NO. CV 13-6020905S : SUPERIOR COURT

GEORGE FLORES, ESQ. & DAVID SMITH, ESQ. : JUDICIAL DISTRICT

V. : OF NEW BRITAIN

FREEDOM OF INFORMATION COMMISSION : APRIL 7, 2014

MEMORANDUM OF DECISION

The plaintiffs, George Flores and David Smith, appeal from an April 24, 2013 final decision of the defendant freedom of information commission (FOIC).[1] In its final decision, the FOIC ordered the office of the chief public defender to disclose records that relate to the plaintiffs, employees of that office.[2]

The final decision of the freedom of information commission reads in relevant part as follows:

2. It is found that, by letter dated April 29, 2012, Alexander Wood . . . made the following request for access to records:

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[1] The final decision of the freedom of information commission is adverse to the plaintiffs and therefore they are aggrieved for purposes of General Statutes § 4-183(a). The plaintiffs were permitted to appear separately from the office of chief public defender pursuant to § 1-214 (b).

[2] The office of chief public defender was not named as a party to this action by the plaintiffs, but was served with a copy of their complaint. The office has not appeared. The complainant in this appeal, Alexander Wood, was also not made a defendant, but was served with a copy of the complaint. He has not moved to be made a defendant, but did participate in the appeal by filing a brief.

"I request the opportunity to inspect all records in the possession of the Division of Public Defender Services . . . concerning any arrests or other allegations of misconduct against the following attorneys: George D. Flores and David G.E. Smith . . . .

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10. On February 28, 2013, the respondents submitted the records described in paragraph 2, above, to the Commission for an in camera review. [These records include]: (a) 14 pages of records pertaining to Attorney Flores, which shall be identified in the report as IC-Atty A-2012-276-01 through IC-AttyA-2012-276-14; (b) 41 pages of records pertaining to Attorney Smith, which shall be identified in the report as IC-AttyB-2012-276-01 through IC-AttyB-2012-276-41; and (c) one three-page memorandum prepared by the respondents' Director of Human Resources, which shall be identified in the report as IC-HR-2012-276-01 through IC-HR-2012-276-03.

* * *

25. While the agency respondents contend that IC-HR-2012-276-01 through IC-HR-2012-276-03 are preliminary drafts or preliminary notes, upon a careful review of these records, it is found that these records comprise a fully developed, cohesive memorandum concerning a single subject.

* * *

30. Accordingly, it is concluded that the memorandum is not exempt from disclosure pursuant to §1-210(b)(1), G.S.

* * *

46. It is found that in-house counsel for the agency respondents determined that the disclosure of records concerning the arrests and/or other allegations of misconduct of two fellow public defenders would constitute a security risk.

47. It is found that, subsequent to this initial determination, there was no consultation with the Chief Court Administrator as to whether there were "reasonable grounds" to believe disclosure of the requested records would constitute a safety risk, pursuant to §1-210(b)(19), G.S. To be clear, it is found that, as of the date of the

contested case hearing, 284 days had passed since the agency respondents received the complainants' request for records, and the agency respondents had yet to engage in any consultation with the Chief Court Administrator with regard to this request.

* * *

49. While §1-210(b)(19), G.S., does mention "the risk to any person," if the agency respondents sincerely thought that the disclosure of records having to [do] with the criminal arrests and other misconduct of public defenders implicated the kind of safety risk contemplated by this exemption, they should have brought such belief to the attention of the statutory decision maker.

50. It is therefore concluded that the agency respondents failed to prove that the records in question are exempt from disclosure pursuant to the provisions of §1-210(b)(19), G.S.

* * *

55. The respondents contend that, because complainant Wood is a member of the press, providing records contained in the personnel file of an employee of the respondent agency to him might lead to

the disclosure of these same records to "an individual committed to the custody or supervision of the Commissioner of Correction or confined in a facility of the Whiting Forensic Division of the Connecticut Valley Hospital" because a story reported on by Complainant Wood might reference the personnel records and then such report might be contained in a newspaper that ultimately arrives at a correctional institution or the Whiting Forensic Division of the Connecticut Valley Hospital. The agency respondents did concede at the contested case hearing that they were construing §18-101f, G.S., in an extremely broad manner.

