

FREEDOM OF INFORMATION COMMISSION
OF THE STATE OF CONNECTICUT

In the Matter of a Complaint by

FINAL DECISION

Petrina Yoxall,

Complainant

Docket # FIC 2017-0744

against

Manager, Human Resources
and Benefits, City of New
Haven; and City of New Haven,

Respondents

August 8, 2018

The above-captioned matter was heard as a contested case on February 26, 2018, 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 sent on November 16, 2017, the complainant made a written request to the respondents for “copies of any and all documentation, notes, recordings, interviews and materials related [to] the investigation and conclusion of my complaint of the racially offensive incident that occurred August 10, 2017 by the end of the business day on November 17, 2017” (“November 16th request”).
3. It is found that, by email sent on November 21, 2017, the respondents provided the complainant with records responsive to her November 16th request, except for “notes” claimed to be exempt from disclosure pursuant to §1-210(b)(1), G.S.
4. By letter received on December 18, 2017, the complainant appealed to this Commission, alleging that the respondents failed to provide her with copies of all records responsive to the November 16th request in violation of the FOI Act.
5. 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.

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 . . . (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 “any 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 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.

9. It is found that in August 2017, the complainant filed an informal complaint with the City of New Haven’s Human Resources (“HR”) Department concerning offensive remarks made by a comedian at a City event (“the event”). It is further found that, in response to such complaint, the respondents conducted an investigation.

10. It is found that, as part of the investigation, the respondent Manager of Human Resources and Benefits (“HR Manager”) instructed a HR staff member, on his behalf, to meet with the complainant to acquire additional information about the event. At the hearing in this matter, the HR Manager testified that he expected the staff member to come back to him with detailed notes about the conversation. It is found that the HR staff member subsequently met with the complainant, and at the meeting took notes. It is found that after meeting with the complainant, the HR staff member met with the HR Manager and together “reviewed” the staff member’s notes. The HR Manager testified that based on those notes, he proceeded to have conversations with other people who were at the event. The HR Manager further testified that, based upon those conversations and the HR staff member’s notes, he determined that the alleged offensive remarks had in fact been made.

11. It is found that, by letter dated October 25, 2017, the HR Manager informed the complainant that “[a]fter speaking with [the complainant] and several other individuals who were . . . present at the event in question, it is clear that several of the remarks made by the comedian were inappropriate for a City event. We have shared our findings with [the City’s]

Chief Administrative Officer...[who]... has met with [the] PSAP¹ Director...on this matter and counseled him on his responsibility as a supervisor to promote an atmosphere where everyone feels welcome and comfortable. I am closing my file and will be taking no further action in this matter.”

12. It is found that the respondents provided the complainant with all records responsive to her November 16th request, except for those documents which they claimed were exempt from disclosure pursuant to §1-210(b)(1), G.S.

13. Immediately following the hearing in this matter, the respondents submitted three pages of unredacted documents to the Commission for in camera review. The in camera records have been marked by the Commission as IC-2017-0744-1 through IC-2017-0744-3.

14. Section 1-210(b)(1), G.S., provides that “[n]othing in the Freedom of Information Act shall be construed to require disclosure of ... [p]reliminary drafts or notes provided the public agency has determined that the public interest in withholding such documents clearly outweighs the public interest in disclosure.”

15. The Supreme Court ruled in Shew v. Freedom of Information Commission, that “the concept of preliminary [drafts or notes], as opposed to final [drafts or notes], should not depend upon...whether the actual documents are subject to further alteration...” but rather “[p]reliminary drafts or notes reflect that aspect of the agency’s function that precede formal and informed decision making.... It is records of this preliminary, deliberative and predecisional process that...the exemption was meant to encompass.” Shew v. Freedom of Information Commission, 245 Conn. 149, 165 (1998), citing Wilson v. Freedom of Information Commission, 181 Conn. 324, 332 (1989). In addition, once the underlying document is identified as a preliminary draft or note, “[i]n conducting the balancing test, the agency may not abuse its discretion in making the decision to withhold disclosure. The agency must, therefore, indicate the reasons for its determination to withhold disclosure and those reasons must not be frivolous or patently unfounded.” State of Connecticut, Office of the Attorney General v. Freedom of Information Commission, 2011 WL 522872, *8 (Conn. Super. Ct. Jan. 20, 2011) (citations omitted).

