



FREEDOM OF INFORMATION



Connecticut Freedom of Information Commission • 18-20 Trinity Street, Suite 100 • Hartford, CT 06106
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Michael Aronow,
Complainant(s)
against

Notice of Meeting

Docket #FIC 2016-0313

Attorney General, State of Connecticut,
Office of the Attorney General; and State
of Connecticut, Office of the Attorney General,
Respondent(s)

February 2, 2017

Transmittal of Proposed Final Decision

In accordance with Section 4-179 of the Connecticut General Statutes, the Freedom of Information Commission hereby transmits to you the proposed finding and decision prepared by the hearing officer in the above-captioned matter.

This will notify you that the Commission will consider this matter for disposition at its meeting which will be held in the Freedom of Information Commission Hearing Room, 18-20 Trinity Street, 1st floor, Hartford, Connecticut, at **2 p.m. on Wednesday, March 8, 2017**. At that time and place you will be allowed to offer oral argument concerning this proposed finding and order. Oral argument shall be limited to ten (10) minutes. For good cause shown, however, the Commission may increase the period of time for argument. A request for additional time must be made in writing and should be filed with the Commission **ON OR BEFORE February 24, 2017**. Such request **MUST BE (1) copied to all parties, or if the parties are represented, to such representatives, and (2) include a notation indicating such notice to all parties or their representatives.**

Although a brief or memorandum of law is not required, if you decide to submit such a document, an **original and fourteen (14) copies** must be filed **ON OR BEFORE February 24, 2017**. **PLEASE NOTE: Any correspondence, brief or memorandum directed to the Commissioners by any party or representative of any party MUST BE (1) copied to all parties, or if the parties are represented, to such representatives, (2) include a notation indicating such notice to all parties or their representatives and (3) be limited to argument. NO NEW EVIDENCE MAY BE SUBMITTED.**

If you have already filed a brief or memorandum with the hearing officer and wish to have that document distributed to each member of the Commission, it is requested that **fifteen (15) copies** be filed **ON OR BEFORE February 24, 2017**, and that **notice be given to all parties or if the parties are represented, to their representatives, that such previously filed document is being submitted to the Commissioners for review.**

By Order of the Freedom of
Information Commission

W. Paradis
Acting Clerk of the Commission

Notice to: Michael Aronow
Attorney Antoria D. Howard

FIC# 2016-0313/Trans/wrbp/PSP//TAH/2017-02-02

FREEDOM OF INFORMATION COMMISSION
OF THE STATE OF CONNECTICUT

In the Matter of a Complaint by

Report of Hearing Officer

Michael Aronow,

Complainant

Docket # FIC 2016-0313

against

Attorney General, State of
Connecticut, Office of the Attorney
General; and State of Connecticut,
Office of the Attorney General,

Respondents

January 31, 2017

The above-captioned matter was heard as a contested case on July 11, 2016, at which time the complainant and 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 email dated April 15, 2016, the complainant made a request to Associate Attorney General (“AAG”) Antoria Howard, the respondent’s Compliance Officer, for the following documents:

[a] All documents including but not limited to emails, memos, letters, and records of phone or personal communications pertaining to the following three documents:

[1] My attached August 14, 2013 letter to Attorney General George Jepsen.

[2] The attached August 27, 2013 email from Associate Attorney General Margaret Q. Chapple to Attorney Heena Kapadia.

[3] The attached August 29, 2013 email from Attorney Heena Kapadia to Associate Attorney General Margaret Q. Chapple.

[b] A copy of the policies for the Attorney General's Office in place from August 14, 2013 to the present pertaining to investigating complaints against Assistant and Associate Attorney General staff.

The complainant also requested that the respondents provide redacted copies of any documents that they believed were privileged including the date of the document and the names of the person(s) sending and receiving all or part of the documents.

3. It is found that the documents referenced in paragraph 2[a], above, consist of a complaint of misconduct filed by the complainant with the Office of the Attorney General ("OAG") in August 2013, a request for an investigation of such misconduct, and the OAG's responses thereto.

