FREEDOM OF INFORMATION COMMISSION
OF THE STATE OF CONNECTICUT

In the Matter of a Complaint by FINAL DECISION

Donna Smirniotopoulos,

Complainant

against Docket #FIC 2018-0212

John Kydes, President, Common Council,
City of Norwalk; and Common Council,
City of Norwalk

Respondents March 13, 2019

The above-captioned matter was heard as a contested case on June 4, 2018, at which time the complainant and the respondents appeared and presented testimony, exhibits and argument on the complaint. This case was consolidated for hearing with Docket #FIC 2018-0169, Donna Smirniotopoulos v. Mayor, City of Norwalk et al., and Docket #FIC 2018-0185, Donna Smirniotopoulos v. Chairman, Common Council, City of Norwalk et al.

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. By letter of complaint filed May 1, 2018, the complainant appealed to this Commission, alleging that the respondents violated the Freedom of Information ("FOI") Act by failing to comply with her April 24, 2018 request for certain public records.

3. It is found that the complainant made an April 24, 2018 request to the respondents for "all correspondence, telephonic records, appointment calendar records, and meeting records pertaining to the nomination of Frank Martini as Zoning Alternate."

4. It is found the respondents provided the only responsive record on or about May 24, 2018.

5. It is found that some of the delay in providing the responsive record was due to the respondents searching the name "Martini," as spelled by the complainant, rather than "Mancini," who was the nominee.

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 concluded that the record provided to the complainant is a public record within the meaning of §§1-200(5), 1-210(a) and 1-212(a), G.S.

10. It is concluded that, there being no denial of records responsive to the complainant's request, the respondents did not violate the FOI Act as alleged.

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

1. The complaint is dismissed.

Approved by Order of the Freedom of Information Commission at its regular meeting of March 13, 2019.

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:

DONNA SMIRNIOTOPOULOS, 18 Shorefront Park, Norwalk, CT 06854

JOHN KYDES, PRESIDENT, COMMON COUNCIL, CITY OF NORWALK; AND COMMON COUNCIL, CITY OF NORWALK, c/o Attorney M. Jeffry Spahr, Office of Corporation Counsel, 125 East Avenue, PO Box 5125, Norwalk, CT 06856-5125

Cynthia A. Cannata
Acting Clerk of the Commission

FIC 2018-0212/FD/CAC/3/13/2019

FREEDOM OF INFORMATION COMMISSION
OF THE STATE OF CONNECTICUT

In the Matter of a Complaint by

NOTICE OF FINAL DECISION

Rachel de Leon and The Center for Investigative Reporting,

Complainant

against

Docket #FIC 2018-0312

Office of the City Attorney; City of Bridgeport; and City of Bridgeport,

Respondents

March 18, 2019

FOR THE COMPLAINANT(S):

To: Rachel de Leon and The Center for Investigative Reporting

FOR THE RESPONDENT(S)

To: Office of the City Attorney; Attorney Tamara Titre for the Respondent(s) City of Bridgeport; and City of Bridgeport

This will serve as notice of the Final Decision of the Freedom of Information Commission in the above matter as provided by §4-183(c), G.S. The Commission adopted the Final Decision in the above-captioned case at its regular meeting of March 13, 2019.

By Order of the Freedom of Information Commission

Cynthia A. Cannata
Acting Clerk of the Commission

FIC#2018-0312/NFD/CAC/03/18/19

CERTIFICATION OF SERVICE

I certify that a copy of the foregoing Notice of Final Decision, dated March 18, 2019, and Final Decision, dated March 13, 2019, was mailed today, March 18, 2019, via certified mail, to the following counsel and party of record:

TO COMPLAINANT(S)
RACHEL DE LEON AND THE CENTER FOR INVESTIGATIVE REPORTING, 1400 65th, Suite 200, Emeryville, CA 94608

TO RESPONDENT(S)
OFFICE OF THE CITY ATTORNEY; CITY OF BRIDGEPORT; AND CITY OF BRIDGEPORT, c/o Attorney Tamara Titre, City of Bridgeport, Office of the City Attorney, 999 Broad Street, Bridgeport, CT 06604

Cynthia A. Cannata
Acting Clerk of the Commission

FREEDOM OF INFORMATION COMMISSION
OF THE STATE OF CONNECTICUT

In The Matter of a Complaint by

FINAL DECISION

Rachael de Leon and The Center for
Investigative Reporting,

Complainants

against

Docket #FIC 2018-0312

Office of the City Attorney,
City of Bridgeport; and
City of Bridgeport,

Respondents

March 13, 2019

The above-captioned matter was heard as a contested case on August 16, 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 an electronic portal request dated April 24, 2018, the complainants requested that the respondents provide them with copies of the following records: "copies of all internal affairs complaints relating to Detective Walberto Cotto between January 1, 2013 and today's date, April 24, 2018."

