

FREEDOM OF INFORMATION COMMISSION
OF THE STATE OF CONNECTICUT

In the Matter of a Complaint by

FINAL DECISION

Andrew Matthews,

Complainant

against

Docket #FIC 2015-794

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

Respondents

November 16, 2016

The above-captioned matter was heard as a contested case on February 16, and March 16, 2016, at which times 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 November 6, 2015, the complainant requested from the respondents certain emails sent and/or received by 10 employees of the respondent department (“department”).¹
3. It is found that the respondents failed to respond to such request.
4. By letter dated November 18, 2015 and filed November 19, 2015, the complainant appealed to this Commission, alleging that the respondents violated the Freedom of Information (“FOI”) Act by failing to provide him with copies of the records, 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. At the hearing in this matter, the respondents claimed the records, described in paragraph 2, above, are exempt from disclosure. By order dated February 16, 2016, the hearing officer instructed the respondents to submit the records they claimed are exempt from disclosure for in camera inspection, as well as an in camera index. On March 4, 2016, the respondents submitted the emails and attachments responsive to the request at issue (the “in camera records”), along with multiple indexes, to the Commission. The respondents separated the in camera records into 10 groups of records, with each group identified by the name of an individual, and in some instances, by a particular year, and created a separate in camera index for each such group of records. On the indexes to the in camera records, the respondents claimed such records are exempt from disclosure in their entirety, pursuant to one or more of the following exemptions: §§1-210(b)(1), G.S., 1-210(b)(2), 1-210(b)(3)(H), 1-210(b)(4), 1-210(b)(13), G.S., attorney-client privilege, and attorney work product.

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 records responsive to the request, described in paragraph 2, above, 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.” (Emphasis added).

11. It is found, however, that the respondents offered no evidence at the hearing in this matter from which it could be found that the records claimed to be exempt pursuant to §1-210(b)(1), G.S., are “preliminary drafts or notes” and 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. Accordingly, it is concluded 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. With regard to the respondents’ claim that certain in camera records are 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.”

13. It is found, however, that none of the in camera records are “personnel or medical and similar files,” but even assuming they are, the respondents failed to prove that their disclosure would constitute an invasion of personal privacy. Accordingly, it is concluded 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)(2), G.S.

14. With regard to the respondents’ claim that certain in camera records are exempt from disclosure pursuant to the attorney work product “privilege,” this Commission previously concluded that the work product doctrine is not a “privilege established by the common law or the general statutes” within the meaning of §1-210(b)(10), G.S., but rather, is an exception to the federal rules of discovery², which exception does not constitute an exemption to disclosure under §1-210(b)(10), G.S. See Jean McCarthy v. Assessor, Town of Redding; and Town of Redding, Docket #FIC 2013-003 (November 13, 2013).

15. Accordingly, it is concluded that none of the in camera records are exempt from disclosure pursuant to the attorney work product doctrine.

16. Moreover, after careful inspection of all of the in camera records, it is concluded that none of the “To,” “From,” “Sent” (date), and “Cc” lines contained in any email submitted for in camera inspection are exempt from disclosure pursuant to any of the exemptions claimed by the respondents.

17. With regard to the respondents’ claim that the majority of the in camera records 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

² The doctrine also is codified in Sec. 13-3 of the Connecticut Practice Book (2016).

codifies “the common-law attorney-client privilege as this court previously had defined it.” Id. at 149.

18. 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...

19. 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).

20. With regard to the respondents’ claim that certain in camera records are exempt from disclosure pursuant to §1-210(b)(13), G.S., that provision states that disclosure is not required of “[r]ecords of an investigation or the name of an employee providing information under the provisions of section 4-61dd....”

21. Section 4-61dd, G.S., known as the “whistleblower” statute, provides that any person having knowledge of corruption in state government, may report such information to the Auditor of Public Accounts (“Auditors”), who, after reviewing such information, must report it to the Attorney General (“AG”). The AG, with the assistance of the Auditors, must conduct an appropriate investigation of such report, and where necessary, report any findings to the Governor or the Chief State’s Attorney.

22. It is concluded that, to the extent that any of the in camera records contain the names of whistleblowers, such names are exempt from disclosure pursuant to §1-210(b)(13), G.S.

23. 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).

24. With regard to the respondents claim that certain in camera records are exempt from disclosure pursuant to §1-210(b)(4), G.S., that provision states that disclosure is not required of:

[r]ecords pertaining to strategy and negotiations with respect to pending claims or pending litigation to which the public agency is a party until such litigation or claim has been finally adjudicated or otherwise settled.

