FREEDOM OF INFORMATION COMMISSION
OF THE STATE OF CONNECTICUT

In The Matter of a Complaint by FINAL DECISION

Mike Savino and Record-Journal,

Complainants

against Docket #FIC 2018-0285

Chief, Police Department,
City of Meriden; Police
Department, City of Meriden;
and City of Meriden,

Respondents January 9, 2019

The above-captioned matter was heard as a contested case on July 31, 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, by letter of request issued in May 2018, the complainants requested that the respondents provide them with access to all internal affairs investigation reports issued in calendar year 2017. It is found that the respondents provided the complainants with access to all such reports with the exception of four. It is found that the complainants reviewed the provided reports, and requested and received copies of certain designated pages.

3. It is found that, by email dated May 23, 2018, the respondents formally denied the complainants' request for access to the four outstanding internal affairs ("IA") investigation reports, which reports all concerned Captain Patrick Gaynor.

4. By email dated and filed June 4, 2018, the complainants appealed to the Commission, alleging that the respondents violated the Freedom of Information Act ("FOI Act") by failing to provide them with access to the remaining internal affairs investigation reports.

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, 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.

6. 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.

7. 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."

8. 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.

9. The background in the instant case is somewhat extensive. It is found that, in the fall of 2016, Captain Patrick Gaynor was in charge of public funds assigned to the City of Meriden's Communications Department. It is found that Captain Gaynor "applied for" and granted himself money from the fund to take a law enforcement course. Captain Gaynor's actions in this regard came to the attention of the respondent department. Thereafter, Chief of Police Jeffry W. Cossette ordered an internal affairs investigation into Captain Gaynor's handling of the fund (the "first IA").

10. After receiving notification that he was being investigated, it is found that Captain Gaynor filed a complaint alleging that Chief Cossette had been retaliating against him (the "retaliation allegations"). It is found that the retaliation allegations were assigned to outside counsel for investigation. Ultimately, it is found that outside counsel determined that there was no evidence to substantiate Captain Gaynor's allegations.

11. It is found that the first IA determined that Captain Gaynor had misappropriated public funds and had committed insubordination.

12. One day following the issuance of the first IA investigation report, the respondents determined that Captain Gaynor was disturbing the investigator who had conducted the first IA. The following day, Captain Gaynor was placed on leave.

13. It is found that the respondents ordered a second internal affairs investigation concerning the validity and veracity of Captain Gaynor's retaliation complaint (the "second IA").

14. It is found that the second IA determined that Captain Gaynor had falsely filed a retaliation complaint against his chief.

15. Thereafter, the first and the second IA investigation reports were disclosed to Chief Charles Reynolds, a retired police chief from New Hampshire. Chief Reynolds was retained to act as the hearing officer and to preside over the Loudermill[1] proceedings concerning the findings in the first and the second IA investigation reports. Chief Reynolds held two separate hearings in this regard.[2]

16. It is found that Chief Reynolds, after considering the first IA investigation report and after conducting a hearing, exonerated Captain Gaynor for misappropriation, but sustained the insubordination determination.

17. It is further found that Chief Reynolds received the respondents' second IA investigation report, reviewed it, and then sent it back to the respondents with a request that additional information be provided and that certain aspects of the report be amended. It is found that, after the second IA investigation report was revised in the manner requested, the respondents returned the amended report to Chief Reynolds (the "amended second IA investigation report"). It is found that Chief Reynolds, after considering the amended second IA investigation report and after conducting a hearing, sustained the finding that Captain Gaynor falsely filed a retaliation complaint against his chief; Captain Gaynor was terminated.

18. It is found that the records pertaining to the first and second IA investigations have been disclosed and are not at issue in this case.

19. It is further found that Captain Gaynor has been disputing his termination at the State Board of Labor Relations for almost two years.

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[1] A "Loudermill" hearing is part of the due process requirement that must be provided to a public employee prior to removing or impacting the employee's employment property right (e.g. imposing severe discipline). The purpose of a Loudermill hearing is to provide an employee an opportunity to present his or her side of the story before the employer makes a final decision on discipline. See Wikipedia The Free Encyclopedia, at https://en.wikipedia.org/wiki/Loudermill_hearing (accessed: October 10, 2018).

[2] Normally, Chief Cossette would have received the IA investigation reports and would have presided over the Loudermill hearing process; however, in this case, because Captain Gaynor made allegations directly against Chief Cossette, the respondents determined it was necessary to retain an outside professional to preside over the hearings.

20. It is found that the four remaining IA investigation reports, which are the records at issue in this case, are investigative reports that post-date Captain Gaynor's termination. It is found that the first two such IA investigation reports pertain to allegations that Captain Gaynor secretly recorded members of the police department (on two separate days, thus two separate IA investigations) and the second two such IA investigation reports pertain to allegations that Captain Gaynor failed to disclose the recordings when requested to do so during the context of the second IA investigation.