3. It is found that, on June 12, 2018, the respondents disclosed one internal affairs complaint and the corresponding investigation to the complainants.

4. By letter dated June 13, 2018 and filed June 14, 2018, the complainants appealed to the Commission, alleging that the respondents violated the Freedom of Information ("FOI") Act by failing to provide them with all of the responsive internal affairs complaints concerning Detective Cotto (and all of the corresponding internal affairs investigation reports).

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 requested records are public records within the meaning of §§1-200(5), 1-210(a), and 1-212(a), G.S.

9. At the start of the contested case hearing, the complainants explained that, even though they had only expressly requested internal affairs complaints against Detective Cotto, they actually wanted the corresponding internal affairs investigation reports as well.

10. It is found that the respondents understood the complainants to be requesting both the internal affairs complaints and the corresponding investigation reports.

11. It is found that, during the time period specified in the request, there were three internal affairs complaints filed against Detective Cotto. It is found that two complaints were filed by individuals, while a third complaint was a joint complaint involving three individuals. Accordingly, it is found that there are five responsive internal affairs complaints and three corresponding internal affairs investigation reports.

12. It is further found that, with regard to one of the individual complaints, the respondents have completed their internal affairs investigation. With regard to the other

individual complaint and the complaint involving three individuals, the respondents have not yet completed what will ultimately result in two internal affairs investigation reports.

13. It is found that the respondents disclosed one internal affairs complaint as well as the completed internal affairs investigation report pertaining to such complaint to the complainants.

14. Because the respondents understood the complainants to be requesting both the internal affairs complaints and the corresponding internal affairs investigation reports, the Commission will address the respondents' legal arguments with regard to their failure to disclose the remaining four internal affairs complaints and the two corresponding internal affairs investigation reports.

15. First, the respondents contend that the two internal affairs investigation reports are exempt from disclosure pursuant to §1-210(b)(1), G.S.

16. Section 1-210(b)(1), G.S., provides that disclosure shall not be required 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. Section 1-210(b)(1), G.S., requires the respondents to prove that they determined that the public interest in withholding records clearly outweighs the public interest in disclosure. "The statute's language strongly suggests that 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." Van Norstrand v. Freedom of Info. Comm'n, 211 Conn. 339, 345 (1989).

18. In 1980, the Connecticut Supreme Court interpreted the phrase "preliminary drafts and notes" in the FOI Act. See Wilson v. FOIC, 181 Conn. 324 (1980) ("Wilson"). The Wilson court ruled that "preliminary drafts or notes reflect that aspect of an agency's function that precedes formal and informal decision making. . . . It is records of this preliminary, deliberative and predecisional process that . . . the exemption was meant to encompass." Wilson, 181 Conn. at 332. In addition, the Wilson court interpreted the phrase "preliminary drafts and notes" in the FOI Act as identical to the deliberative process privilege found in 5 U.S.C. §552(b)(5) of the federal Freedom of Information Act, with the exception that, under Connecticut's FOI Act, the public agency carried the additional burden to show that "the public interest in withholding such document clearly outweighs the public interest in disclosure." See Wilson, 181 Conn. at 333-340.

19. The year following Wilson, the Connecticut legislature adopted Public Act 81-431, which added to the FOI Act the language now codified in §1-210(e)(1). See ¶ 21, below.

20. It is found that, with adoption of Public Act 81-431, the Connecticut Legislature made clear that the Connecticut FOI Act required more robust disclosure than is required by the deliberative process privilege permitted at the federal level.

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

> Notwithstanding the provisions of [§1-210(b)(1), G.S.], disclosure shall be required of:
>
> (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.

22. Sergeant Milton Johnson, who is the respondents' FOI Coordinator, appeared and testified at the contested case hearing.

23. It is found that the respondents are still in the process of investigating four internal affairs complaints filed against Detective Cotto. Upon completion of their investigations, the respondents will have two additional internal affairs investigation reports. Based on the testimony, it is found that, while the respondents have begun drafting these two internal affairs investigation reports, certain sections of the reports, including the conclusion sections, have not yet been completed.

24. It is found that the two internal affairs investigation reports are preliminary drafts, within the meaning of §1-210(b)(1), G.S.

25. It is further found that the respondents determined that the public interest in withholding the draft reports clearly outweighs the public interest in disclosure.[1] It is further found that the respondents' reasoning for withholding the draft reports was not frivolous or patently unfounded.

26. Finally, it is found that the two internal affairs investigation reports are not interagency or intra-agency memoranda, letters, advisory opinions, recommendations or reports, within the meaning of §1-210(e)(1), G.S.

