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FREEDOM OF INFORMATION



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Nsonsa Kisala,
Complainant(s)
against

Notice of Meeting

Docket #FIC 2014-330

Commissioner, State of Connecticut, Department of
Public Health; and William Gerrish, Director of
Communications, State of Connecticut, Department of
Public Health; and State of Connecticut, Department of
Public Health,

Respondent(s)

February 18, 2015

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 11, 2015**. 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 27, 2015**. 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 27, 2015**. **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 February 27, 2015**, 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: Nsonsa Kisala
Kerry A. Colson, Esq.

2015-02-18/FIC# 2014-330/Trans/wrbp/CAL//TCB

An Affirmative Action/Equal Opportunity Employer

FREEDOM OF INFORMATION COMMISSION
OF THE STATE OF CONNECTICUT

In The Matter of a Complaint by

Report of Hearing Officer

Nsona Kisala,

Complainant

against

Docket #FIC 2014-330

Commissioner, State of Connecticut,
Department of Public Health; William Gerrish,
Director of Communications, State of Connecticut,
Department of Public Health; and State of
Connecticut, Department of Public Health,

Respondents

February 11, 2015

The above-captioned matter was consolidated for hearing with Docket #FIC 2014-389; also captioned Nsona Kisala v. Commissioner, State of Connecticut, Department of Public Health; William Gerrish, Director of Communications, State of Connecticut, Department of Public Health; and State of Connecticut, Department of Public Health. Both matters were heard as contested cases on December 2, 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 email dated May 9, 2014, the complainant made a request to the respondents for a copy of “the personnel file of Mr. Bruce Wallen”, including the “Application for Employment...to be...Director of Program Monitoring and Fiscal Review”, his “State of Connecticut employment history” and his “College education” including the “name and complete address of each College...dates of attendance...type of degree [and] major course of study....”
3. It is found that, by email dated May 21, 2014, the respondents acknowledged the complainant’s request.

4. By notice of appeal dated and filed May 28, 2014, the complainant appealed to this Commission, alleging that the respondents violated the Freedom of Information Act by denying his request for the records.

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 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 . . . (3) receive a copy of such records in accordance with section 1-212.

7. Section 1-212(a)(1), 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. The type of copy provided shall be within the discretion of the public agency, except (1) the agency shall provide a certified copy whenever requested, and (2) if the applicant does not have access to a computer or facsimile machine, the public agency shall not send the applicant an electronic or facsimile copy.

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. Immediately prior to the hearing, the respondents provided six pages of records from Mr. Wallen’s personnel file to the complainant. These six pages constituted notifications of hiring or promotion and a layoff notice. Except for these six pages, the records described at paragraph 2, above, are sometimes hereinafter the “requested records”.

10. At the contested case hearing, the respondents claimed that the requested records were exempt from mandatory disclosure pursuant to §5-225, G.S., which provides:

All persons competing in any examination shall be given written notice of their final earned ratings and the minimum earned rating necessary to pass the examination. Not later than thirty days after the issuance of the final earned rating, a person who has not achieved a passing rating may inspect his or her papers, markings, background profiles and other items used in determining the final earned ratings, other than examination questions and other materials constituting the examination, subject to such regulations as may be issued by the Commissioner of Administrative Services. Not later than ten days after inspecting his or her papers, a person may, in writing, appeal to the Commissioner of Administrative Services the accuracy of his or her final earned rating, as based on the original examination paper or responses. The commissioner shall render a final decision on the person's appeal within thirty days thereafter and correct candidate lists as appropriate. (emphasis added)

11. Also at the hearing, the complainant presented evidence that the same form (PLD-1) was used as an examination application and as an employment application, arguing that it was an examination application when filed with the Department of Administrative Services and an employment application when filed with the employing agency. He further testified that when he was initially hired by the respondent Department as a Health Program Assistant 1, he filed separate applications on the same form with the Department of Administrative Services and then again with the respondent Department. The complainant's post hearing brief cited §1-214(a), G.S., which deems all employment contracts of the state to be public records.

12. In response, the respondents presented testimony at the hearing that the key to determining whether a completed PLD-1 form is an application for examination or employment is whether the position at issue is competitive or non-competitive. Because non-competitive positions do not require examinations, the completed PLD-1 forms for such positions are employment applications. In cases of applications for examination for competitive positions, the applications are sometimes required to be filed with the Department of Administrative Services and sometimes required to be filed with the employing agency. Promotional examination applications are often required to be filed with the employing agency. Finally, the examination may consist of an examination of professional credentials, experience and evaluations, rather than a traditional written or oral examination that involves responding to questions or a hypothetical set of facts.

