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FREEDOM OF INFORMATION



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Denise Bachiochi,
Complainant(s)
against

Notice of Meeting

Docket #FIC 2013-787

Commissioner, State of Connecticut,
Department of Correction; and State of
Connecticut, Department of Correction,
Respondent(s)

August 29, 2014

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, September 24, 2014**. 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 September 12, 2014**. 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 September 12, 2014**. **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 **fourteen (14) copies** be filed **ON OR BEFORE September 12, 2014**, 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


Wendy Paradis
Acting Clerk of the Commission

Notice to: Denise Bachiochi
Nicole Anker, Esq.,
James Neil, Esq.

2014-08-29/FIC# 2013-787/Trans/wrbp/MS/TCB/VDH

FREEDOM OF INFORMATION COMMISSION
OF THE STATE OF CONNECTICUT

In The Matter of a Complaint by

Report of Hearing Officer

Denise Bachiochi,

Complainant

against

Docket #FIC 2013-787

Commissioner, State of Connecticut,
Department of Correction; and State
of Connecticut, Department of Correction,

Respondents

August 27 2014

The above-captioned matter was heard as a contested case on July 15, 2014, at which time the complainant 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 dated October 15, 2013, the complainant submitted the following request to the respondent:
 - a. "Correctional Officer Seniority list for Osborn Correctional Institute sorted by shift seniority;
 - b. Leave accrual balances (sick, vacation, TO) for Correctional Officer Aaron Michael Brown at Osborn Correctional as of October 18, 2013;
 - c. Leave accrual days used by Correctional Officer Aaron Michael Brown at Osborn Correctional sorted by date that each leave day was used from January 1, 2008 – October 15, 2013; and
 - d. W-2 Statements for Correctional Officer Aaron Michael Brown at Osborn Correctional from 2008 – 2012."

3. By letter dated November 20, 2013, the respondents responded to the complainant's request stating that the records described in paragraphs 2a through 2c are exempt from disclosure under §1-210(b)(18)(G), G.S., of the Connecticut General Statutes and therefore, the request has been denied. The respondents further informed the complainant that the records described in paragraph 2d, above, are not produced or maintained by the Department of Correction.

4. By letter dated December 16, 2013 and filed on December 19, 2013, the complainant appealed to this Commission alleging that the respondents violated the Freedom of Information ("FOI") Act by denying her request.

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 described in paragraph 2, above, to the extent they exist, are public records within the meaning of §§1-200(5), 1-210(a), and 1-212(a), G.S.

9. With respect to the requested record described in paragraph 2a, above, it is found that no such record exists.

10. With respect to the requested record described in paragraph 2d, above, it is found that such records are not maintained by the respondents but rather are maintained by the Office of the State Comptroller.

11. Consequently, it is found that the respondents did not violate the disclosure provisions of the FOI Act with respect to the requested records described in paragraphs 2a and 2d, above.

12. At the hearing on this matter, the respondents argued that the requested records described in paragraph 2b and 2c, above, are exempt from disclosure pursuant to §1-210(b)(2), G.S.

13. Section 1-210(b)(2), G.S., permits the nondisclosure of "personnel or medical files and similar files the disclosure of which would constitute an invasion of personal privacy."

14. The Supreme Court set forth the test for the §1-210(b)(2), G.S., exemption in Perkins v. Freedom of Information Commission, 228 Conn. 158, 175 (1993), which test has been the standard for disclosure of records pursuant to that exemption since 1993. The Commission takes administrative notice of the multitude of court rulings, Commission final decisions and instances of advice given by Commission staff members which have relied upon the Perkins test, since its release in 1993.

15. Specifically, under the Perkins test, the claimant must first establish that the files in question are personnel, medical or similar files. Second, the claimant must show that disclosure of the records would constitute an invasion of personal privacy. In determining whether disclosure would constitute an invasion of personal privacy, the claimant must establish both of two elements: first, that the information sought does not pertain to legitimate matters of public concern, and second, that disclosure of such information is highly offensive to a reasonable person.

16. Further, §1-214, G.S., provides in relevant part that:

(b) Whenever a public agency receives a request to inspect or copy records contained in any of its employees' personnel or medical files and similar files and the agency reasonably believes that the disclosure of such records would legally constitute an invasion of privacy, the agency shall immediately notify in writing (1) each employee concerned . . . and (2) the collective bargaining representative, if any, of each employee concerned. Nothing herein shall require an agency to withhold from disclosure the contents of personnel or medical files and similar files when it does not reasonably believe that such disclosure would legally constitute an invasion of personal privacy.

17. It is found that the respondent Commissioner determined, upon review of the requested records, that their disclosure would constitute an invasion of Mr. Brown's personal privacy and notified him of the complainant's request described in paragraph 2, above. It is also found that the respondent Commissioner provided Mr. Brown with notice of the proceedings in this matter at which he appeared and testified.

18. It is further found that Mr. Brown objected to the disclosure of the records described in paragraphs 2b and 2c, above, contending that disclosure of the records would invade his personal privacy. At the hearing on this matter, he contended that the information contained in the requested records was not a legitimate matter of public concern and that disclosure would be highly offensive to a reasonable person given the safety risk described by the respondent Commission in paragraph 22, below.