Davoren In Camera Records (110 pages)

25. On the index to the Davoren in camera records (Davoren records), the respondents claimed, in addition to the exemption set forth in paragraphs 10 and 11, above, that such records are exempt from disclosure pursuant to the attorney-client privilege, §§1-210(b)(4), G.S., and/or 1-210(b)(13), G.S.

26. After careful inspection of the Davoren records, it is found that the records listed below, or portions thereof³, are communications between attorneys (“in-house” counsel, outside counsel, or assistant attorney general) for the respondent department and several department officials, or attachments thereto. It is further found that such attorneys were acting in their capacities as legal counsel for the respondent department; the communications were between the attorney(s) and employee(s) or official(s) of the respondent department; the communications related to legal advice sought by the official(s) from the attorneys; and the communications were made in confidence: IC 2015-794-001, lines 21-26; IC 2015-794-003 through 006; IC 2015-794-007, lines 7-15, 22-26; IC 2015-794-009, lines 6-8; IC 2015-794-010; IC 2015-794-011; IC 2015-794-012, line 15; IC 2015-794-013; IC 2015-794-014; IC 2015-794-015, lines 13-21; IC 2015-794-017, lines 11-13; IC 2015-794-018 through 024; IC 2015-794-026, lines 7, beginning with the word “Nothing,” through the end of line 8; IC 2015-794-027 through 039; IC 2015-794-040, lines 12, 19; IC 2015-794-042 through 048; IC 2015-794-049, lines 29-30; IC 2015-794-052 through 054, lines 7-19; IC 2015-794-055; IC 2015-794-056; IC 2015-794-058 through 062; IC 2015-794-066 through 068, lines 12-14, 20-30; IC 2015-794-069; IC 2015-794-073; IC 2015-794-074; IC 2015-794-076; IC 2015-794-080, line 12, beginning with the word “Nothing,” through the end of line 13; IC 2015-794-082, line 10, beginning with the word “I,” through the end of line 14; IC 2015-794-085 through 088; IC 2015-794-089, lines 32-34; IC 2015-794-090, lines 1-2; IC 2015-794-091, line 9, beginning with the word “including,” through the end of line 11; IC 2015-794-092, lines 13-16; IC 2015-794-093, lines 17-20, 30-35; IC 2015-794-094, lines 1-5; IC 2015-794-095, lines 9-10, 17-21; IC 2015-794-096, lines 11, 18-22, 29, 38-40; IC 2015-794-097, lines 8-10, 20-30; IC 2015-794-099, lines 18-22; IC 2015-794-100, lines 10, 17-21, 28; IC 2015-794-101, lines 8-11, 20-30; IC 2015-794-103, lines 17-27; IC

³ 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.

2015-794-105, lines 6-7, 14-20; IC 2015-794-106, lines 6, 13-17, 24; IC 2015-794-107, lines 3-5, 15-25; IC 2015-794-109, lines 8-9, 20-23; and IC 2015-794-110, lines 1-6. It is further found some of the emails listed above have attachments, and that the attachments were the subject of the legal advice requested.

27. The respondents also claimed that IC 2015-794-025 is an attorney-client privileged communication. However, it is found that such communication is an email sent to an unidentified individual's private email account, and that the respondents offered no evidence regarding whether an attorney-client relationship existed between the attorney and such individual. It is therefore found that the respondents failed to prove that such communication is privileged.

28. Accordingly, it is concluded that, except for the information described in paragraph 16, above, the portions of the Davoren records, described in paragraph 26, above, are communications protected by the attorney-client privilege.

29. The respondents also claimed that the remaining portions of IC 2015-794-054 (i.e., lines 20-32) are exempt from disclosure pursuant to §1-210(b)(4), G.S. However, after careful inspection of those portions, it is found that they are not records of "strategy and negotiations," with respect to a pending claim or litigation.⁴

30. The respondents also claimed that certain Davoren records are entirely exempt from disclosure pursuant to §1-210(b)(13), G.S., as records of a whistleblower investigation. However, after careful inspection of such records, it is concluded that such records are not "records of an investigation," of a whistleblower complaint, and therefore, it is concluded that they are not exempt from disclosure in their entirety, as claimed.

31. Based upon the foregoing, it is concluded that the respondents violated §§1-210(a) and 1-212(a), G.S., by withholding the Davoren records, or portions thereof, not specifically identified as exempt from disclosure in paragraphs 22 and 26, above.

