FREEDOM OF INFORMATION COMMISSION
OF THE STATE OF CONNECTICUT

In the Matter of a Complaint by FINAL DECISION

Joe Cooper and Journal Inquirer,

Complainants Docket # FIC 2017-0480

against

Town Administrator,
Town of Andover; and
Town of Andover,

Respondents May 23, 2018

The above-captioned matter was heard as a contested case on October 19, 2017, at which time the complainants and respondents appeared, stipulated to certain facts and presented testimony, exhibits and argument on the complaint. For purposes of hearing, the above captioned matter was consolidated with Docket # FIC 2017-0482; Lauren Yandow and Rivereast News Bulletin v. Town Administrator, Town of Andover; and Town of Andover.

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, on August 14, 2017, the complainants made a written request to the respondents for "access to all records related to complaints filed against Jay Linddy" ("August 14th request").

3. It is found that, by letter dated August 15, 2017, counsel for the respondents denied the complainants' August 14th request, claiming that such records were exempt from disclosure pursuant to §1-210(b)(2), G.S., in that they were personnel or similar files the disclosure of which would constitute an invasion of privacy. It is found that the personnel or similar files at issue were of three Town employees ("subject employees").

4. It is found that, by letter dated August 17, 2017, the respondents notified the subject employees that a request was made for their personnel or similar files, and gave them the opportunity to object to the disclosure of any information. All three employees objected to the disclosure of their respective files.[1] Subsequently, by letter dated August 27, 2017, town counsel

[1] The written objections to disclosure were signed on August 18, 22 and 23, 2017, respectively.

informed the complainants in this matter that the Town Administrator had received written objections to disclosure from the subject employees.

5. By letter dated and received on August 16, 2017, the complainants appealed to this Commission, alleging that the respondents failed to provide them copies of the records, described in paragraph 2, above, in violation of the FOI Act.

6. 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.

7. 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.

8. 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."

9. It is found that the records requested by the complainants 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.

10. It is found that at the time of the August 14th request, the Town of Andover was investigating two sexual harassment complaints filed against Jay Linddy. It is found that, at the time of the filing of such complaints, Linddy was an elected official and also a Town employee. The Town completed its investigation of the two complaints on October 4, 2017, and thereafter terminated Linddy's employment with the Town.

11. On October 25, 2017, the respondents submitted unredacted copies of 28 pages of records for in camera review. On the in camera Index, the respondents claimed that such records were exempt from disclosure pursuant to §§1-210(b)(1), 1-210(b)(2) and 1-214, G.S. It is found that the subjects of the records at issue received notice of the complaint and hearing in this matter, but did not seek to intervene or appear at the October 19th hearing.

12. At the hearing in this matter, the respondents argued that the disclosure of the requested records would constitute an invasion of privacy of the subject employees as such records concerned an "extremely sensitive" personnel matter involving accusations of sexual harassment that took place in a Town office. The respondents argued that the alleged misconduct was of an "extreme nature" and that there were items in the requested records that would "shock the conscience," and there was no legitimate public interest in the disclosure of such records. In addition, the respondents argued that the individuals involved were very well known in Town, and they did not want the situation to become politicized or for any pressure to be brought upon those individuals conducting the investigation and deciding the situation. The respondents further argued that their decision to withhold the records was based on certain state and local personnel policies; specifically, §46a-54-204(c)(2)(A) of the Regulations of Connecticut State Agencies and section 11.3 of the Town of Andover's Personnel Policies.

13. With respect to the respondents' reliance on certain state and local personnel policies as a basis for withholding the requested records, Conn. Agencies Regs. §46a-54-204(c)(2)(A) of pertains to the sexual harassment posting and training requirements for employers having fifty or more employees; specifically, it states that "[w]hile not exclusive, the training may also include, but is not limited to, the following elements… [i]nforming training participants that…the contents of the [sexual harassment] complaint are personal and confidential and are not to be disclosed except to those persons with a need to know…." In addition, section 11.3 of the Town of Andover's Personnel Policies which sets forth the procedure for handling all sexual harassment complaints requires that such complaints be handled "in a timely and confidential manner." It is found that Conn. Agencies Regs. §46a-54-204(c)(2)(A) and section 11.3 of the Town of Andover's Personnel Policies concern the confidential handling of investigations into complaints of sexual harassment, and do not provide an exemption from disclosure within the meaning of §1-210(a), G.S.