* * *

58. It is concluded that the meaning of the §18-10f, G.S., is plain and unambiguous. Accordingly, the Commission declines the agency respondents' invitation to include "reporters" alongside inmates and Whiting Forensic Institute residents as an additional class of person intended to be covered by the amendments contained in Public Act 11-220. Moreover, §1-200(1), G.S., of the FOI Act is

a section of the FOI Act containing definitional information, not exemptions to disclosure.

59. It is therefore concluded that the respondents failed to prove that the records in question are exempt from disclosure pursuant to the provisions §1-200(1), G.S. as amended by Public Act 11-220.

* * *

64. However, it is found that evidence presented at the contested case hearing clearly establishes that the agency respondents have never represented a particular external client with regard to the records at issue in this case, or with regard to the matters which such records concern. It is further found that none of in camera records in this case evidence a communication between a "public defender" and a "person," as such terms are defined within the context of Public Act 11-51, §12.

65. It is therefore concluded that the agency respondents failed to prove that the records in question are exempt from disclosure pursuant to the provisions of Public Act 11-51, §12.

* * *

68. The interveners next contend in their reply brief that the records described in paragraphs 10.a and 10.b, above, are exempt from disclosure pursuant to both HIPAA and CIIPPAA. The interveners cite no specific section of either the federal or state statute, do not identify which particular records might be exempt under their provisions, and their brief contains no analysis of the law as it applies to the records at issue.

* * *

70. It is found that HIPAA applies to any entity that is: a health care provider that conducts certain transactions in electronic form; a health care clearinghouse; or a health plan. See 45 C.F.R. §160.103 (2010). It is found that an entity that is one or more of these types or entities is referred to as "a covered entity" in the Administrative Simplification regulations that govern HIPAA and are required to comply with those regulations. See 45 C.F.R. Parts 160, 162, and 164 (2010).

* * *

73. It is concluded that the FOI Act requires by law the disclosure of non-exempt requested records, within the meaning of 45 C.F.R. §164.103. See State of Nebraska ex re. Adams County Historical Society v. Kinyoun, 277 Neb. 749 (2009); Abbott v. Texas Dep't of Mental Health, 212 S.W. 3rd 658 (Tex. 2006); State ex rel. Cincinnati Enquirer v. Daniels, 108 Ohio St. 3d 518 (2006) (state public records laws which require disclosure of records are not in conflict with HIPAA privacy rules exceptions, even for covered entities). Accordingly, it is concluded that none of the in camera records are exempt pursuant to HIPAA regulations.

74. Based on the foregoing, it is concluded that the interveners failed to prove that the records described in paragraphs 10.a and 10.b, above, are exempt from disclosure pursuant to the provisions of HIPAA.

* * *

77. It is found that the interveners have failed to produce any evidence from which it can be determined that the agency respondents are agents, insurance institutions, or insurance-

support organizations, as such terms are set forth in CIIPPA. It is therefore concluded that the interveners failed to prove that the records described in paragraphs 10.a and 10.b, above, are exempt from disclosure pursuant to the provisions of CIIPPA.

* * *

79. Finally, the interveners claim that the records described in paragraphs 10.a and 10.b, above, might be exempt from disclosure pursuant to the state's erasure statute, or may be subject to a sealing order. In addition, the agency respondents, along with the interveners, contend that all of in camera records are exempt from disclosure pursuant to §1-210(b)(2), G.S.

* * *

86. It is found that the erasure provisions of §54-142a, G.S., do not reach records in the possession of the agency respondents, which records were gathered or received by such respondents in connection with the investigation of an employee's misconduct or criminal arrest. It is therefore concluded that the interveners failed to prove that the records described in paragraphs 10.a and

10.b, above, are exempt from disclosure pursuant to the provisions of the state's erasure statute.