32. Finally, it is found that the following Davoren records submitted by the respondents for in camera inspection are not responsive to the request, described in paragraph 2, above, and need not be disclosed: IC 2015-794-063 through 065.

Podgorski In Camera Records (111 pages)

33. On the index to the Podgorski in camera records (Podgorski records), the respondents claimed certain records are exempt from disclosure pursuant to the attorney-client privilege, and that other records are exempt from disclosure, pursuant to §1-210(b)(13), G.S.

34. After careful inspection of the Podgorski records, it is found that IC 2015-794-106 and 107, and IC 2015-794-110, are communications (e.g. emails) between outside counsel for

⁴ Because the other Davoren records claimed to be exempt pursuant to §1-210(b)(4), G.S., were found to be exempt pursuant to the attorney-client privilege, the Commission need not consider this alternative claim of exemption with regard to such records.

the respondent department and department officials. It is further found that such attorney was acting in his capacity as legal counsel for the respondent department; the communications were between the attorney and official of the respondent department; the communications related to legal advice sought by the official from the attorney; and the communications were made in confidence.

35. It is further found that IC 2015-794-108 through 109 are attachments to certain Podgorski records, described in paragraph 34, above, and that such attachments are not “records of an investigation” of a whistleblower complaint, and it is therefore concluded that such records are not exempt from disclosure, pursuant to §1-210(b)(13), G.S.

36. Accordingly, it is concluded that, except for the information described in paragraph 16, above, the portions of the Podgorski records, described in paragraph 34, above, are communications protected by the attorney-client privilege.

37. In addition, after careful inspection of the Podgorski records, it is found that IC 2015-794-003 through 105 are not “records of an investigation” of a whistleblower complaint, and it is therefore concluded that such records are not exempt from disclosure pursuant to §1-210(b)(13), G.S.

38. Based upon the foregoing, it is concluded that the respondents violated §§1-210(a) and 1-212(a), G.S., by withholding the portions of the Podgorski records, described in paragraphs 16, 35, and 37, above.

39. Finally, it is found that the following Podgorski records submitted by the respondents for in camera inspection are not responsive to the request, described in paragraph 2, above, and need not be disclosed: IC 2015-794-001 and 002.

Barbara Lynch In Camera Records (4 pages)

40. On the index to the Barbara Lynch in camera records (B. Lynch records), the respondents claimed, in addition to the exemption set forth in paragraphs 10 and 11, above, that IC 2015-794-001 through 004 are exempt from disclosure pursuant to the attorney-client privilege.

41. After careful inspection of the B. Lynch records, it is found that IC 2015-794-001 through 004 are communications (e.g. emails) between “in house” counsel for the respondent department and department officials; and emails between outside counsel for the respondent department and department officials; and an attachment to one of the emails. It is further found that such attorneys were acting in their capacities as legal counsel for the respondent department; the communications were between the attorney and official of the respondent department; the communications related to legal advice sought by the official from the attorney; and the communications were made in confidence. It is also found that the attachment was the subject of the legal advice sought.

42. Accordingly, it is concluded that, except for the information described in paragraph 16, above, IC 2015-001 through 004 are communications exempt from disclosure, pursuant to the attorney-client privilege.

43. Based upon the foregoing, it is further concluded that the respondents violated §§1-210(a) and 1-212(a), G.S., by withholding those portions of the B. Lynch records, described in paragraph 16, above.

Duffy In Camera Records (23 pages)

44. On the index to the Duffy in camera records (Duffy records), the respondents claimed, in addition to the exemptions set forth in paragraphs 10 through 15, above, that such records are exempt from disclosure pursuant to the attorney-client privilege, and §1-210(b)(13).

45. After careful inspection of the Duffy records, it is found that IC 2015-794-001, 002, 019 and 020, are communications (e.g. emails) between “in house” counsel for the respondent department and department officials, and between outside counsel for the respondent department and department officials. It is further found that such attorneys were acting in their capacities as legal counsel for the respondent department; the communications were between the attorneys and officials of the respondent department; the communications related to legal advice sought by the officials from the attorney; and the communications were made in confidence.

46. Accordingly, it is concluded that, except for the information described in paragraph 16, above, IC 2015-794-001, 002, 019 and 020, are communications protected by the attorney-client privilege.