14. With respect to the respondents' claim that the requested records were exempt pursuant to §1-214, G.S., such section 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 (1) each employee concerned, provided such notice shall not be required to be in writing where impractical due to the large number of employees 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.
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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 or such collective bargaining representative of the notice or, if there is no evidence of receipt of written notice, not later than nine business days from the date the notice is actually mailed, sent, posted or otherwise given. Each objection filed under this subsection shall be on a form prescribed by the public agency, which shall consist of a statement to be signed by the employee or the employee's collective bargaining representative, under the penalties of false statement, that to the best of his knowledge, information and belief there is good ground to support it and that the objection is not interposed for delay. Upon the filing of an objection as provided in this subsection, the agency shall not disclose the requested records unless ordered to do so by the Freedom of Information Commission pursuant to section 1-206. Failure to comply with a request to inspect or copy records under this section shall constitute a denial for the purposes of section 1-206. Notwithstanding any provision of this subsection or subsection (b) of section 1-206 to the contrary, if an employee's collective bargaining representative files a written objection under this subsection, the employee may subsequently approve the disclosure of the records requested by submitting a written notice to the public agency.

15. It is concluded that §1-214, G.S., governs the process that agencies must follow in response to requests for personnel, medical, and similar files. It is concluded that §1-214, G.S., does not provide an exemption from disclosure of public records. It is found that the respondents denied the complainants' August 14th request prior to receiving the employees' written objections, as described in paragraph 4 and footnote 1, above, in violation of §§1-214(b) and (c), G.S.

16. With respect to the respondents' claim that the requested records were exempt from disclosure pursuant to §1-210(b)(1), G.S., such section 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."

17. 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). 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).

18. It is found that the respondents failed to prove that the records at issue were "preliminary drafts or notes" within the meaning of §1-210(b)(1), G.S. Accordingly, it is concluded that such records are not exempt from disclosure pursuant to §1-210(b)(1), G.S.

19. With respect to the respondents' claim that the requested records were exempt from disclosure pursuant to §1-210(b)(2), G.S., such section provides that disclosure is not required of "[p]ersonnel, medical and similar files the disclosure of which would constitute an invasion of personal privacy."

20. "When a claim for exemption is based upon §1-210(b)(2), [G.S.,] the person claiming the exemption must meet a twofold burden of proof. First, the person claiming the exemption must establish that the files are personnel, medical or similar files.... Second, the person claiming the exemption...must also prove that disclosure of the files would constitute an invasion of personal privacy." Rocque v. Freedom of Information Commission, 255 Conn. 651, 661 (2001), citing Perkins v. Freedom of Information Commission, 228 Conn. 158 (1993). 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 would be highly offensive to a reasonable person. Rocque, supra, at 662.

21. In Rocque, the Supreme Court considered whether disclosure of records of an investigation of alleged sexual harassment by a public employee against a co-worker would constitute an invasion of personal privacy within the meaning of §1-210(b)(2), G.S. The Court observed that, in general, much of the information in such records is of legitimate public concern because it reveals a state agency's procedures in investigating sexual harassment complaints. Rocque, supra, at 665. The Court nonetheless held that, under Perkins, "the complainant's identity and related identifying information...[and]...sexually explicit or descriptive information, such as allegations of sexual contact and sexual improprieties, and details of intimate personal relationships...are not of legitimate public concern, and their disclosure would be highly offensive to a reasonable person. Consequently, the identity of the complainant and the sexually explicit portions of the investigation documents are exempt from public disclosure under §1-210(b)(2)[G.S.]." Id. at 665, 667. In State of Connecticut, Department of Transportation, et. al. v. Freedom of Information Commission, No. CV 01-0508810, 122101 CTSUP, New Britain, J.D. (Schuman, J.) (December 21, 2001), the Court found that the two-page summary of a sexual harassment investigation "contain[ed] some instances of what might be described as inappropriate conversation or crude talk.... But the document [did] not contain 'sexually explicit or descriptive information, such as allegations of sexual contact and sexual improprieties, and details of intimate personal relationships'.... Accordingly, under the narrow holding of *Rocque*, the entire statement should be disclosed except for the names and other identifying information...." (emphasis in original).