4. It is found that at the time of the complainant's August 2013 filing, described in paragraph 3, above, there were ongoing proceedings at the Office of Public Hearings ("OPH") involving a whistleblower retaliation complaint filed by the complainant against the University of Connecticut Health Center. It is also found that the complainant was involved in ongoing litigation against the Freedom of Information ("FOI") Commission concerning a final decision issued by the Commission. In addition, it is found that the respondents represented the complainant in the OPH and FOI matters.

5. By email dated April 22, 2016, the complainant appealed to this Commission, alleging that the respondents violated the FOI Act by failing to provide him with copies of the records described in paragraph 2, above.

6. 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.

7. 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.

8. 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.”

9. It is found that the records requested by the complainant are public records and must be disclosed in accordance with §§1-200(5), 1-210(a) and 1-212(a), G.S., unless they are exempt from disclosure.

10. It found that, by letter dated May 9, 2016, AAG Howard responded to the complainant’s April 15, 2016 request described in paragraph 2, above, and provided the complainant with six pages of documents responsive to such request. AAG Howard also informed the complainant that the respondents do not have any written policies regarding investigations of complaints against its staff. In addition, AAG Howard informed the complainant that there were seven pages of documents which the respondents claimed were exempt from disclosure pursuant to Conn. Gen. Stat. §§1-210(a), 210(b)(4) and 1-210(b)(10), and which would therefore not be provided.

11. At the hearing, the complainant contended that the respondents failed to provide him with copies of all records that were responsive to his April 15th request, including, but not limited to, the records that the respondents claimed were exempt from disclosure, a copy of the respondents’ ethics policy, which the complainant downloaded from the OAG’s website, and, at least one email, dated April 8, 2016 at 11:22am, from Margaret Q. Chapple, a former Assistant and Associate Attorney General, to Heena Kapadia, the complainant’s attorney, which he obtained from Attorney Kapadia.

12. With respect to the records requested in paragraph 2[b], above, Ms. Chapple testified, and it is found, that the respondents do not maintain any policies that pertain to the investigation of complaints against assistant and associate attorney generals. It is found that the ethics policy described in paragraph 11, above, is intended as a general guide regarding prohibited conduct, and not a policy concerning the investigation of complaints. Accordingly, it is concluded that the respondents did not violate the FOI Act by failing to provide such policy to the complainant.

13. With respect to the records requested in paragraph 2[a], above, Ms. Chapple testified that although there were discussions concerning the complainant’s August 2013 complaint to the OAG, no formal investigation was conducted resulting in a written report. She testified that, in response to the complainant’s records request, she searched a folder on her computer containing information relating to the August 2013 complaint, and that due to the volume of documents relating to the complainant she limited her search to around the time the August 2013 complaint was filed.

14. It is found that the complainant’s request did not limit the time period from which records were sought. It is also found that the April 8, 2016 email, described in paragraph 11,

above, was responsive to the April 15th request, and should have been provided to the complainant. Therefore, it is concluded that the respondents violated the FOI Act by failing to provide such email to the complainant.

15. With respect to the records that are claimed to be exempt from disclosure, after the hearing in this matter, the respondents submitted an in camera index and 7 pages of unredacted documents to the Commission for in camera review. On December 15, 2016, pursuant to an order of the hearing officer, the respondents submitted a statement clarifying the line references, indicated on the in camera index, which were claimed to be exempt from disclosure, and the statutory exemptions being claimed.¹ The respondents also informed the Commission that they were no longer claiming an exemption for two of the records which were previously submitted for in camera review (identified by the respondents as Record Ref. ##6 and 7), and represented that copies of such records would be sent to the complainant.

16. The in camera records remaining at issue consist of emails and are identified as IC-2016-0313-1 (lines 19-22), IC-2016-0313-2 (lines 6-9), IC-2016-0313-3 (lines 7-16), IC-2016-0313-4 (lines 19-28) and IC-2016-0313-5 (lines 18-27).² The respondents claim that such records are exempt from disclosure pursuant to §§1-210(b)(4), 1-210(b)(10) and 52-146r, G.S. The respondents have not claimed an exemption for the remaining portions of IC-2016-0313-1 through IC-2016-0313-5, including a document that is referenced in IC-2016-0313-2 (line 5) as an attachment. The respondents did not submit the attachment in IC-2016-0313-2 (line 5) to the Commission for in camera review.