47. The respondents also claimed that IC 2015-794-003 through 018, and IC 2015-794-022 and 023, are exempt from disclosure pursuant to §1-210(b)(13), G.S. After careful inspection of such records, it is concluded that such records are not “records of an investigation,” of a whistleblower complaint, and therefore are not exempt from disclosure in their entirety, as claimed by the respondents.

48. Based upon the foregoing, it is concluded that the respondents violated §§1-210(a) and 1-212(a), G.S., by withholding the portions of the Duffy records, not specifically identified as exempt from disclosure in paragraphs 22 and 46, above.

49. Finally, although the respondents submitted IC 2015-794-021 of the Duffy records for in camera inspection, it is found that such record is not responsive to the request and therefore need not be disclosed.

Edward Lynch In Camera Records (37 pages)

50. On the index to the Edward Lynch in camera records (E. Lynch records), the respondents claimed that IC 2015-794-001 through 004, IC 2015-794-029 through 031 and IC 2015-794-036 and IC 2015-794-037 are entirely exempt from disclosure, pursuant to the

attorney-client privilege. According to the index to such records, the remaining pages (IC 2015-794-005 through 028 and IC 2015-794-032 through 035) are “not claimed as privileged.”

51. After careful inspection of the E. Lynch records claimed to be exempt pursuant to the attorney-client privilege, it is found that IC 2015-794-003, line 8, beginning with the word “where,” through the end of line 9; IC 2015-794-029 and IC 2015-794-030; IC 2015-794-031, line 9; and IC 2015-794-036, are communications (e.g. emails) between “in house” counsel for the respondent department and department officials, and between outside counsel for the respondent department and department officials. It is further found that such attorneys were acting in their capacities as legal counsel for the respondent department; the communications were between the attorneys and officials of the respondent department; the communications related to legal advice sought by the officials from the attorney; and the communications were made in confidence.

52. Accordingly, it is concluded that, except for the information described in paragraph 16, above, the portions of the E. Lynch records, identified in paragraph 51, above, are communications protected by the attorney-client privilege.

53. Based upon the foregoing, it is concluded that the respondents violated §§1-210(a) and 1-212(a), G.S., by withholding the portions of the E. Lynch records, not specifically identified as exempt from disclosure in paragraphs 22 and 52, above.

54. Although the respondents submitted IC 2015-794-037 of the E. Lynch records for in camera inspection, it is found that such record is not responsive to the request and therefore need not be disclosed.

Boyle In Camera Records (26 pages)

55. On the index to the Len Boyle in camera records (Boyle records), the respondents claimed, in addition to the exemptions set forth in paragraphs 10 through 13, above, that such records are exempt from disclosure pursuant to the attorney-client privilege, and §1-210(b)(3)(H), G.S.

56. The respondents claimed, first, that IC 2015-794-002 through 014 are exempt from disclosure pursuant to the attorney-client privilege. After careful inspection of such records, it is found, first, that IC 2015-794-011 through 014 are not responsive to the request and need not be disclosed. It is also found that IC 2015-794-002 through 010 are communications (e.g. emails) between an assistant attorney general and department officials. However, it is further found that the respondents failed to prove that such attorney was acting in his or her capacity as legal counsel for the respondent department and that the communications related to legal advice sought by the officials from the attorney.

57. In addition, the respondents claimed that IC 2015-794-001 is exempt from disclosure pursuant to §1-210(b)(3)(H), G.S. However, after careful inspection of such record, it is found that such record was not compiled in connection with the detection or investigation

of crime. It is therefore concluded that IC 2015-794-001 is not exempt from disclosure pursuant to §1-210(b)(3)(H), G.S.

58. Based upon the foregoing, it is concluded that the respondents violated §§1-210(a) and 1-212(a), G.S., by withholding the Boyle records, except for the information described in paragraph 22, above, from the complainant.

Danaher In Camera Records (2006-2007) (69 pages)

59. On the index to the John Danaher (2006-2007) in camera records (Danaher 2006-2007 records), the respondents claimed, in addition to the exemption set forth in paragraphs 10 and 11, above, that such records are exempt from disclosure pursuant to the attorney-client privilege, §§1-210(b)(4), and 1-210(b)(13), G.S.