22. It is found that the requested records consist of an investigation of sexual harassment complaints and related documents and are part of the subject employees' personnel files or similar files, within the meaning of §1-210(b)(2), G.S.

23. Based upon a careful review of the in camera records, it is found that several of the requested records identify the complainants in the investigation. As stated in paragraph 20, above, our Supreme Court in Rocque concluded that there was no legitimate public interest in disclosing the name of the sexual harassment complainant in that case, and that disclosing the name would be highly offensive to a reasonable person. Although the complaining employees' names are already known to the complainants in this matter, the Commission declines in its discretion to further publicize their identities by naming them in this decision, or ordering disclosure of their names as they are contained on the following pages of the requested records: pages 1, 2, 2a, 3, 4, 5, 13 through 17, and 21 through 28.

24. Based upon a careful review of the in camera records, it is also found that a few of the requested records contain sexually explicit or descriptive information. It is found that such information is not a legitimate matter of public concern, and that disclosure of such information would be highly offensive to a reasonable person. Such records are described in paragraph 25, below.

25. It is found that the following records do not pertain to a legitimate matter of public concern, and that disclosure of such information would be highly offensive to a reasonable person: page 3, line 14 (words 3, 4, 9 and 10), line 28 (words 8 and 9); page 6; page 7; page 8; page 23, line 7 (words 10 through 13), line 9 (words 1 and 2); page 25, line 18 (words 2, 3 and 7 through 13), line 31 (words 12 and 13), line 32 (words 7 to end of line), line 33 (words 1 through 6); page 27, line 33 (words 11 and 12); and page 28, line 5 (words 10 and 11).[2]

26. It is concluded, therefore, that disclosure of the information described in paragraph 25, above, would constitute an invasion of privacy, within the meaning of §1-210(b)(2), G.S.

27. Based upon a careful review of the remaining information in the in camera records, it is found that, in contrast to Rocque, such information is not "sexually explicit information." It is found that, unlike in Rocque, the information does not pertain to sexual contact and sexual improprieties, and are not details of the complainants' intimate relationships.

28. It is found that the requested records, with the exception of the records described in paragraphs 23 and 25, above, pertain to a legitimate matter of public concern in that they concern matters of professional conduct and reveal the substance and degree of severity of alleged misconduct by a public official. It is also found that disclosure of such information would not be highly offensive to a reasonable person.

29. It is found that disclosure of the requested records, with the exception of the records described in paragraphs 23 and 25, above, would not constitute an invasion of personal privacy within the meaning of §1-210(b)(2), G.S. Accordingly, it is concluded that such information is not exempt from disclosure, and that the respondents violated §§1-210(a) and 1-212(a), G.S., by not providing such records to the complainants.

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[2] The respondents did not number the lines on the in camera records; therefore, the hearing officer numbered such lines in pencil in order to identify which portion of a particular record is exempt from disclosure.

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 a copy of the requested records to the complainants, free of charge.

2. In complying with paragraph 1 of the order, above, the respondents may redact the identities of the complainants and the information described in paragraphs 23 and 25 of the findings, above.

Approved by Order of the Freedom of Information Commission at its regular meeting of May 23, 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:

JOE COOPER AND JOURNAL INQUIRER, 306 Progress Drive, P.O. Box 510, Manchester, CT 06045

TOWN ADMINISTRATOR, TOWN OF ANDOVER; AND TOWN OF ANDOVER, c/o Attorney Dennis O'Brien, 120 Bolivia Street, Willimantic, CT 06226

Cynthia A. Cannata
Acting Clerk of the Commission

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