* * *

89. It is therefore concluded that the interveners failed to prove that the records described in paragraphs 10.a and 10.b, above, are exempt from disclosure pursuant to a sealing order.

90. Finally, the agency respondents and the interveners contend that all of the in camera records are exempt from disclosure pursuant to §1-210(b)(2), G.S.

* * *

94. It is found that the agency respondents timely notified the two public defenders whose records are at issue of the request for access in this case, and that both attorneys timely filed objections to the disclosure of the records, within the meaning of §1-214, G.S.

95. It is found that the records at issue constitute a "personnel" or "similar" file within the meaning of §1-210(b)(2), G.S.

96. At the contested case hearing both of the public defenders testified that it was their belief that the disclosure of any of the in camera records would constitute an invasion of their personal privacy. The public defenders testified that they reviewed IC-Atty-A-2-12-276-01 through IC-AttyA-2012-276-14, and IC-AttyB-2012-276-01 through IC-AttyB-2012-276-41, respectively, and that they believed the information contained in these records was personal and private information, which had no bearing on how they performed their jobs or how they handled the criminal cases assigned to them as public defenders. In effect, they testified that the events described in the in camera records did not affect their ability to practice law or defend their clients. They further testified that the records contained information concerning their health, well-being and certain family matters, which if disclosed could cause embarrassment to them and to their families. While they testified that they did not believe that the public had a legitimate interest in the records, they did concede that there were records within the in camera submissions which were responsive to the complainants' request.

97. In addition, the individual public defenders contended that, while they were not permitted to review IC-HR-2012-276-01 through IC-HR-2012-276-03, if these records contained personal, medical or embarrassing information, they would object to their disclosure as well.

98. Upon careful review of the in camera records described in paragraph 10, above, as well as records submitted into evidence by the complainants, it is found that the records at issue in this case concern separate instances of off-duty conduct resulting in the criminal arrests of two public defenders. It is found that the public defenders to whom the records pertain have been employed by the Division of Public Defenders Services for over ten years. It is found that there is no evidence in this case that there has ever been a break in pay for either public defender, especially during the course of the incidents described in the records at issue. It is found that public has a legitimate interest in the criminal arrests or misconduct of any of its public employees, especially public employees who are also officers of the court. It is further found

that the public defenders at times represent clients who have associations or involvement in crime and illegal conduct, and who are cooperating in the investigation or prosecution of other people. It is found that an allegation (or evidence) that a public defender has a personal association or involvement with crime or illegal conduct is a legitimate matter of public concern. It is found that a criminal arrest is an allegation of criminal misconduct which gives rise to a legitimate public interest in the underlying allegations.

99. However, based on the finding in paragraph 83, above, and the facts and circumstances of this case, it is found that the public has no legitimate interest in arrest records that have been erased and, thus, no longer have any legal existence. It is further found that the disclosure of such erased records would be highly offensive to a reasonable person.

100. It is therefore concluded that the disclosure of IC-AttyB-2012-276-01 through IC-AttyB-2012-276-41 would constitute an invasion of personal privacy within the meaning of §1-210(b)(2),

G.S. It is therefore concluded that these records are exempt from mandatory disclosure by virtue of §1-210(b)(2), G.S. It is further concluded that the agency respondents did not violate the FOI Act by withholding such records from the complainants.

101. It is further found that the following portions of that IC-HR-2012-276-01 through IC-HR-2012-276-03 discuss or identify an employee in the context of a criminal arrest which has been erased, that, based on the facts and circumstances of this case, the public has no legitimate interest in such information and that disclosure of such information would be highly offensive to a reasonable person:

a. IC-HR-2012-276-01: Line 1, words 1 and 2; Line 2, word 2; Line 3, word 1; Line 4, word 1; Line 5, words 2 and 3; Line 6, word 2; Line 7, word 5; Line 9, word 3.

b. IC-HR-2012-276-02: Line 8, word 1.

c. IC-HR-2012-276-03: Line 3, word 5; Line 6, word 12; Line 8, words 1 and 15; Line 10, word 1; Line 11, word 3; Line 12, word

3; Line 13, word 1; Line 15, word 2; Line 16, word 7; Line 19, word 1.