60. After careful inspection of the Danaher 2006-2007 records, it is found that IC 2015-794-001 through 007; IC 2015-794-009, lines 5, 6, 11; IC 2015-794-016 through 023; IC 2015-794-025; IC 2015-794-027, lines 6-7; IC 2015-794-029; IC 2015-794-038; IC 2015-794-039; IC 2015-794-047 through 049; IC 2015-794-053; IC 2015-794-057; IC 2015-794-064; IC 2015-794-067, line 7, beginning with the word "Nothing," through the end of line 8; IC 2015-794-068 through 069, are communications between attorneys ("in-house" counsel, outside counsel, or assistant attorney general) for the respondent department and several department officials, and attachments thereto. It is further found that, with respect to such communications, such attorneys were acting in their capacities as legal counsel for the respondent department; the communications were between the attorney(s) and employee(s) or official(s) of the respondent department; the communications related to legal advice sought by the official(s) from the attorneys; and the communications were made in confidence. It is found that IC 2015-794-002, 004, 007, 019 through 023 and 025 are attachments that were the subject of the legal advice requested.

61. The respondents also claimed that 2015-794-031 through 034; IC 2015-794-044 through 045, and IC 2015-794-059 and IC 2015-794-060, are exempt from disclosure pursuant to the attorney-client privilege. However, it is found that the respondents failed to prove that the communications contained in those records related to legal advice sought by the department from attorneys acting in their capacities as legal counsel to the respondent department.

62. Accordingly, it is concluded that, except for the information described in paragraph 16, above, the portions of the Danaher 2006-2007 records, described in paragraph 60, above, are communications protected by the attorney-client privilege.

63. The respondents also claimed that IC 2015-794-011 through 015, IC 2015-794-031 through 034, IC 2015-794-046, IC 2015-794-050, IC 2015-794-055, IC 2015-794-056, IC 2015-794-058, IC 2015-794-062, and IC 2015-794-063, are exempt from disclosure pursuant to §1-210(b)(13), G.S. After careful inspection of such records, however, it is concluded that such records are not "records of an investigation," of a whistleblower complaint, and therefore are not exempt from disclosure in their entirety, as claimed.

64. The respondents also claimed that IC 2015-794-055 and IC 2015-794-056 are exempt from disclosure pursuant to §1-210(b)(4), G.S. After careful review of such records, however, it is found that such records consist of a two-page email from an author that is identified in the email only by his or her first name, and in which no particular pending claim or litigation can be discerned. It is found that the respondents offered no evidence at the hearing in this matter to support this claim of exemption. Accordingly, it is concluded that the respondents failed to prove that IC 2015-794-055 and IC 2015-794-056 are exempt from disclosure pursuant to §1-210(b)(4), G.S.

65. Based upon the foregoing, it is concluded that the respondents violated §§1-210(a) and 1-212(a), G.S., by withholding the portions of the Danaher 2006-2007 records, not specifically identified as exempt from disclosure in paragraphs 22 and 62, above.

66. Finally, although the respondents submitted IC 2015-794-024, 026, IC 2015-794-040, IC 2015-794-61 and IC 2015-794-065, for in camera inspection, it is found that such records are not responsive to the request and need not be disclosed.

Danaher In Camera Records 2008 (51 pages)

67. On the index to the John Danaher (2008) in camera records (Danaher 2008 records), the respondents claimed, in addition to the exemption set forth in paragraphs 10 and 11 above, that such records are exempt from disclosure pursuant to the attorney-client privilege, and §1-210(b)(13), G.S.

68. First, the respondents claimed that IC 2015-794-001 through 004, IC 2015-794-010 through 033, and IC 2015-794-035 through 051 are exempt from disclosure pursuant to the attorney-client privilege. After careful inspection of those in camera records, it is found that IC 2015-794-003; IC 2015-794-010; IC 2015-794-012 through 016; IC 2015-794-019, lines 10-12, 19-38; IC 2015-794-024 through 026; IC 2015-794-027, line 10, beginning after the word “times,” through the end of line 11, and lines 17 through 37; IC 2015-794-029, line 14, beginning after the word “2008” through the end of line 14, and line 15, up to the word “if;” IC 2015-794-030 through 033; IC 2015-794-040 through 047, lines 12-32; IC 2015-794-049, lines 12-19; and IC 2015-794-051, lines 1-15, are communications (e.g. emails) between attorneys (“in-house” counsel, outside counsel, or assistant attorney general) for the respondent department and several department officials, and attachments thereto. It is further found that such attorneys were acting in their capacities as legal counsel for the respondent department; the communications were between the attorneys and officials of the respondent department; the communications related to legal advice sought by the officials from the attorneys; and the communications were made in confidence. It is also found that the attachments were the subject of the legal advice sought.