21. It is further found that, if Captain Gaynor successfully disputes his termination, he will be entitled to a Loudermill hearing with regard to the four remaining IA investigation reports, at which time the reports would be forwarded to an assigned hearing officer and the Loudermill hearing process would begin.

22. The respondents contended that, because the Loudermill process has not been conducted with regard to the four remaining IA investigation reports, the reports are drafts within the meaning of §1-210(b)(1), G.S.

23. 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.

24. 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 informal 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.

25. The year following Wilson, the Connecticut legislature adopted Public Act 81-431, which added to the FOI Act the language now codified in §1-210(e)(1). See ¶ 46, below.

26. It is found that with adoption of Public Act 81-431, the Connecticut Legislature made clear that the Connecticut FOI Act required more robust disclosure than is required by the deliberative process privilege permitted at the federal level.

27. 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.

28. Sgt. Christopher Fry appeared at the contested case hearing and provided testimony. It is further found that Sgt. Fry was the investigator assigned to the second IA investigation as well as the remaining four IA investigations referenced in paragraph 20, above. It is further found that Sgt. Fry is the investigator who produced the second IA investigation report, the amended second IA investigation report, and the remaining four IA investigation reports.

29. It is found that the four undisclosed IA investigation reports are the culmination of Sgt. Fry's investigation into the allegations that Captain Gaynor secretly recorded his fellow staff members, and failed to produce such recordings when requested to do so in the course of the second IA investigation. It is found Sgt. Fry has completed those reports and, should Captain Gaynor prevail in challenge to his termination, the investigation reports *in their current form* will be disclosed to the hearing officer assigned to precede over the Loudermill process.

30. It is found that the four remaining IA investigation reports are not preliminary drafts, within the meaning of §1-210(b)(1), G.S. See Richard L. Judd, et al. v. Comm'r, State of Connecticut, Dep't of Pub. Safety, et al., Docket #FIC 95-138 (Feb. 15, 1996) (internal affairs investigation report was not a draft within the meaning of §1-210(b)(1), G.S., even though Loudermill proceedings had not yet occurred and "any changes to completed report could be issued in a supplemental report").

31. The respondents contended that, because the assigned hearing officer could decide (as Chief Reynolds did in course of the second Loudermill process, see ¶ 17, above) to send the reports back for further revision, the reports in their current form must be considered preliminary drafts. The Commission disagrees. Even if the reports were sent back to Sgt. Fry for further investigation or clarification of any kind, both versions of the IA investigation report—that is, the first final investigation report and the amended final investigation report—would be public records subject to disclosure as interagency recommendations or reports "comprising part of the process by which governmental decisions . . . are formulated," within the meaning of §1-210(e)(1), G.S. See Chris Chappell v Chief, Police Dep't, Town of West Hartford, et al., Docket #FIC 2016-0687 (July 20, 2017) (first version of the internal affairs report was not exempt pursuant to §1-210(b)(1), G.S., even though the Chief of Police sent the report back to the Internal Affairs Investigation Division for amendments; both the first

report and the amended report were public records subject to disclosure).

32. It is therefore concluded that the four internal affairs investigation reports at issue in this case are not exempt pursuant to §1-210(b)(1), G.S.

33. The respondents also claimed in correspondence that they sent to the complainants that the four remaining IA investigation reports are exempt from disclosure pursuant to §1-210(b)(4), G.S.

34. Section 1-210(b)(4), G.S., provides that nothing in the FOI Act shall be construed to require disclosure of:

> Records pertaining to strategy and negotiations with respect to pending claims or pending litigation to which the public agency is a party until such litigation or claim has been finally adjudicated or otherwise settled.

35. It is found the four remaining IA investigation reports are final reports by an internal affairs investigator concerning allegations of police misconduct. The respondents have failed to produce any evidence to prove that the four remaining IA investigation reports are or contain their "strategy" or "negotiations" with respect to pending claims or pending litigation.

36. Accordingly, it is concluded that the respondents violated the disclosure provisions of the FOI Act by denying the complainants access to the four requested IA investigation reports.

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 complainants with a copy of each of the four IA investigation reports described in paragraph 3, of the findings, above, free of charge.

Approved by Order of the Freedom of Information Commission at its regular meeting of January 9, 2019.

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:

MIKE SAVINO AND RECORD-JOURNAL, 500 South Broad Street, Meriden, CT 06450

CHIEF, POLICE DEPARTMENT, CITY OF MERIDEN; **POLICE DEPARTMENT, CITY OF MERIDEN; AND CITY OF MERIDEN**, c/o Attorney Deborah L. Moore, City of Meriden, Office of Corporation Counsel, 142 East Main Street, Suite 240, Meriden, CT 06450

Cynthia A. Cannata
Acting Clerk of the Commission

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