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[1] In this regard, the respondents testified that disclosing the incomplete internal affairs investigation reports to the public would mean disclosing reports that are missing key information including, in this case, the ultimate findings and conclusions with regard to the validity of the allegations contained in the internal affairs complaints themselves.

27. Accordingly, it is concluded that the respondents did not violate the FOI Act when they refused to disclose the two draft internal affairs reports to the complainants.

28. At the conclusion of the contested case hearing, the hearing officer ordered the respondents to submit the four undisclosed internal affairs complaints to the Commission for an in camera inspection.

29. On September 11, 2018, the respondents submitted the four internal affairs complaints at issue to the Commission. The in camera records are fairly described as follows: a three-page internal affairs complaint, dated July 7, 2017; a six-page internal affairs complaint, dated July 26, 2017; a five-page internal affairs complaint, dated July 26, 2017; and a four-page internal affairs complaint, dated August 24, 2017.

30. At the contested case hearing and in their written responses to the complainants, the respondents contended that the four internal affairs complaints were exempt in their entirety from disclosure because the corresponding internal affairs investigation reports had not been completed. In this regard, the respondents contended that the internal affairs complaints were exempt pursuant to §1-210(b)(3)(D), G.S.

31. Section 1-210(b)(3)(D), G.S., provides that nothing in the FOI Act shall require the disclosure of the following:

> 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 . . . (D) information to be used in a prospective law enforcement action if prejudicial to such action. (Emphasis supplied).

32. After a careful review of the in camera records, it is found that the four internal affairs complaints 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 four civilians filing internal affairs complaints with the police department. It is found that an internal affairs complaint is, by its nature, a civil complaint. Accordingly, 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)(D), G.S. It is therefore concluded that the internal affairs complaints are not exempt from disclosure pursuant to §1-210(b)(3)(D), G.S.

33. Next, the respondents contended that the names of each of the four individuals who filed the internal affairs complainants are exempt from disclosure pursuant to §1-210(b)(2), G.S.

34. 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."

35. The Supreme Court set forth the test for the exemption contained in §1-210(b)(2), G.S., in Perkins v. FOIC, 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.

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

37. The Connecticut Supreme Court has determined that the disclosure of the name and identifying information of a victim of sexual harassment or sexual assault would constitute an invasion of personal privacy. See Rocque v. FOIC, 255 Conn. 651, 665 (2001) (the name and related identifying information of a sexual harassment complainant "are not legitimate matters of public concern" and, by implication, the disclosure of such information would be highly offensive to a reasonable person).

38. After a careful in camera inspection, it is found that names and identifying information (all which has been highlighted in the in camera records by the respondents at the request of the hearing officer[2]) contained in the following records concern victims of alleged sexual harassment and/or assaults and, as such, such information may be redacted prior to the disclosure of such records to the complainants: the three-page internal affairs complaint, dated July 7, 2017; the six-page internal affairs complaint, dated July 26, 2017; and the five-page internal affairs complaint, dated July 26, 2017.

39. It is concluded that the respondents did not violate the FOI Act when they refused to disclose the specific information referenced in paragraph 38, above, to the complainants.

40. It is found that the respondents failed to prove that the in camera records comprising the four-page internal affairs complaint, dated August 24, 2017, contain the name or other identifying information of a sexual harassment or a sexual assault victim.

41. It is concluded that, other than the specific portion of the in camera records referenced in paragraph 38, above, the respondents violated the disclosure provisions of §§1-210(a) and 1-212(a), G.S., when the refused to disclose the four requested internal

[2] At the hearing, the respondents contended that there could be "witnesses" named by the internal affairs complainants in their complaints and that these names should also be redacted from the records prior to their disclosure to the complainants. However, the respondents did not raise this claim on any of the indexes accompanying the in camera records, and they only highlighted the names and identifying information of the internal affairs complainants themselves. Accordingly, the respondents' argument that witnesses' names should be redacted is deemed abandoned.

affairs complaints to the complainants.

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 the complainants with a copy of the records described in paragraph 29 of the findings, above, free of charge. Prior to disclosing such records to the complainants, the respondents may redact the name and the identifying information of the internal affairs complainants from the records specifically identified in paragraph 38 of the findings, above.

Approved by Order of the Freedom of Information Commission at its regular meeting of March 13, 2019.

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:

RACHEL DE LEON AND THE CENTER FOR INVESTIGATIVE REPORTING, 1400 65th, Suite 200, Emeryville, CA 94608

OFFICE OF THE CITY ATTORNEY; CITY OF BRIDGEPORT; AND CITY OF BRIDGEPORT, c/o Attorney Tamara Titre, City of Bridgeport, Office of the City Attorney, 999 Broad Street, Bridgeport, CT 06604

Cynthia A. Cannata
Acting Clerk of the Commission

FIC 2018-0312/FD/CAC/3/13/2019