102. It is therefore concluded that the disclosure of the portions of IC-HR-2012-276-01 through IC-HR-2012-276-03 specifically identified in paragraph 101, above, would constitute an invasion of person privacy within the meaning of §1-210(b)(2), G.S. It is therefore concluded that such portions of IC-HR-2012-276-01 through IC-HR-2012-276-03 are exempt from mandatory disclosure by virtue of §1-210(b)(2), G.S. It is further concluded that the agency respondents did not violate the FOI Act by withholding such portions of the records from the complainants.

103. However, it is found that other than the portions specifically identified in paragraph 101, above, the remainder of the records comprising IC-HR-2012-276-01 through IC-HR-2012-276-03 contain information which formed the basis for a personnel decision. It is further found that these records are necessary to and facilitate the public's understanding and evaluation of the agency respondents investigative process, decision-making and

overall handling of an important matter involving a fellow public defender.

104. It is therefore found that, other than those portions specifically identified in paragraph 101, above, the records described in paragraph 10.c, above, pertain to legitimate matters of public concern. It is further found that, upon redaction of the portions of the records specifically identified in paragraph 101, above, disclosure of the remaining portions of the records would not be highly offensive to a reasonable person.

105. With regard to the contention that the remaining in camera records may include medical information or information concerning the "well-being" of a public defender the disclosure of which would constitute an invasion of personal privacy, the following is found: the disclosure of records pertaining to public employees is presumptively a legitimate matter of public concern. The fact that a personnel file contains evidence of misconduct which may be linked to a medical condition does not, in and of itself, render such records exempt from public disclosure. It is

found that remaining in camera records evidence a course of conduct that pertains to the ability of a public defender to effectively and safely perform his public duties. It is found that the behavior described in these records is very serious. It is further found that the more serious the specific behavior, the more a finding of legitimate public concern is warranted concerning the records describing the behavior. It is further found that §1-210(b)(2), G.S., was not intended to shield such conduct from public knowledge.

106. It is concluded, therefore, that with the exception the in camera records specifically identified in paragraph 100, above, and those portions of the in camera records specifically identified in paragraph 101, above, disclosure of the remaining records would not constitute an invasion of privacy within the meaning of §1-210(b)(2), G.S. It is further concluded that the agency respondents violated the disclosure provisions of §§1-210(a) and 1-212(a), G.S., by denying the complainants' request for access to such records.

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

1. The agency respondents shall forthwith provide the complainants with a copy of the records described in paragraphs 10.a and 10.c, of the findings above, free of charge. In complying with this order, the agency respondents may redact from the records described in paragraph 10.c, of the findings, above, the information specifically identified in paragraph 101, of the findings above. (Return of Record, ROR, pp. 264-88)

The assistant public defender plaintiffs have appealed from the FOIC's final decision, reasserting their claims that were rejected by the FOIC. This court reviews the final decision pursuant to the Uniform Administrative Procedure Act (AUPA), § 4-166 et seq.

"Under the UAPA, it is [not] the function . . . of this court to retry the case or to substitute its judgment for that of the administrative agency. . . . Even for conclusions of law, "[t]he court's ultimate duty is only to decide whether, in light of the evidence, the [agency] has acted unreasonably, arbitrarily, illegally, or in abuse of its discretion. . . . [Thus] [c]onclusions of law reached by the administrative agency must stand if the court determines that they resulted from a correct application of the law to the facts found and could reasonably and

logically follow from such facts. . . . [Similarly], this court affords deference to the construction of a statute applied by the administrative agency empowered by law to carry out the statute's purposes. . . . Cases that present pure questions of law, however, invoke a broader standard of review than is . . . involved in deciding whether, in light of the evidence, the agency has acted unreasonably, arbitrarily, illegally or in abuse of its discretion. . . . Furthermore, when a state agency's determination of a question of law has not previously been subject to judicial scrutiny . . . the agency is not entitled to special deference. . . . [T]he traditional deference accorded to an agency's interpretation of a statutory term is unwarranted when the construction of a statute . . . has not previously been subjected to judicial scrutiny [or to] . . . a governmental agency's time-tested interpretation. . . .[3]