69. Accordingly, it is concluded that, except for the information described in paragraph 16, above, the portions of the Danaher 2008 records, described in paragraph 68, above, are communications protected by the attorney-client privilege.

70. The respondents also claimed that IC 2015-794-001, IC 2015-794-002, IC 2015-794-004, IC 2015-794-011, IC 2015-794-019, IC 2015-794-020, IC 2015-794-022, IC 2015-794-023, IC 2015-794-028, and IC 2015-794-029, are exempt from disclosure pursuant to §1-210(b)(13), G.S. After careful inspection of such records, however, it is concluded that they are not “records of an investigation,” of a whistleblower complaint, and therefore are not exempt from disclosure in their entirety, as claimed.

71. Based upon the foregoing, it is concluded that the respondents violated §§1-210(a) and 1-212(a), G.S., by withholding the portions of the Danaher 2008 records, not specifically identified as exempt from disclosure in paragraphs 22 and 69, above.

72. Finally, although the respondents submitted IC 2015-794-008, IC 2015-794-009 and IC 2015-794-034 for in camera inspection, it is found that such records are not responsive to the request and need not be disclosed.

Danaher In Camera Records (2009) (56 pages)

73. On the index to the John Danaher (2009) in camera records (Danaher 2009 records), the respondents claimed, in addition to the exemption set forth in paragraphs 10 and 11, above, that such records are exempt from disclosure pursuant to the attorney-client privilege, §§1-210(b)(13), and 1-210(b)(4) G.S.

74. The respondents claimed that IC 2015-794-012 through 017, IC 2015-794-023 through 026, IC 2015-794-033 through 042, IC 2015-794-046, IC 2015-794-047, IC 2015-794-049, IC 2015-794-050, and IC 2015-794-053 through 056, are exempt from disclosure pursuant to the attorney-client privilege. After careful inspection of those in camera records, it is found that IC 2015-794-012, lines 5-6, 13-19, 26-29; IC 2015-794-013 through 015; IC 2015-794-16, lines 1-27; IC 2015-794-023; IC 2015-794-025; IC 2015-794-026; IC 2015-794-033, lines 12-27; IC 2015-795-034, lines 8-9; IC 2015-794-035 through 036; IC 2015-794-037, lines 35-37; IC 2015-794-038, lines 1-2; IC 2015-794-039, lines 10, 16-18, 26-38; IC 2015-794-041, lines 6, 12-28; IC 2015-794-042, lines 17-21; IC 2015-794-046, lines 6-7, 13-32; IC 2015-794-047, lines 26-30; IC 2015-794-049; IC 2015-794-050; IC 2015-794-053; IC 2015-794-054, and IC 2015-794-056 are communications (e.g. emails) between attorneys (“in-house” counsel, outside counsel, or assistant attorney general) for the respondent department and several department officials. It is further found that such attorneys were acting in their capacities as legal counsel for the respondent department; the communications were between the attorneys and officials of the respondent department; the communications related to legal advice sought by the officials from the attorneys; and the communications were made in confidence.

75. Accordingly, it is concluded that, except for the information described in paragraph 16, above, the portions of the Danaher 2009 records, described in paragraph 74, above, are communications protected by the attorney-client privilege.

76. The respondents also claimed that IC 2015-794-010, IC 2015-794-011, IC 2015-794-017, IC 2015-794-019, IC 2015-794-021, IC 2015-794-022, IC 2015-794-024, IC 2015-794-028 through 032, and IC 2015-794-037, are exempt from disclosure pursuant to §1-

210(b)(13), G.S. After careful inspection of such records, however, it is concluded that they are not “records of an investigation,” of a whistleblower complaint, and therefore are not exempt from disclosure in their entirety, as claimed by the respondents.

77. The respondents also claimed that IC 2015-794-043 and IC 2015-794-044 are exempt from disclosure pursuant to §1-210(b)(4), G.S., as records pertaining to strategy and negotiations with respect to pending claims or pending litigation.⁵

78. It is found, however, that the respondents did not offer any evidence to prove the applicability of §1-210(b)(4), G.S.

79. Accordingly it is concluded that the respondents failed to prove that the records, described in paragraph 77, above, are exempt from disclosure pursuant to §1-210(b)(4), G.S.

80. On the index to the in camera records, the respondents claimed that IC 2015-794-027 is not responsive to the request. However, after careful inspection of such record, it is clear that such record is, in fact, responsive. The respondents claimed no exemption for such record.

