FREEDOM OF INFORMATION COMMISSION
OF THE STATE OF CONNECTICUT

In the Matter of a Complaint by FINAL DECISION

Leigh Tauss and the Record Journal,

Complainants

against Docket #FIC 2017-0415

Director of Human Resources, City of Meriden; and City of Meriden,

Respondents January 10, 2018

The above-captioned matter was heard as a contested case on October 3, 2017, at which time the complainants and the respondents appeared, stipulated to certain facts and presented testimony, exhibits and argument on the complaint. The hearing officer granted Deborah Moore's unopposed motion to intervene.

After consideration of the entire record, the following facts are found and conclusions of law are reached:

1. It is found that the respondents are public agencies within the meaning of §1-200(1), G.S.

2. It is found that on July 5, 2017, the complainants requested records from the respondents. It is found that among the records requested, the complainants sought a letter of discipline concerning the intervenor, attorney Moore.

3. By letter filed July 24, 2017, the complainants appealed to this Commission, alleging that the respondents violated the Freedom of Information ("FOI") Act by failing to provide copies of the requested records.

4. 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, …whether such data or information be handwritten, typed, tape-recorded, printed, photostated, photographed or recorded by any other method.

5. Section 1-210(a), G.S., provides, in relevant part:

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

6. Section 1-212(a), G.S., provides in relevant part: "Any person applying in writing shall receive, promptly upon request, a plain, facsimile, electronic or certified copy of any public record.

7. It is found that the records requested by the complainant are public records within the meaning of §§1-200(5), 1-210(a), and 1-212(a), G.S.

8. At the hearing in this matter, the only record at issue was the letter of discipline, described in paragraph 2, above.

9. It is found that on October 2, 2017, the respondents disclosed a redacted copy of the requested letter of discipline, along with a redacted copy of attorney Moore's rebuttal to such letter.

10. During the hearing in this matter, the hearing officer ordered the respondents to submit for in camera inspection the records for which they claim an exemption, and to provide an accompanying index indicating the exemption(s) claimed.

11. On October 5, 2017, the respondents submitted records for in camera inspection, along with an accompanying Index to Records Submitted for In Camera Inspection. Such in camera records shall be referenced herein as follows:

> IC-2017-0415-1-1 and -1-2,
> IC-2017-0415-2-1, -2-2 and -2-3,
> IC-2017-0415-3-1 and -3-2,
> IC-2017-0415-4,
> IC-2017-0415-5, and
> IC-2017-0415-6-1 through IC-2017-0415-6-8.

12. Section 1-21j-37(f)(1) of the Regulations of Connecticut State Agencies provides:

> Any party or intervenor may request an in camera inspection of the records claimed to be exempt from disclosure in a contested case; and the presiding officer or the commission may order such an inspection on request, on such presiding officer's or the commission's own initiative, or on remand by a court. (Emphasis added.)

13. It is found that the Index describes IC-2017-0415-3 and IC-2017-0415-4 as "state statute." It is found that the Index describes IC-2017-0415-5 as "City of Meriden CT Charter Section," and the Index describes IC-2017-0415-6 as "City of Meriden CT City Code/Policy."

14. Neither a state statute, nor sections from a city charter or city code or policy are exempt from disclosure. It is concluded, therefore, that §1-21j-37(f)(1) does not permit in camera review of such records. It is concluded that IC-2017-0415-3 through IC-2017-0415-6 were submitted and accepted in error.[1]

15. With respect to the redactions to the letter of discipline and the rebuttal, it is found that the respondents claimed such records to be exempt pursuant to §§1-210(a) and (b)(2), G.S., and "HIPAA."

16. Turning first to the claim that the records are exempt pursuant to HIPAA, federal regulations implementing HIPAA ("Federal Health Insurance Portability and Accountability Act") prohibit a "covered entity" from disclosing "individually identifiable health information," also known as "protected health information," without consent of the individual. See 45 CFR §164.512.

17. For all relevant purposes here, "Individually Identifiable Health information" is health information that identifies an individual or can be used to identify an individual. 45 CFR §160.103.

18. It is found that the redacted information claimed to be exempt pursuant to HIPPA merely identifies an employee -- who is not the intervenor Moore – but contains no information about such employee's health. It is found that the redacted information does not even reference the employee's health or medical circumstances.

19. It is concluded that HIPPA does not prohibit disclosure of such information.

20. Section 1-210(b)(2), G.S., provides that disclosure is not required of "[p]ersonnel or medical files and similar files the disclosure of which would constitute an invasion of personal privacy[.]"

21. 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.

22. 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

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[1] Nevertheless, the in camera protections shall be preserved pursuant to §§1-21j-37(f)(12) and (13) of the Regulations of State Agencies.

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.

23. Attorney Moore claimed at the hearing in this matter that she was asserting only the privacy rights of the "other employee;" however, in her post-hearing brief, she claims that disclosure of the records would be an invasion of *her* privacy rights because "the allegations of a policy violation have not been formalized through the findings of the appropriate agency, and therefore remain confidential under the applicable statutes and city Charter/Code provisions."

24. It is found, based on exhibits and testimony submitted at the hearing in this matter, that the requested letter of discipline to attorney Moore was authored by Michael Quinn, Corporation Counsel for the respondents, and attorney Moore's supervisor. It is found that the letter contains the reasons for the letter of discipline, and states that her conduct may have violated certain city policies or procedures. It is found that Quinn's statements are merely his assessment of Moore's conduct and his explanation of why such conduct merited discipline. It is found that the letter is neither a formal allegation nor a finding in a separate proceeding and is not subject to any confidentiality provisions that may apply to such a separate proceeding.

25. It is found that the redacted information pertains to legitimate matters of public concern. It is also found that disclosure of such information would not be highly offensive to a reasonable person.

