FREEDOM OF INFORMATION COMMISSION
OF THE STATE OF CONNECTICUT

In The Matter of a Complaint by FINAL DECISION

Jesse Buchanan and
The Record-Journal Publishing Company,

Complainants

against Docket #FIC 2018-0026

Chief, Police Department,
Town of Cheshire; Police
Department, Town of Cheshire;
and Town of Cheshire,

Respondents September 26, 2018

The above-captioned matter was heard as a contested case on April 10, 2018, at which time the complainants 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 December 11, 2017, the complainants requested that the Chief of Police for the Town of Cheshire provide them with a copy of an internal affairs investigation from 2007 concerning then Officer (currently Sergeant) Jeffrey Falk, as well as the former chief of police's order, which order issued as a result of the internal affairs investigation.

3. It is found that, by email dated December 13, 2017, the respondents acknowledged the request, disclosed two orders from the former chief of police, both of which issued after the 2007 internal affairs investigation, but denied the complainants' request for a copy of the internal affairs investigation itself.

4. By letter dated and filed January 12, 2018, the complainants appealed to this Commission, alleging that the respondents violated the FOI Act by failing to provide them with access to the requested record.

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 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, (2) copy such records in accordance with subsection (g) of section 1-212, or (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 "[a]ny 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 complainants are public records within the meaning of §§1-200(5), 1-210(a), 1-212(a), G.S., and must be disclosed unless they are exempt from disclosure.

9. It is found that the complainants received an anonymous phone call from a member of the public concerning an incident that occurred in 2007 involving then Officer Falk and a female employee of the respondent department. It is found that the complainants determined that the former chief of police, following an internal affairs investigation, had issued two written orders containing restrictions concerning Officer Falk's proximity in the work place with regard to the female employee. It is found that the respondents agreed to release the orders to the complainants with the female employee's name redacted, which was acceptable to the complainants. It is further found that when Officer Falk was promoted to Sergeant in 2017, Chief Neil Dryfe, the current chief, found it necessary to modify the restrictions in the previous chief's orders. It is found that the modified order has also been disclosed to the complainants, and they have raised no issue with regard to the redactions contained therein. Accordingly, there is no issue to address with regard to the disclosed orders.

10. The respondents contend, however, that the internal affairs investigation report is exempt from disclosure pursuant to §1-210(b)(3)(H), G.S. (uncorroborated criminal

allegations), and §1-210(b)(2), G.S. (invasion of personal privacy).

11. After the hearing, the respondents submitted the records at issue to the Commission for an in camera inspection. The in camera records are fairly described as one internal affairs investigation report comprised of 149 pages. The in camera records shall be referred to as IC-2018-0026-1 through IC-2018-0026-149.

12. In addition, on the index accompanying the in camera records, the respondents also claimed that certain portions of the internal affairs investigation report are exempt from disclosure pursuant to §1-217, G.S. (residential address of a police officer), and §1-210(b)(10), G.S. (attorney-client privilege).

13. First, the respondents claim that the internal affairs investigation report is exempt pursuant to §1-210(b)(3)(H), G.S., which section provides that nothing in the FOI Act shall require the disclosure of:

> Records of law enforcement agencies not otherwise available to the public which records were compiled in connection with the detection or investigation of a 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 supplied).

14. Section 1-216, G.S., which section is read in conjunction with §1-210(b)(3)(H), G.S., provides as follows:

> Except for records the retention of which is otherwise controlled by law or regulation, records of law enforcement agencies consisting of uncorroborated allegations that an individual has engaged in criminal activity shall be reviewed by the law enforcement agency one year after the creation of such records. If the existence of the alleged criminal activity cannot be corroborated within ninety days of the commencement of such review, the law enforcement agency shall destroy such records.

15. After a careful review of the in camera records, it is found that such records are records of a law enforcement agency, not otherwise available to the public. However, it is found that such records were compiled in connection with an internal affairs investigation. See, e.g. Chappell v. Chief, Police Dept., Town of West Hartford, et al., Docket #FIC 2016-0687 (July 20, 2017) (holding that an internal affairs investigation report was not exempt pursuant to §1-210(b)(3)(H), G.S., as "such records were compiled in connection with an internal affairs investigation," which, "is, by its nature, a civil investigation, not a criminal investigation").

16. It is found that the in camera records were not "compiled in connection with the detection or investigation of crime," within the meaning of §1-210(b)(3)(H). G.S. It is

concluded that the requested records are not exempt from disclosure pursuant to §1-210(b)(3)(H), G.S. It is further found that the allegations contained in the internal affairs investigation are not "uncorroborated," within the meaning of §1-216, G.S.

17. Next, the respondents contended that certain portions of the internal affairs investigation records are exempt pursuant to §1-210(b)(2), G.S, because disclosure of such records would constitute an invasion of Sergeant Falk's personal privacy. Sergeant Falk appeared at the contested case hearing and provided testimony on the invasion of personal privacy claim.