13. At the hearing, the respondents also submitted the requested records to the Commission for an in camera inspection (sometimes the "in camera records"). The in

camera records consist of forty pages of records, which shall be identified as IC-2014-330-01 through IC-2014-330-40.

14. Finally, at the contested case hearing, the respondents stated that they did not believe that the disclosure of the requested records would legally constitute an invasion of privacy and therefore did not give notice to Mr. Wallen pursuant to §1-214(b), G.S. Nor did Mr. Wallen object to disclosure pursuant to §1-214(c), G.S.

15. In Personnel Director, Department of Income Maintenance v. FOIC, 214 Conn. 312 (1990) (“Personnel Director”), the Supreme Court found that “the disclosure and inspection referred to under §5-225 applies only to the candidate who has taken the examination.” Id. at 320. Based on this finding, the Supreme Court held that §5-225, G.S., provided an exemption from mandatory disclosure with reference to persons other than a person seeing their own examination papers:

In conclusion, [§1-210(a)] provides that all records kept on file by public agencies shall be public records ‘[e]xcept as provided by any federal law or state statute.’ We hold that §5-225. . . provide[s] such an exception for the requested personnel files, which contained the promotional examination records of candidates for program supervisor other than the candidate’s own records. (emphasis added)

Id. at 321.

16. Moreover, in 2013, the General Assembly further narrowed §5-225, G.S., in order to allow only those individuals who fail an examination the right to review their examination materials. See detailed discussion of Public Act 13-247, including the General Assembly’s bill summary, in Docket #FIC 2013-663; Mark Dumas and The Connecticut State Police Union v. Donald DeFronzo, Commissioner, State of Connecticut, Department of Administrative Services; and State of Connecticut, Department of Administrative Services.

17. The Commission has, on numerous occasions over nearly twenty years, previously specifically held that the completed PLD-1 forms and attachments are exempt from disclosure pursuant to §5-225, G.S., and Personnel Director. Docket #FIC 1994-055; Fisi v Department of Health and Addiction Services (applications for director’s position exempt from disclosure pursuant to §5-225, G.S.); Docket #FIC 2005-492; Michael Winkler and the Administrative and Residual Employees Union Local 4200 v. Commissioner, State of Connecticut, Department of Administrative Services, (“Winkler”) (PLD-1 used to determine promotions and therefore exempt); Docket #FIC 2012-203; Miller v. Department of Labor, Docket #FIC 2012-203 (2013) (applications of individuals who applied for positions with Department of Labor exempt from disclosure pursuant to §5-225, G.S.); Docket #FIC 2013-129; Adam Osmond v. Commissioner, State of Connecticut, Department of Administrative Services; and State of Connecticut,

Department of Administrative Services (application of person selected for Fiscal Administrative Officer, now known as Form CT-HR-12, which superseded PLD-1, exempt from disclosure).

18. It is found that the hiring and all the promotions of Mr. Bruce Wallen at the respondent Department of Public Health were for competitive positions that required examination supervised by the Department of Administrative Services. All of his applications were therefore applications for examination.

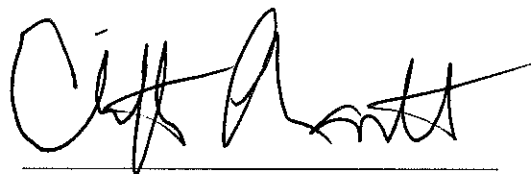
19. Thomas Mumalecky, Human Resources Manager at the respondent Department testified, and it is found, that "the personnel file of Mr. Bruce Wallen" did not include any other records than the in camera records and the six pages of records disclosed immediately prior to the hearing, as set forth at paragraph 9, above. Mr. Mumalecky further testified that he personally performed the relevant search for records.

20. Based on the in camera inspection, it is found that IC-2014-330-01 through IC-2014-330-40 are all records used to determine the final examination rating. Just as in the Commission's 2006 decision in Winkler, Personnel Director is on point in that it involved merit examinations similar to the ones at issue herein.

21. It is therefore concluded that the requested records are exempt from mandatory disclosure pursuant to §5-225, G.S., and that the respondents did not violate §§1-210(a) and 1-212(a), G.S., by withholding such records from the complainants.

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

1. The complaint is dismissed.



Clifton A. Leonhardt
as Hearing Officer