"When construing a statute, [o]ur fundamental objective is to ascertain and give effect to the apparent intent of the legislature. . . . In seeking to determine that meaning, General Statutes § 1-2z directs us first to consider the text of the statute itself and its relationship to other statutes. If, after examining such text and considering such relationship, the meaning of

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[3] The parties do not disagree that the court must give deference to the FOIC's legal test for invasion of personal privacy of *Perkins* v. *Freedom of Information Commission*, 228 Conn. 158, 635 A.2d 783 (1993). The court does not otherwise defer to the agency's interpretations of its statutes.

such text is plain and unambiguous and does not yield absurd or unworkable results, extratextual evidence of the meaning of the statute shall not be considered. . . . The test to determine ambiguity is whether the statute, when read in context, is susceptible to more than one reasonable interpretation. . . . When a statute is not plain and unambiguous, we also look for interpretive guidance to the legislative history and circumstances surrounding its enactment, to the legislative policy it was designed to implement, and to its relationship to existing legislation and common law principles governing the same general subject matter. . . ." (Citations omitted; internal quotation marks omitted.) *Chairperson, Connecticut Medical Examining Board* v. *Freedom of Information Commission*, 310 Conn. 276, 281-83, 77 A.3d 121 (2013).

The first contention is that the in camera records[4] are exempt from disclosure under a "deliberative privilege," claimed to be similar to that of the Federal Freedom of Information Act, 5 U.S.C. § 552 (b) (5). The court agrees with the FOIC that such privilege, to the extent that it even exists under the Connecticut statutes or at common law, does not function as in the federal act. It has no application here. See § 1-210 (e) (1); *East Lyme Board of Education* v. *Freedom of Information Commission*, Superior Court, judicial district of Hartford-New Britain, Docket No. 700617 (January 29, 1991). Construing the plaintiffs' argument to be that the § 1-

[4] The court, pursuant to § 1-206 (d), has reviewed the sealed record that consists of the "in camera" documents submitted by the FOIC.

210 (b) (1) exemption applies (preliminary drafts and notes), the court concludes that the notes in the in camera records are not preliminary. *Strillacci* v. *Freedom of Information Commission*, Superior Court, judicial district of New Britain, Docket No. CV 08-4018120 (April 20, 2009). The notes are completed documents to be used by the office of the chief public defender in the course of its public duties.

The second contention is that the records are exempt under exemption § 1-210 (b) (19): "Records when there are reasonable grounds to believe disclosure may result in a safety risk. . . ." This exemption requires the chief court administrator to make such a determination. § 1-210 (b) (19 (B); see also *Pictometry International Corp.* v. *Freedom of Information Commission*, 307 Conn. 648, 665, 59 A.3d 172 (2013). The plaintiffs conceded that this determination was never made in this case, although it is their burden to make this inquiry of the chief court administrator. See *Director, Department of Information Technology* v. *Freedom of Information Commission*, 274 Conn.179, 189, 874 A.2d 785 (2005). Therefore the court agrees with the FOIC that the plaintiffs have failed to establish their right to this exemption.

The third contention is that the plaintiffs' records should be non-disclosable in keeping with § 18-101f, prohibiting disclosure of personnel records of the Division of Public Defender Services when requested by inmates or committed persons. Here the request was made by a member of the public, a journalist, not an inmate or committed person. Therefore the provisions

of § 18-101f are inapplicable to this freedom of information request. The provision was enacted specifically to apply only to the inmate or committed person situation, *Redmond* v. *Promotico*, Superior Court, judicial district of New Haven, Docket No. CV 12-6029399 (October 16, 2012); *Dept. of Correction* v. *Freedom of Information Commission*, Superior Court, judicial district of New Britain, Docket No. CV 10-6006278 (April 5, 2012), and should not be expanded beyond its language or intended meaning.