18. Section 1-210(b)(2), G.S., provides that nothing in the FOI Act shall be construed to require the disclosure of "[p]ersonnel or medical files and similar files the disclosure of which would constitute an invasion of personal privacy."

19. The Supreme Court set forth the test for the exemption contained in §1-210(b)(2), G.S., in Perkins v. Freedom of Information Commission, 228 Conn. 158, 175 (1993). The claimant must first establish that the files in question are personnel, medical or similar files. Second, the claimant must show that disclosure 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 such information is highly offensive to a reasonable person.

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

> (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. . . . 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.

21. It is found that the respondents timely notified Sergeant Falk of the request in this case, and that Sergeant Falk timely objected, within the meaning of §1-214, G.S.

22. It is further found that the records at issue constitute a "personnel" or "similar" file within the meaning of §1-210(b)(2), G.S.

23. The respondents contended that the information contained in the internal affairs investigation report should not be disclosed because the details of the investigation are sexually salacious and that the disciplinary actions that issued subsequent to the internal affairs investigation occurred some eleven years ago and, therefore, such actions no longer have relevance. The respondents further contended that the name of the alleged victim's name should not be disclosed. In addition, Sergeant Falk contended that the internal affairs investigation should not be disclosed because the conduct investigated had to do with a medical condition.

24. The Connecticut Supreme Court has stated "that when a person accepts public employment, he or she becomes a servant of and accountable to the public." Perkins, 228 Conn. at 177. Nowhere is the public's interest in obtaining information about its public servants more justified than in the area of law enforcement. The Supreme Court has emphasized that "because of the public interest in fairness of police investigations, there is a general presumption in favor of disclosure, even for investigative reports that exonerate police officers from charges that have been brought against them." Dept. of Pub. Safety v. FOIC, 242 Conn. 79, 88 (1997) (emphasis supplied).

25. After a careful review of the in camera records, is found that the internal affairs investigation concerned Sergeant Falk's off-duty conduct, which, once investigated, led to Sergeant Falk being suspended and to the issuance of an order restricting Sergeant Falk from being alone with a particular female employee while in the workplace. It is found that none of the in camera records contained language that is sexually salacious or unnecessarily graphic. It is further found that the remoteness of the underlying incident is not determinative.

26. It is found that the public has a legitimate interest in the underlying conduct, even though it occurred years ago. The fact that Sergeant Falk was promoted in 2017 and that the disciplinary restrictions which were imposed on him following the internal affairs investigation had to be modified to accommodate his promotion supports the finding that the public has a legitimate interest in the requested records. It is further found that the disclosure of the internal affairs investigation would not be highly offensive to a reasonable person.

27. Nonetheless, it is found that IC-2008-0026-92 through 94 are medical records or contain medical information. It is found that there is there is no legitimate public interest in these records. It is further found that their disclosure would be highly offensive to a reasonable person.

28. Finally, it is found that the name and residential address of the female employee may be redacted wherever it appears in the in camera records. In addition, the records may be redacted to remove the employee's ex-husband's name and his residential address. See Rocque v. FOIC, 255 Conn. 651, 664 (2001) (the name of a sexual harassment complainant "is not of legitimate public concern" and, by implication, its disclosure would be highly offensive to a reasonable person).

29. The respondents next claim that the portions of the in camera records that contain police officers' residential addresses are exempt pursuant to §1-217, G.S.

30. Section 1-217, G.S., provides, in relevant part, as follows:

> (a) No public agency may disclose, under the Freedom of Information Act, from its personnel, medical or similar files, the residential address of any of the following persons employed by such public agency:
>
> . . .
>
> (2) A sworn member of a municipal police department, a sworn member of the Division of State Police within the Department of Emergency Services and Public Protection or a sworn law enforcement officer within the Department of Environmental Protection;

31. After a careful in camera review, it is found that the in camera records contain the residential addresses of police officers in the following locations: IC-2018-0026-1 (line 9, words 8 through 12); IC-2018-0026-15 (line 7, first six words; line 9, first six words; line 11, first six words; and line 13 first six words); IC-2018-0026-39 (line 6, words 2 through 4, 6 and 8); IC-2018-0026-44 (line 6, words 2 through 4, 6 and 8); and IC-2018-0026-52 (line 7, the two words following the word "on").