17. Section 1-210(b)(4), G.S., permits an agency to withhold from disclosure “[r]ecords 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 fully adjudicated or otherwise settled....”

18. Section 1-200(8), G.S., defines “pending claim” as “a written notice to an agency which sets forth a demand for legal relief or which asserts a legal right stating the intention to institute an action in an appropriate forum if such relief or right is not granted.”

19. Section 1-200(9), G.S., defines “pending litigation” as:

(A) a written notice to an agency which sets forth a demand for legal relief or which asserts a legal right stating the intention to institute an action before a court if such relief or right is not granted by the agency; (B) the service of a complaint against an agency returnable to court which seeks to enforce or implement

¹ The respondents’ revised index, described in paragraph 15, above, has been marked as Respondents’ Exhibit 1: Clarification of the Index, dated December 12, 2016.

² The respondents submitted the in camera records without providing specific line references on the in camera records. The hearing officer therefore supplied line references, in pencil, on the in camera records, in an effort to avoid confusion regarding the permitted redactions.

legal relief or a legal right; or (C) the agency's consideration of an action to enforce or implement legal relief or a legal right.

20. Based upon the evidence in the record, and upon careful examination of IC-2016-0313-1 (lines 19-22) and IC-2016-0313-2 (lines 6-9), it is found that such records pertain to "strategy and negotiations with respect to pending claims or pending litigation" against the respondents. It is therefore found that such records are exempt from disclosure pursuant to §1-210(b)(4), G.S. Accordingly, the respondents did not violate the FOI Act by withholding such records from disclosure.

21. Section 1-210(b)(10), G.S., provides that mandatory disclosure is not required of "communications privileged by the attorney-client relationship...."

22. Established Connecticut law defining the attorney-client privilege governs the applicability of the exemption contained in §1-210(b)(10), G.S. Such 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. 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.

25. Based upon the evidence in the record and upon careful examination of IC-2016-0313-3 (lines 7-16), IC-2016-0313-4 (lines 19-28) and IC-2016-0313-5 (lines 18-27), it is found that such records are communications transmitted in confidence between an attorney(s) for the respondents and employees and officials of the respondents relating to legal advice sought by the respondents or in furtherance of the rendition of such legal advice, within the meaning of §§1-210(b)(10) and 52-146r(2), G.S.

26. It is found that IC-2016-0313-3 (lines 7-16), IC-2016-0313-4 (lines 19-28) and IC-2016-0313-5 (lines 18-27), constitute communications privileged by the attorney-client

relationship within the meaning of §1-210(b)(10), G.S., and are exempt from disclosure pursuant to §1-210(b)(10), G.S. Accordingly, the respondents did not violate the FOI Act by withholding such records from disclosure.

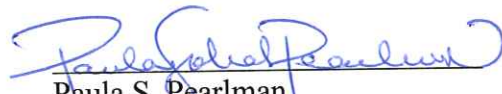
The following order by the Commission is hereby recommended on the basis of the record concerning the above-captioned complaint:

1. The respondents shall, within 30 days of the notice of final decision in this matter, undertake an additional search for records responsive to the complainant's request described in paragraph 2[a] of the findings, above. If the respondents discover additional records that they have not provided to the complainant, they shall provide copies of such records to the complainant, free of charge. If the respondents do not locate any additional records responsive to the complainant's request, they shall notify the complainant in writing of the results of their search including the locations searched and search terms used.

2. If the respondents have not already done so, they are hereby ordered to provide the complainant with copies of the two records not previously provided to the complainant, as described in paragraph 15 of the findings, above.

3. In addition, if the respondents have not already done so, they are hereby ordered to provide the complainant with copies of those portions of IC-2016-0313-1 through IC-2016-0313-5 for which no exemption from disclosure is claimed, as described in paragraph 16 of the findings, above.

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


Paula S. Pearlman
as Hearing Officer