16. The year following Wilson, the Connecticut legislature adopted Public Act 81-431, and added to the FOI Act the language now codified in §1-210(e)(1), G.S.

17. Accordingly, §1-210(b)(1), G.S., must be read in conjunction with §1-210(e)(1), G.S., which provides, in relevant part:

Notwithstanding the provisions of subdivisions (1) and (16) of subsection (b) of this section, disclosure shall be required of...

¹ The Commission notes that “PSAP” refers to the City of New Haven’s “Public Safety Answering Point”, which processes the City’s 911 calls for service. *See* http://www.ct.gov/despp/cwp/view.asp?a=4437&Q=515090&desppNAV_GID=2127&desppNav=.

(1) Interagency or intra-agency memoranda or letters, advisory opinions, recommendations or any report comprising part of the process by which governmental decisions and policies are formulated, except disclosure shall not be required of a preliminary draft of a memorandum, prepared by a member of the staff of a public agency, which is subject to revision prior to submission to or discussion among the members of such agency....

18. It is found that in camera documents IC-2017-0744-1 through IC-2017-0744-3 consist of notes taken by the HR staff member during her interview of the complainant concerning the complainant's complaint, described in paragraph 9, above. It is found that the HR staff member shared such notes with the HR Manager. It is further found that the HR Manager based his determination, in part, upon the HR staff member's notes, as described in paragraphs 10 and 11, above.

19. It is found that the requested records are preliminary drafts or notes within the meaning of §1-210(b)(1), G.S.

20. It is also found that the respondents determined that the public interest in withholding the requested records clearly outweighed the public interest in disclosure. Specifically, the respondents determined that the release of the notes would harm the investigatory process. According to the respondents, in order to have a high quality investigation of an employee complaint, it is essential that those individuals conducting the investigation be as thorough as possible, and feel free to take detailed notes. Without detailed notes, the respondents would have to totally rely on the individuals' memories. In addition, the respondents were concerned that the records at issue do not constitute all of the information upon which the HR Manager relied to make his determination. The disclosure of incomplete information relating to the investigation was not in the public interest.

21. Based upon a careful review of the in camera records, it is further found that such records are interagency or intra-agency memoranda or letters, advisory opinions, recommendations or reports comprising part of the process by which governmental decisions and policies are formulated, within the meaning of §1-210(e)(1), G.S. Additionally, it is found that the in camera records are not a preliminary draft of a memorandum, prepared by a member of the staff of a public agency, which is subject to revision prior to submission to or discussion among the members of such agency, within the meaning of §1-210(e)(1), G.S.

22. Accordingly, it is concluded that the in camera records are not exempt from disclosure pursuant §1-210(b)(1), G.S.

23. It is concluded, therefore, the respondents violated the disclosure provisions of the FOI Act, as alleged in the complaint.

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

1. Forthwith, the respondents shall provide to the complainant copies of the records described in finding 18, above, free of charge.

Approved by Order of the Freedom of Information Commission at its regular meeting of August 8, 2018.

A handwritten signature in black ink, appearing to read "Cynthia A. Cannata". The signature is written in a cursive, flowing style.

Cynthia A. Cannata
Acting Clerk of the Commission

PURSUANT TO SECTION 4-180(c), G.S., THE FOLLOWING ARE THE NAMES OF EACH PARTY AND THE MOST RECENT MAILING ADDRESS, PROVIDED TO THE FREEDOM OF INFORMATION COMMISSION, OF THE PARTIES OR THEIR AUTHORIZED REPRESENTATIVE.

THE PARTIES TO THIS CONTESTED CASE ARE:

PETRINA YOXALL, 147 Stuyvesant Avenue, New Haven, CT 06512

MANAGER, HUMAN RESOURCES AND BENEFITS, CITY OF NEW HAVEN; AND CITY OF NEW HAVEN, c/o Attorney Kathleen Foster, City of New Haven, Office of Corporation Counsel, 165 Church Street, New Haven, CT 06510



Cynthia A. Cannata
Acting Clerk of the Commission