

FREEDOM OF INFORMATION COMMISSION
OF THE STATE OF CONNECTICUT

In the Matter of a Complaint by

FINAL DECISION

Crystal Matthews,

Complainant

against

Docket #FIC 2017-0521

Commissioner, State of Connecticut,
Department of Emergency Services
and Public Protection; and State of
Connecticut, Department of Emergency
Services and Public Protection,

Respondents

May 23, 2018

The above-captioned matter was heard as a contested case on April 6, 2018, at which time the complainant and the respondents appeared 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 August 21, 2017, the complainant requested from the respondents certain emails sent and/or received by certain employees of the respondent department ("department").¹
3. It is found that the respondents failed to respond to such request.
4. By letter dated September 2, 2017, and filed September 6, 2017, the complainant appealed to this Commission, alleging that the respondents violated the Freedom of Information ("FOI") Act by failing to provide her with copies of certain records responsive to the request, described in paragraph 2, above.

¹ The request at issue in the present case is directly related to an earlier request that was the subject of Andrew Matthews v. Commissioner, State of Connecticut, Department of Public Safety, et al., Docket # FIC 2011-052 (November 16, 2011), *appealed Commissioner, State of Connecticut, Department of Public Safety v. Freedom of Information Commission*, superior court, judicial district of New Britain (HHB-CV-126013830-S) (appeal pending).

5. It is found that the respondents provided to the complainant some responsive records, but withheld others entirely, claiming such records, or portions thereof, are exempt from disclosure. By notice dated March 5, 2018, the hearing officer ordered the respondents to submit the records they claimed are exempt from disclosure for in camera inspection, as well as a corresponding in camera index. On April 2, 2018, the respondents submitted emails and attachments responsive to the request at issue (the “in camera records”), along with two indexes, one consisting of five pages (“Index 1”), the other consisting of two pages (“Index 2”), to the Commission. The respondents numbered the records, and such numbers shall be used for reference herein. On the indexes to the in camera records, the respondents claimed such records, or portions thereof, are exempt from disclosure pursuant to one or more of the following exemptions: §§1-210(b)(1), 1-210(b)(2), 1-210(b)(3)(H), 1-210(b)(4), and 1-210(b)(10), G.S. (attorney-client privilege).

6. 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.

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 or . . . (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 “[a]ny 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 in camera records are public records within the meaning of §§1-200(5) and 1-210(a), G.S.

10. With regard to the respondents’ claim that certain in camera records are exempt from disclosure pursuant to §1-210(b)(1), G.S., that statute provides that disclosure is not required of “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.”

11. It is found that the respondents failed to prove that such in camera records are preliminary drafts or notes within the meaning of §§1-210(b)(1), G.S. It is found, moreover, that the respondents offered no evidence at the hearing in this matter that the respondent department made a determination that the public interest in withholding any of the in camera records clearly outweighed the public interest in disclosure. It is therefore found that the respondents failed to prove that any of the in camera records, or portions thereof, are exempt from disclosure pursuant to §1-210(b)(1), G.S.

12. Accordingly, it is concluded that the respondents violated §§1-210(a) and 1-212(a), G.S., by withholding the following records from the complainant: on Index 1, Records 08785-08792, 09279-09280, 10429-10440, 10559-10561, and 17375; on Index 2, Records 57211-12, 57215-17, 57218-19, 57231-32, 57455, 57456-57, 57459-60, 57461, 57462-64, 57465-66, 57493-95, 57501-03, 57507-09, 57511.

13. With regard to the respondents’ claim that a portion of an email that appears twice in the in camera records is exempt from disclosure pursuant to §1-210(b)(2), G.S., that statute provides that disclosure is not required of “personnel or medical and similar files, the disclosure of which would constitute an invasion of personal privacy.”

14. At the hearing in this matter, the complainant consented to the redaction of the information contained in lines 8 and 9 in Record 21672 and line 33 in Record 57568. Therefore, such portion of such records shall not be further addressed herein.

15. With regard to the respondents’ claim that certain in camera records are exempt from disclosure pursuant to §1-210(b)(3)(H), G.S., that provision states that disclosure is not required of:

[r]ecords of law enforcement agencies not otherwise available to the public which records were compiled in connection with the detection or investigation of crime, if the disclosure of said records would not be in the public interest because it would result in the disclosure of... (H) uncorroborated allegations subject to destruction pursuant to section 1-216. (Emphasis added).

16. The respondents claimed that Records 09257-09259, 09262-09264 and 13738-13742 are exempt from disclosure pursuant to §1-210(b)(3)(H), G.S.

17. In support of their claim, the respondents offered only the testimony of a staff attorney for the respondent department, who testified that such records were compiled in connection with the detection or investigation of crime, and that the allegations contained therein are uncorroborated. However, it is found that this witness was not involved in the creation or compiling of such records, and offered no evidence that he had inquired of the

individual or individuals who was or were so involved, to determine the purpose for which such records were compiled. After careful inspection of the records identified in paragraph 16, above, it is found that such records do not appear to have been compiled in connection with the detection or investigation of crime, within the meaning of §1-210(b)(3)(H), G.S., despite the witness' testimony. Moreover, it is found that the respondents did not offer substantial evidence that the allegations contained in these records are uncorroborated allegations, as that term is used in §1-210(b)(3)(H), G.S.

