

NO. CV 08 4018826S		SUPERIOR COURT
DUANE TOMPKINS	:	JUDICIAL DISTRICT OF
V.	:	NEW BRITAIN
FREEDOM OF INFORMATION COMMISSION, ET AL.	:	JULY 13, 2009
NO. CV 08 4018838S	:	SUPERIOR COURT
TOWN OF ENFIELD, ET AL.	:	JUDICIAL DISTRICT OF
V.	:	NEW BRITAIN
FREEDOM OF INFORMATION COMMISSION, ET AL.	:	JULY 13, 2009

MEMORANDUM OF DECISION

The plaintiff, town of Enfield¹ (the town) in Docket No. CV 08 4018838 and the plaintiff, Duane Tompkins (Tompkins) in Docket No. CV 08 4018826 have brought these administrative appeals from an August 13, 2008 final decision of the defendant freedom of information commission (FOIC), ordering the disclosure of documents under the Freedom of information Act (FOIA) to the defendant Manchester Journal Inquirer

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The other plaintiffs are the Enfield department of human resources, the Enfield police department, and Carl Sferrazza, Enfield police chief.

SUPERIOR COURT
 2009 JUL 13 A 11: 10
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(Journal Inquirer).²

The record shows as follows. The Journal inquirer made a request on October 15, 2007 to the town that it produce "all records generated or received by the Town of Enfield, including the Enfield Police Department, in connection with the recent suspension of a police lieutenant [Tompkins]. This request includes but is not limited to all records related to the facts or allegations that led to the suspension, including facts uncovered by the internal investigation, and all records setting forth the starting and ending dates of the suspension and any effects the suspension may have had on the lieutenant's compensation." The town refused to make the requested records available in an October 22, 2007 response, claiming exemptions from FOIA on its own and due to an objection to disclosure filed by Tompkins.

The Journal Inquirer then appealed to the FOIC on October 30, 2007, alleging the failure of the town to provide the requested records. The hearing was held by a hearing officer of the FOIC on March 27, 2008. Prior to the hearing, there were three developments. On February 5, 2008, the town released to the Journal Inquirer a severance agreement between Tompkins and the town that states that there were "disputes between . . . Tompkins and the Police Department concerning his off-duty conduct" and

2

The other defendants are Alexander Wood and Jenna Carlesso, newspaper reporters for the Journal Inquirer and the complaining parties to the FOIC; only Wood made an appearance before this court.

that "Tompkins . . . decided to resign his position in lieu of further proceedings"

On March 14, 2008, the town submitted a series of documents to the FOIC for *in camera* inspection, claiming exemptions for these documents. They consisted of a loose-leaf binder, referred to as item 1, with records organized by tabs A through J.

Additionally, the *in camera* records included items marked as "Reference 2" through "Reference 11." Finally, at the hearing before the FOIC hearing officer on March 27, 2008, the town provided the Journal Inquirer with records documenting the compensation status of Tompkins after he was suspended and until the severance agreement became effective, as well as the *in camera* records marked "reference 8" through "reference 11."³

The hearing officer rendered a proposed final decision on May 8, 2008. At a meeting of the FOIC on May 28, 2008, the FOIC voted to table the proposed decision. At a special meeting on June 17, 2008, the FOIC voted to reject the proposed final decision prepared by the hearing officer and directed the staff to prepare a new proposed final decision consistent with the FOIC commissioners' comments at the special meeting. A second proposed final decision was issued and approved as a final decision on August 13, 2008. (Return of Record, pp. 492-497).

The final decision in finding 15 concludes that the requested records are public

3

Therefore the records at issue are those contained in the so-called loose-leaf notebook and references 2-7.

records. Findings 16, 17 conclude that certain lines of the *in camera* records that state a residential address of a police officer are exempt from disclosure under General Statutes § 1-217 (a) (2). Finding 18 recites that under exemption § 1-210 (b) (2)⁴ and *Perkins v. Freedom of Information Commission*, 228 Conn. 158, 175 (1993), the town and Tompkins had the burden of demonstrating that the records in question were (1) personnel, medical or similar files, (2) the information sought does not pertain to legitimate matters of public concern, and (3) such information is highly offensive to a reasonable person.

Finding 19 concluded that the records were “personnel” files or “similar files.” The key to the final decision is Finding 20: “Based on the *in camera* inspection, it is found that all of the requested records pertain to a legitimate matter of public concern. The requested records evidence a continuing practice that could pose a danger to portions of the public. The more egregious the specific behavior, the more a finding of legitimate public concern is warranted concerning the records describing the behavior. Further, the fact that respondent Tompkins remained on the payroll of the Town of Enfield for ten months after the execution of the severance agreement adds to the legitimate matters of public concern.” In Finding 21, the FOIC concluded that it was unnecessary to reach the

4

This exemption from disclosure of records is for “[p]ersonnel or medical files and similar files the disclosure of which would constitute an invasion of person privacy.”

invasion of privacy portion of *Perkins* where the town and Tompkins had failed to negate the “legitimate public concern” prong.