19. It is found that the testimony offered by the respondent Commission in this regard consisted of little more than conclusory language and unsubstantiated hypotheticals.¹ It is found that the respondents failed to prove that disclosure of the numerical data contained in the requested records would be highly offensive to a reasonable person.

20. Furthermore, the Supreme Court has already determined "that when a person accepts public employment, he or she becomes a servant of and accountable to the public. As a result, that person's reasonable expectation of privacy is diminished, especially in regard to the dates and times required to perform public duties. The public has a right to know not only who their public employees are, but also when their public employees are and are not performing their duties." Perkins, supra 228 Conn. at 177. Therefore, it is concluded that the information contained in the requested records is of legitimate concern to the public.

21. Consequently, it is also concluded, as the Supreme Court did, "that a records request under the FOIA for disclosure of the numerical data concerning an employee's attendance records ... does not constitute an invasion of personal privacy within the meaning of [§1-210(b)(2), G.S.]." Perkins, supra 228 Conn. at 177. Therefore the requested records are not exempt from disclosure under such provision.

22. With respect to the respondents' claim that the records are exempt from disclosure pursuant to §1-210(b)(18)(G), G.S., that section provides in relevant part as follows:

¹ "[U]nsupported conclusory allegations of counsel are not evidence and are insufficient for the application of an exemption from disclosure." New Haven v. Freedom of Information Commission, 205 Conn. 767, 776, 535 A.2d 1297. "The burden of establishing the applicability of an exemption ... requires the claimant ... to provide more than conclusory language, generalized allegations or mere arguments of counsel. Rather, a sufficiently detailed record must reflect the reasons why an exemption applies to the materials requested." (Citations omitted.) *Id.*, at 775-76, 535 A.2d 1297; Superintendent of Police v. Freedom of Information Commission, 222 Conn. 621, 627, 609 A.2d 998; Hartford v. Freedom of Information Commission, 201 Conn. 421, 434-35, 518 A.2d 49.

(b) Nothing in the Freedom of Information Act shall be construed to require disclosure of . . .

(18) Records, the disclosure of which the Commissioner of Correction, or as it applies to Whiting Forensic Division facilities of the Connecticut Valley Hospital, the Commissioner of Mental Health and Addiction Services, has reasonable grounds to believe may result in a safety risk, including the risk of harm to any person or the risk of an escape from, or a disorder in, a correctional institution or facility under the supervision of the Department of Correction or Whiting Forensic Division facilities. Such records shall include, but are not limited to . . .

(G) Logs or other documents that contain information on the movement or assignment of inmates or staff at correctional institutions or facilities

23. At the hearing on this matter, the respondents contended that disclosure of the records described in paragraph 2b and 2c, above, may result in a safety risk to the subject of the records and his child by disclosing his attendance patterns. By way of example, the respondents described a situation in which an employee takes vacation at the same time every year and if such information were available, someone wishing to harm the employee (specifically a former inmate) could plan to cause such harm around the time that he is not at work and more likely to be at home.

24. It is found, however, that the records described in paragraph 2b, above, specifically leave accrual balances broken into the categories of vacation, sick and "TO", would simply be numerical figures that if disclosed would not reveal a pattern of attendance and could not be used to determine when an employee would not be at work.

25. Consequently, it is found that the respondent Commissioner's grounds for believing that disclosure of the records described in paragraph 2b, above, may result in a safety risk are "irrational" and therefore not reasonable within the meaning of §1-210(b)(18)(G), G.S.²

26. It is therefore conclude that the respondents violated the disclosure provisions of the FOI Act by failing to comply with the complainant's request described in paragraph 2b, above.

² "The FOIC's role [when making a determination of reasonableness] is to determine whether the [commissioner's] reasons were pretextual and not bona fide, or irrational." Commissioner, Department of Correction v. FOI Commission, Superior Court, Judicial District of New Britain, Docket No. CV074015438 and CV084016766 (November 3, 2008) (2008 Conn. Super. 2724) *13.

27. With respect to the records described in paragraph 2c, above, the respondents submitted the requested records for in camera inspection pursuant to the hearing officer's order of August 7, 2014, which records have been identified as IC# 2013-787-001 through 2013-787-030.

28. It is found that while it is *possible* that a former inmate would make an FOI request for records that disclose a correctional officer's attendance pattern to plan an attack against him or his family around the time such officer may or may not be at home, the specific records requested in this case do not reveal an attendance pattern.

29. It is found, therefore, that the respondent Commissioner's belief is "pretextual and not bona fide," and "irrational." Therefore, it is concluded that the respondents Commissioner does not have reasonable grounds to believe that disclosure of the records described in paragraph 2c, above, may result in a safety risk within the meaning of §1-210(b)(18), G.S.

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 complainant with a copy of the records described in paragraphs 2b and 2c of the findings, above, free of charge.



Commissioner Matthew Streeter
as Hearing Officer