The fourth contention is based on the federal Health Insurance Portability and Accounting Act (HIPAA) and the Connecticut Insurance Information and Privacy Protection Act (CIIPPA). But these acts do not apply to records maintained by the office of the public defender. See 45 C.F.R. § 160.103; General Statutes § 38a-976. The court also agrees with the detailed analysis of this issue in the final decision, Findings ## 68-78.

The fifth contention relates to claimed exemptions based upon erasure and sealing. The final decision held that the Smith court record was not disclosable. To do so would violate Smith's privacy in that § 54-142a erases a case after a pre-trial diversion program is successfully completed. This is also in keeping with § 54-56i (b). In the final decision, the three-page Human Resources memorandum regarding Smith is also redacted to prevent disclosure of material subject to erasure. These provisions do not apply to Flores at all as he has agreed that his criminal matter has not been resolved. Therefore the court cannot conclude that the FOIC erred on this ground for making the in camera records of Flores available.

The final contention is that the FOIC erred in failing to apply the exemption of § 1-210 (b) (2) (invasion of personal privacy) to exempt both the Human Resources memorandum relating to Smith and the personnel records of Flores from disclosure. There is no question that the in camera records are personnel files.

Therefore the plaintiffs must establish first that the information sought does not pertain to legitimate matters of public concern and second, that such information is highly offensive to a reasonable person. *Perkins* v. *Freedom of Information Commission*, 228 Conn. 158, 175, 635 A.2d 783 (1993). Recently, in *Tompkins* v. *Freedom of Information Commission*, 136 Conn. App. 496, 508, 46 A.3d 291 (2012), our Appellate Court found, in a case similar to the present, that fitness to perform a job as a public official was a matter of public concern. Events occurring out of work, according to *Tompkins*, may be matters of concern for the public, and the request need not be only for direct work-related mistakes. See also *Enfield* v. *Freedom of Information Commission*, Superior Court, judicial district of New Britain, Docket No. CV 06-4012219 (November 27, 2007) (matters of public concern; policeman in accident with medical issue).

The court has reviewed the in camera documents in light of *Perkins* and *Tompkins*. The redacted three-page Human Resources memorandum is of public concern, as it discusses the steps to be taken by a public defender to recover from his drug misuse and return to regular employment. There is nothing in the document that is highly offensive.

Similarly with regard to Flores, the documents are of public concern as demonstrating the procedure he has followed to return to work. The court also reviewed the Flores records to determine if they were highly offensive. There were no references to family issues or specific treatments. The public record exists (ROR, p. 129) that shows an arrest for Flores on a substance abuse charge. Further, mere mention of a medical issue is insufficient to require application of the exemption of § 1-210 (b) (2). See *Dept. of Public Safety* v. *Freedom of Information Commission*, Superior Court, judicial district of New Britain, Docket No. CV 08-4018164 (March 3, 2009). The plaintiffs have therefore not satisfied the *Perkins* test.

The court also holds that the failure of the FOIC to accept an ex parte brief of the plaintiffs after the conclusion of the hearing is not grounds to reverse the final decision. The plaintiffs had an opportunity to argue their case to the full commission. They submitted their materials in camera, and they were available for the commissioners of the FOIC to inspect. "[N]ot all procedural irregularities require a reviewing court to set aside an administrative decision; material prejudice to the complaining party must be shown." *Goldstar Medical Services, Inc.* v. *Dept. of Social Services*, 288 Conn. 790, 828, 955 A.2d 15 (2008); see also *Gonzalez* v. *State Elections Enforcement Commission*, 145 Conn. App. 458, 463, 77 A.3d 790 (2013) (§ 4-183 (j) requires substantial prejudice for reversal of final decision of agency).

The appeal is dismissed for the reasons stated above.

Henry S. Cohn, J.