81. With regard to the remaining portion of IC 2015-794-054, specifically, lines 7 through 16, the respondents claimed such portion is exempt from disclosure pursuant to common law as “containing mental impressions of counsel.” However, the respondents offered no evidence or explanation in support this claim of exemption.

82. Based upon the foregoing, it is concluded that the respondents violated §§1-210(a) and 1-212(a), G.S., by withholding the portions of the Danaher 2009 records, not specifically identified as exempt from disclosure in paragraphs 22 and 75, above.

83. Finally, although the respondents submitted IC 2015-794-018, and IC 2015-794-020 for in camera inspection, it is found that such records are not responsive to the request and need not be disclosed.

Danaher In Camera Records (2010) (26 pages)

84. On the index to the John Danaher (2010) in camera records (Danaher 2010 records), the respondents claimed such records are exempt from disclosure pursuant to the attorney-client privilege, and §1-210(b)(13), G.S.

85. The respondents claimed that IC 2015-794-001 through 026 are exempt from disclosure pursuant to the attorney-client privilege. After careful inspection of those in camera records, it is found that IC 2015-794-001, lines 21-25; IC 2015-794-002, lines 16, 22-26, 32; IC 2015-794-003, lines 12-14, 23-33; IC 2015-794-005, lines 23-26; IC 2015-794-006, lines 4-9; IC 2015-794-007; IC 2015-794-008, lines 17-19, 28-33; IC 2015-794-009, lines 1-5; IC 2015-794-010; IC 2015-794-011, lines 10, 16-20, 26; IC 2015-794-012; IC 2015-794-014 through

⁵ On the index to the Danaher 2009 records, the respondents also claimed that IC 2015-794-043 and IC 2015-794-044 are not responsive to the request. However, after careful review of such records, it is found that such records are, in fact, responsive to the request.

016; IC 2015-794-017, lines 4, 10-14, 20; IC 2015-794-018 and 019; IC 2015-794-020, lines 6, 12-16, 22; IC 2015-794-021, lines 3-5, 14-24; and IC 2015-794-22 through 026, are communications (e.g. emails) between attorneys (“in-house” counsel, outside counsel, or assistant attorney general) for the respondent department and several department officials. It is further found that such attorneys were acting in their capacities as legal counsel for the respondent department; the communications were between the attorneys and officials of the respondent department; the communications related to legal advice sought by the officials from the attorneys; and the communications were made in confidence.

86. Accordingly, it is concluded that, except for the information described in paragraph 16, above, the portions of the Danaher 2010 records, described in paragraph 85, above, are communications protected by the attorney-client privilege.

87. In addition, the respondents claimed that, to the extent IC 2015-794-001 through 023, or portions thereof, are not exempt from disclosure pursuant to the attorney-client privilege, they alternatively are exempt from disclosure pursuant to §1-210(b)(13), G.S. After careful inspection of those records or portions thereof, it is concluded that they are not “records of an investigation,” of a whistleblower complaint, and therefore are not exempt from disclosure in their entirety, as claimed by the respondents.

88. Based upon the foregoing, it is concluded that the respondents violated §§1-210(a) and 1-212(a), G.S., by withholding the portions of the Danaher 2010 records, not specifically identified as exempt from disclosure in paragraphs 22 and 86, above.

Hellier In Camera Records (2004-2009) (118 pages)

89. On the index to the Hellier (2004-2009) in camera records (Hellier 2004-2009 records), the respondents claimed, in addition to the exemptions set forth in paragraphs 10, 11, 14 and 15, above, that such records are exempt from disclosure pursuant to the attorney-client privilege, and §1-210(b)(13), G.S.

90. The respondents claimed that IC 2015-794-001 through 005, IC 2015-794-018 through 025, and IC 2015-794-029 through 118, are exempt from disclosure pursuant to the attorney-client privilege. After careful inspection of those records, it is found that IC 2015-794-001; IC 2015-794-004, lines 12-16; IC 2015-794-005, lines 1-2, 8-19; IC 2015-794-018 through 020; IC 2015-794-022; IC 2015-794-023; IC 2015-794-033; IC 2015-794-034, lines 7-9, 18-35; IC 2015-794-035 through 037; IC 2015-794-042; IC 2015-794-044 through 059; IC 2015-794-064, lines 12-13, 26, 32-34; IC 2015-794-065; IC 2015-794-067, lines 30-31; IC 2015-794-069; IC 2015-794-070; IC 2015-794-073, lines 13-14; IC 2015-794-075, lines 14-15; IC 2015-794-078; IC 2015-794-080 through 081; IC 2015-794-083; IC 2015-794-101, lines 17-18 up to the word “I”, and lines 25-32; IC 2015-794-102; IC 2015-794-104 through 107, lines 15-24; IC 2015-794-108, lines 13-22; IC 2015-794-110 through 111; and IC 2015-794-115, lines 8-9; IC 2015-794-116; and IC 2015-794-118, are communications (e.g. emails) between attorneys (“in-house” counsel, outside counsel, or assistant attorney general) for the respondent department and several department officials, and attachments thereto. It is further found that such attorneys were acting in their capacities as legal counsel for the respondent department; the