The final decision concludes in Finding 22, by rejecting the claimed exemption of § 1-210 (b) (2) for the reasons stated in the prior findings. It also rejected the applicability of § 1-210 (b) (3) (G)⁵ on the ground that there had been no allegations against Tompkins of criminal activity. The FOIC in its final decision ordered that the *in camera* records that had not been previously provided were “subject to mandatory disclosure.”⁶ This appeal by the town and Tompkins followed.

As is clear from the above summary of the final decision, the seven *in camera* items are to be disclosed in full. The court has reviewed these items. The first item is a loose-leaf notebook with tabs A-J, with tabs D-I verbatim transcripts of instant messages between Tompkins and third parties. The remaining tabs in the first item⁷ and remaining

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This exemption applies to “[r]ecords of law enforcement agencies not otherwise available to the public which records were compiled in connection with the detection or investigation of crime, if the disclosure of said records would not be in the public interest because it would result in the disclosure of . . . (G) uncorroborated allegations subject to destruction pursuant to section 1-216. . . .” Section 1-216 provides a schedule for the destruction of “uncorroborated allegations that an individual has engaged in criminal activity.”

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As indicated the town was permitted to withhold a few lines of the records that would disclose the residential address of a police officer.

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Tab A in the notebook at page 6 and following also has a verbatim transcript. Tab G does

items (the so-called “references”) arise from the Tompkins internal investigation.

In deciding whether the FOIC correctly concluded that the *in camera* documents should be released, the court is guided by the case of *Rocque v. Freedom of Information Commission*, 255 Conn. 651, 774 A.2d 957 (2001). There the documents “comprised a written complaint of sexual harassment made by an employee of the department against a department manager, the complainant’s detailed statement to the investigating officer, and notes from interviews of many coworkers taken during the course of the department’s investigation of the complaint. The investigation resulted in a finding that no sexual harassment took place, but that the manager exercised poor judgment.” (Internal quotation marks omitted.) *Id.* at 662.

The Supreme Court concluded: “We turn next to the second category of information that the department claims is exempt to determine whether any of this information is of legitimate public concern.⁸ We conclude that much of this information *is* of legitimate public concern in that it reveals, for example, the department’s efforts to secure the complainant’s cooperation, the department’s procedure in questioning witnesses and the complainant’s concern for job-related consequences from the alleged

not have a transcript at page 16 and following.

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The Court was using the *Perkins* test. *Rocque v. Freedom of Information Commission*, *supra*, 225 Conn. 664.

sexual harassment. After reviewing all of the department's exemption claims, we conclude that the only portions of the records that are not a matter of legitimate public concern are those portions containing sexually explicit or descriptive information, such as allegations of sexual contact and sexual improprieties, and details of intimate personal relationships. . . . [We have] affirmed [in another case] the trial court's finding that the public had no legitimate interest in disclosure of a report describing details of a state trooper's personal and marital relationship. The investigative report in that case resulted from a citizen's complaint that the trooper was involved in an inappropriate relationship with the complainant's wife. We conclude similarly here, that sexually explicit information contained in the records at issue pertaining to the complainant's intimate relationships is not a matter of legitimate public concern." (Emphasis in original.) *Id.* at 665-66. The Court also concluded that this material would be highly offensive to a reasonable person. *Id.* at 667.

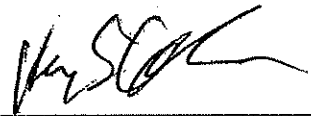
The final decision in this case does not analyze the *in camera* documents in keeping with *Rocque*. See also *Dept. Of Public Safety v. Freedom of Information Commission*, 242 Conn. 79, 90, 698 A.2d 803 (1997) (rejecting the argument of the FOIC that "every aspect of a trooper's personal life is always a matter of legitimate public concern as long as it is contained within a report that is the product of an investigatory process"). The final decision in the present case orders that all the documents be

disclosed. The court, in light of precedent, asks the FOIC to amend its final decision by reviewing the documents again and discussing whether it is a matter of legitimate public concern to release the verbatim transcripts in tabs D-J and the portion of tab A at page 6 and following.⁹

The final decision sets forth in finding 20 the FOIC's reasons that the documents are legitimate matters of public concern: (1) they represent a continuing practice that might pose a danger to a portion of the public, (2) they represent egregious specific behavior, and (3) they raise the issue of why Tompkins was permitted to remain on the town's payroll for ten months after his signing of the severance agreement. The FOIC should resolve why each of these reasons might not be obtained by limiting disclosure to the remaining tabs in the notebook as well as references 2-7.

The court remands this matter to the FOIC while retaining jurisdiction. *Hogan v. Dept. of Children and Families*, 290 Conn. 545, 559, 964 A.2d 1213 (2009); *Lisee v. Commission on Human Rights & Opportunities*, 258 Conn. 529, 539, 782 A.2d 670 (2001).¹⁰

So ordered.



Henry S. Cohn, Judge

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Should the FOIC determine that the transcripts are not matters of legitimate public concern, then the FOIC should apply the remainder of the *Perkins* test.

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In remanding this matter for clarification, the court has not ruled on the merits of the plaintiffs' claimed exemptions of §§ 1-210 (b) (2) and 1-210 (b) (3) (G).