters, advisory opinions or recommendations or any report comprising part of the process by which governmental decisions and policies are formulated.

23. Consequently, it is concluded that in camera documents IC-2018-0078-02 through 37 are permissibly exempt from disclosure pursuant to §1-210(b)(1), G.S.

24. It is found that in camera document IC-2018-0078-38 through 41 is an internal draft of a labor relations investigation report.

25. It is found that the respondents failed to prove that they determined that the public interest in withholding the draft labor relations investigation report clearly outweighs the public interest in disclosure.

26. Consequently, it is concluded that the draft labor relations investigation report is not permissibly exempt from disclosure pursuant to §1-210(b)(1), G.S.

27. It is found that in camera record IC-2018-0078-042 and 43 is a planning draft.

28. It is found that the respondents failed to prove that they determined that the public interest in withholding the planning draft clearly outweighs the public interest in disclosure.

29. Accordingly, it is concluded that the planning draft is not permissibly exempt from disclosure pursuant to §1-210(b)(1), G.S.

30. It is found that in camera documents IC-2018-0078-44 through 47 is a draft engagement letter between the law firm Shipman & Goodwin and the accounting firm Baker Newman Noyes.

31. The respondents contend that the draft engagement letter is also exempt from disclosure pursuant to §1-210(b)(10), G.S., the attorney-client privilege.

32. The applicability of the exemption contained in §1-210(b)(10), G.S., is governed by established Connecticut law defining the privilege. *Maxwell v. FOI Commission*, 260 Conn. 143 (2002). In *Maxwell*, 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.

33. 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. . . .

34. 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.

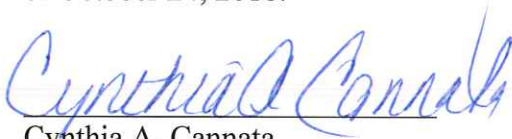
35. Based upon the evidence adduced at the hearing on Docket #FIC 2018-0625, *Cieplinski v. UConn Health Center et al.*, it is concluded that limited portions of the draft engagement letter that were redacted in that case are exempt from disclosure pursuant to §1-210(b)(10), G.S., and that it is unnecessary to consider the respondents' additional claim of exemption under §1-210(b)(1), G.S.

36. It is concluded that the respondents violated §1-210(a), G.S., by failing to disclose the records found not to be exempt from disclosure, as described in paragraphs 17, 19, 24, 26, 27, and 29, above.

The following order is recommended on the basis of the record concerning the above-captioned complaint:

1. The respondents shall forthwith provide the complainant with copies of the records described in paragraphs 17, 19, 24, 26, 27, and 29, above.

Approved by Order of the Freedom of Information Commission at its regular meeting of October 24, 2018.



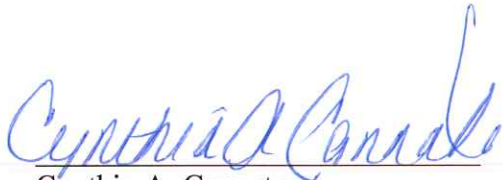
Cynthia A. Cannata
Acting Clerk of the Commission

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:

CHRISTINE CIEPLINSKI, 28 Hickory Lane, West Hartford, CT 06107

EXECUTIVE DIRECTOR, STATE OF CONNECTICUT, UNIVERSITY OF CONNECTICUT HEALTH CENTER; AND STATE OF CONNECTICUT, UNIVERSITY OF CONNECTICUT HEALTH CENTER, c/o Assistant Attorney General Lynn Wittenbrink, UCONN Health Center, 263 Farmington Avenue, MC1093, Farmington, CT 06030-1093 and Assistant Attorney General Ann E. Lynch, Office of the Attorney General, 55 Elm Street, Hartford, CT 06105



Cynthia A. Cannata
Acting Clerk of the Commission