32. It is concluded that §1-217, G.S., prohibits the disclosure of these portions of the in camera records.

33. Finally, the respondents claim that the following in camera records are exempt from disclosure pursuant to §1-210(b)(10), G.S., because they contain privileged attorney-client communications: IC-2018-0026-98 (lines 3 through 8); IC-2018-0026-105 (lines 4 through 36); IC-2018-0026-106 (lines 1 through 6); IC-2018-0026-107 through IC-2018-0026-108; IC-2018-0026-109 (lines 8 through 23); IC-2018-0026-110 through IC-2018-0026-112; IC-2018-0026-113 (lines 6 through 36); IC-2018-0026-114 (lines 5 through 25); IC-2018-0026-115 through IC-2018-0026-116; IC-2018-0026-117 (lines 5 through 25); IC-2018-0026-118 through IC-2018-0026-119; IC-2018-0026-120 (lines 4 through 39); IC-2018-0026-121 (lines 5 through 35); IC-2018-0026-122; IC-2018-0026-129 (lines 6 through 14); IC-2018-0026-131 (lines 6 through 15); IC-2018-0026-132; IC-2018-0026-134 (lines 4 through 35); IC-2018-0026-137 (lines 5 through 56); IC-2018-0026-138 (lines 1 through 19); IC-2018-0026-139 (lines 6 through 31); and IC-2018-0026-140.

34. In relevant part, §1-210(b)(10), G.S., permits the nondisclosure of "communications privileged by the attorney-client relationship. . . ."

35. 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 well set forth in Maxwell v. FOI Commission, 260 Conn. 143 (2002). 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.

36. 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. . . .

37. The Supreme Court has stated that "both the common-law and statutory privileges protect those communications between a public official or employee and an attorney that are confidential, made in the course of the professional relationship that exists between the attorney and his or her public agency client, and relate to legal advice sought by the agency from the attorney." Maxwell, supra. at 149.

38. After a careful inspection of the in camera records, it is found that the following records, or portions thereof, are exempt from disclosure pursuant to the attorney-client privilege: IC-2018-0026-98 (lines 3 through 8); IC-2018-0026-105 (lines 4 through 13); IC-2018-0026-113 (lines 6 through 36); IC-2018-0026-114 (lines 5 through 25); IC-2018-0026-115 through IC-2018-0026-116; IC-2018-0026-117 (lines 5 through 25); IC-2018-0026-118 through IC-2018-0026-119; IC-2018-0026-120 (lines 4 through 39); IC-2018-0026-121 (lines 5 through 35); IC-2018-0026-122; IC-2018-0026-129 (lines 6 through 14); IC-2018-0026-131 (lines 6 through 15); IC-2018-0026-134 (lines 4 through 35); IC-2018-0026-137 (lines 5 through 56); IC-2018-0026-138 (lines 1 through 19); and IC-2018-0026-139 (lines 6 through 31).

39. It is further found that the records, or portions thereof, identified in paragraph 38, above, contain the legal advice that the respondents sought and/or received from their attorneys. It is further found that the respondents were acting within the scope of their duties with regard to current agency business when they sought and/or received this advice. It is further found that the communications were made in confidence. It is further found that the respondents did not waive their attorney-client privilege. Accordingly, it is concluded that the respondents did not violate the FOI Act when they denied the complainants copies of such records.

40. However, it is found that the respondents failed to prove that the following records, or portions thereof, constitute records containing communications written in confidence between a public agency and a government attorney relating to legal advice sought by the public agency or provided by such attorney, or records prepared by the attorney in furtherance of the rendition of such legal advice, within the meaning of §52-146r(2), G.S.: IC-2018-0026-105 (lines 14 through 36); IC-2018-0026-106 (lines 1 through 6); IC-2018-0026-107 through IC-2018-0026-108; 2018-0026-109 (lines 8 through 23); IC-2018-0026-110 through IC-2018-0026-112; IC-2018-0026-132; and IC-2018-0026-140.

41. Based on the foregoing, it is found, however, that other than the in camera records, or portions thereof, specifically identified in paragraphs 27, 28, 31 and 38, above, the remainder of the in camera records contain the information which formed the basis for and which triggered the internal affairs investigation. It is found that these records are necessary to and facilitate the public's understanding and evaluation of the Cheshire Police Department's investigative process, decision-making and overall handling of an important matter involving a fellow police officer. Accordingly, it is concluded that the respondents violated the disclosure provisions of §§1-210(a) and 1-212(a), G.S., when they refused to provide the complainants with copies of such records.

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

1. The respondents shall forthwith provide to the complainants a copy of the requested records, except for those in camera records, or portions thereof, specifically referenced in paragraphs 27, 28, 31 and 38 of the findings, above.

Approved by Order of the Freedom of Information Commission at its regular meeting of September 26, 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:

JESSE BUCHANAN AND THE RECORD-JOURNAL PUBLISHING COMPANY, 500 South Broad Street, Meriden, CT 06450

CHIEF, POLICE DEPARTMENT, TOWN OF CHESHIRE; POLICE DEPARTMENT, TOWN OF CHESHIRE; AND TOWN OF CHESHIRE, c/o Attorney Joseph B. Schwartz, Murtha Cullina, LLP, City Place I, 185 Asylum Street, 29th Floor, Hartford, CT 06103

Cynthia A. Cannata
Acting Clerk of the Commission

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