18. Accordingly, it is found that the respondents failed to prove that the records identified in paragraph 16, above, are exempt from disclosure pursuant to §1-210(b)(3)(H), G.S., and it is therefore concluded that the respondents violated §§1-210(a) and 1-212(a), G.S., by withholding such records from the complainant.

19. With regard to the respondents' claim that certain in camera records, or portions thereof, are exempt from disclosure pursuant to the attorney-client privilege, the applicability of the exemption contained in §1-210(b)(10), G.S., is governed by established Connecticut law defining the privilege. That law is set forth in Maxwell v. FOI Commission, 260 Conn. 143 (2002), and in that case, the Supreme Court stated that §52-146r, G.S., which established a statutory privilege for communications between public agencies and their attorneys, merely codifies "the common-law attorney-client privilege as this court previously had defined it." Id. at 149.

20. Section 52-146r(2), G.S., defines "confidential communications" as:

All oral and written communications transmitted in confidence between a public official or employee of a public agency acting in the performance of his or her duties or within the scope of his or her employment and a government attorney relating to legal advice sought by the public agency or a public official or employee of such public agency from that attorney, and all records prepared by the government attorney in furtherance of the rendition of such legal advice...

21. As our Supreme Court has stated, a four part test must be applied to determine whether communications are privileged: "(1) the attorney must be acting in a professional capacity for the agency; (2) the communications must be made to the attorney by current employees or officials of the agency; (3) the communications must relate to the legal advice sought by the agency from the attorney, and (4) the communications must be made in confidence." Lash v. Freedom of Information Commission, 300 Conn. 511, 516 (2011), citing Shew v. Freedom of Information Commission, 245 Conn. 149, 159 (1998).

22. After careful inspection of the in camera records, portions of which the respondents claimed to be exempt from disclosure pursuant to the attorney-client privilege, it is found that the email communications contained in such in camera records were between an employee or official of the respondent department and outside counsel, an assistant attorney general, or a

labor relations attorney, who were acting in their professional capacities as counsel for the respondent department, and that the communications related to legal advice sought by the respondent department from outside counsel, assistant attorney general or labor relations attorney.

23. It is further found, based upon the context in which such email communications were made, that such communications were made in confidence.

24. Accordingly, it is concluded that the communications contained in the portions of the following records claimed to be exempt from disclosure pursuant to the attorney-client privilege are so privileged, and that there was no evidence in the record that the privilege was waived with respect to any such communications: on Index 1: Records 21418, 21421, 21422, 21424, 21425, 21426, 21427, 21567, 21568, 21651, 21672 (except lines 8 and 9, see paragraph 14, above), 21678, 21689, 21690, 21804, 57225, 57226, 57247, 57252, 57253, 57267, 57290, 57297, 57298, 57299, 57300, 57310-311, 57313, 57468, 57469, 57489, 57513, 57515, 57528, 57529, 57531, 57532, 57533, 57540, 57548, 57568 (except line 33, see paragraph 14, above), and 57569. It is therefore concluded that the respondents did not violate §§1-210(a) and 1-212(a), G.S., by withholding such portions from the complainant.²

25. However, it is also concluded that the respondents violated §§1-210(a) and 1-212(a), G.S., by withholding from the complainant the remaining portions of the records identified in paragraph 24, above, for which they claimed no exemption.

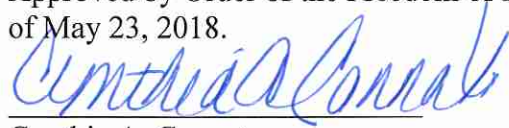
26. It is further concluded that Record 21547 on Index 2 is exempt from disclosure in its entirety pursuant to the attorney-client privilege.

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 in camera records to the complainant, free of charge.
2. In complying with paragraph 1 of the order, above, the respondents may withhold the in camera records, or portions thereof, identified as exempt from disclosure in paragraphs 24 and 26 of the findings and conclusions, above.
3. Henceforth, the respondents shall strictly comply with the disclosure provisions in §§1-210(a) and 1-212(a), G.S.

² Based on this conclusion, the Commission need not address the respondents' alternative claim that these portions of the in camera records are exempt from disclosure pursuant to §1-210(b)(4), G.S.

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:

CRYSTAL MATTHEWS, P.O. Box 143, Willington, CT 06279

COMMISSIONER, STATE OF CONNECTICUT, DEPARTMENT OF EMERGENCY SERVICES AND PUBLIC PROTECTION; AND STATE OF CONNECTICUT, DEPARTMENT OF EMERGENCY SERVICES AND PUBLIC PROTECTION, c/o Assistant Attorney General Terrence M. O'Neill, Office of the Attorney General, 110 Sherman Street, Hartford, CT 06105



Cynthia A. Cannata
Acting Clerk of the Commission