26. Attorney Moore claimed in her post-hearing brief that the "other employee," who is no longer an employee of the respondents, was not notified of the complainants' request. It is found, however, that the requested records – the letter of discipline and Moore's response – are personnel or similar records of attorney Moore, not of the "other employee."

27. It is concluded, therefore, that §1-210(b)(2), G.S., does not permit the respondents to withhold such information.

28. The respondents also claimed that a certain policy or certain policies of the respondents prohibited disclosure of the redacted information.

29. It is found, however, that the respondents refused to identify such policy or policies except by submitting statutes, codes and policies for in camera inspection. The respondents contended that identifying the applicable policy or statute would reveal the information claimed to be exempt. Nevertheless, it is the respondents' burden to prove their claim that records are exempt from disclosure, and an integral part of such proof is identifying the specific laws that are claimed to be applicable. Because the respondents refused to identify such laws either in open hearing or on the public Index, and copies of such laws are not accepted for in camera inspection (see paragraph 14, above), it is found that the administrative record in this matter contains no evidence from which the Commission can determine whether the redacted information is prohibited from disclosure.

30. Moreover, the exceptions to disclosure set forth in §1-210(a), G.S., apply only to "federal law and state statute." It is concluded that §1-210(a), G.S., does not apply to municipal codes, policies, or charters.

31. In her post-hearing brief, attorney Moore also claimed that the requested record was a "draft" because the letter of discipline was "under review" and not placed in her personnel file.

32. Section 1-210(b)(1), G.S., provides:

> Nothing in the FOI Act shall be construed to require disclosure of:
>
> (1) Preliminary drafts or notes provided the public agency has determined that the public interest in withholding such documents clearly outweighs the public interest in disclosure[.]

33. The respondents did not claim that the requested record is exempt as a preliminary draft pursuant to §1-210(b)(1), G.S. Neither the respondents nor the intervenor presented any evidence as to whether the public agency determined that the public interest in withholding the letter of discipline clearly outweighs the public interest in disclosure. It is also found that Attorney Quinn signed and issued his letter of discipline, and Moore provided her response to the respondents. At the time, neither the respondents nor the intervenor considered such records to be preliminary drafts. That the respondents may subsequently reconsider the discipline imposed does not transform the requested records into preliminary drafts.

34. It is found that §1-210(b)(1), G.S., does not exempt the requested records from disclosure.

35. Even if the respondents proved that the requested record is a preliminary draft, however, §1-210(e)(1) provides:

> Notwithstanding the provisions of subdivisions (1)...of subsection (b) of this section disclosure shall be required of:
>
> 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;

36. It is found that the requested record is an interagency letter, recommendation or report comprising part of the process by which governmental decisions are formulated, and the record is not a draft of a memorandum prepared by a member of the staff of a public agency subject to revision prior to discussion among members of such agency. It is concluded, therefore, that §1-210(e)(1),G.S., requires disclosure.

37. It is found, therefore, that the respondents failed to prove that the redacted information is prohibited from disclosure.

38. It is concluded, therefore, that the respondents violated §§1-210(a) and 1-212(a), G.S., by withholding the redacted records from the complainant.

39. The complainants also alleged that the respondents failed to provide the letter of discipline promptly upon request.

40. Section 1-214, G.S., provides in relevant part:

> (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 ... 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. (Emphasis added.)
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> (c) A public agency which has provided notice under subsection (b) of this section shall disclose the records requested unless it receives a written objection from the employee concerned or the employee's collective bargaining representative, if any, within seven business days from the receipt by the employee[.]

41. Upon examination of the unredacted letter of discipline, and the unredacted letter of rebuttal, and in light of the evidence in the record, it is found that it was *not* reasonable for the respondents to believe that disclosure of such records would legally constitute an invasion of privacy. It is concluded, therefore, that the respondents violated §1-214, G.S., by refusing to promptly disclose the requested records.

42. It is found that the complainants made it known to the respondents that although they sought copies of many personnel records, they were primarily interested in the requested letter of discipline and asked that the respondents provide a copy of the letter before reviewing all the other requested records for possible exemptions.

43. ` It is found that the respondents failed to provide the requested records in a prompt manner, and it is concluded that such failure violated §§1-210(a) and 1-212(a), G.S.

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, free of charge, unredacted copies of all the records submitted for in camera inspection.

2. Henceforth, the respondents shall strictly comply with §§1-210(a) and 1-212(a), G.S.

Approved by Order of the Freedom of Information Commission at its regular meeting of January 10, 2018.

Cynthia A. Cannata
Acting Clerk of the Commission

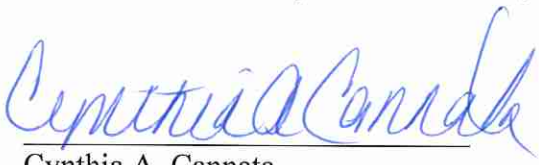
PURSUANT TO SECTION 4-180(c), G.S., THE FOLLOWING ARE THE NAMES OF EACH PARTY AND THE MOST RECENT MAILING ADDRESS, PROVIDED TO THE FREEDOM OF INFORMATION COMMISSION, OF THE PARTIES OR THEIR AUTHORIZED REPRESENTATIVE.

THE PARTIES TO THIS CONTESTED CASE ARE:

LEIGH TAUSS AND RECORD JOURNAL, 500 South Broad Street, Meriden, CT 06450

DIRECTOR OF HUMAN RESOURCES, CITY OF MERIDEN; AND CITY OF MERIDEN, c/o Attorney John H. Gorman, City of Meriden, 142 East Main Street, Meriden, CT 06450

Intervenor: Attorney Deborah Moore, 142 East Main Street, Meriden, CT 06450



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