communications were between the attorneys and officials of the respondent department; the communications related to legal advice sought by the officials from the attorneys; and the communications were made in confidence. It is also found that the attachments were the subject of the legal advice sought.

91. With regard to IC 2015-794-039, 040, 041, and 112, it is found that such records are emails and attachments that include recipients or senders whom the respondents failed to prove were “attorneys” or “clients,” (nor are these facts evident from the records themselves), and that therefore, the respondents failed to prove such communications are protected by the attorney-client privilege.

92. Accordingly, it is concluded that, except for the information contained in paragraph 16, above, the portions of the Hellier 2004-2009 records, described in paragraph 90, above, are exempt from disclosure pursuant to the attorney-client privilege.

93. The respondents also claimed, on the index to the Hellier 2004-2009 records, that certain of those records are exempt from disclosure pursuant to §1-210(b)(13), G.S. After careful inspection of such records, however, it is concluded that they are not “records of an investigation,” of a whistleblower complaint, and therefore are not exempt from disclosure in their entirety, as claimed.

94. Finally, although the respondents submitted IC 2015-794-006 through 017 and IC 2015-794-026 through 028 for in camera inspection, they indicated on the index that they claimed no exemption for such records.

95. Based upon the foregoing, it is concluded that the respondents violated §§1-210(a) and 1-212(a), G.S., by withholding the portions of the Hellier 2004-2009 records, not specifically identified as exempt from disclosure in paragraphs 22 and 92, above.

Hellier In Camera Records (2006-2008) (364 pages)

96. On the index to the Hellier (2006-2008) in camera records (Hellier 2006-2008 records), the respondents claimed, in addition to the exemptions set forth in paragraphs 10 through 15, above, that such records are exempt from disclosure pursuant to the attorney-client privilege, and §§1-210(b)(3)(H), and 1-210(b)(13), G.S.

97. With regard to the claim that certain Hellier 2006-2008 records are exempt from disclosure pursuant to the attorney client privilege, it is found, after careful inspection of such records, that the following are communications (e.g. emails) between attorneys (“in-house” counsel, outside counsel, or assistant attorney general) for the respondent department and several department officials, and attachments thereto. It is further found that such attorneys were acting in their capacities as legal counsel for the respondent department; the communications were between the attorneys and officials of the respondent department; the communications related to legal advice sought by the officials from the attorneys; and the communications were made in confidence: IC 2015-794-001 through 008; IC 2015-794-011 through 020; IC 2015-794-022 through IC 2015-794-024; IC 2015-794-029 through 045; IC

2015-794-051 through 057; IC 2015-794-059; IC 2015-794-066; IC 2015-794-067; IC 2015-794-074 through 076; IC 2015-794-077, lines 6, 12, 19-23; IC 2015-794-078 through 081; IC 2015-794-092 through 118; IC 2015-794-121, lines 24-38; IC 2015-794-123 through 126; IC 2015-794-140 through 144; IC 2015-794-146 through 149; IC 2015-794-232, line 27, after the word “well,” up to the word “I,” in line 29; IC 2015-794-234, line 12, from after the word “re:,” through the end of line 18; IC 2015-794-235 through 237; IC 2015-794-242; IC 2015-794-244, lines 11-15; IC 2015-794-245; IC 2015-794-265; IC 2015-794-266, lines 11-13, 21-27; IC 2015-794-267 through 277; IC 2015-794-281; IC 2015-794-285; IC 2015-794-287; IC 2015-794-290; IC 2015-794-291, lines 5-7; IC 2015-794-295 through 300; IC 2015-794-302; IC 2015-794-310 through IC 2015-794-313; IC 2015-794-322; IC 2015-794-324; IC 2015-794-327 through 329; IC 2015-794-346 through 353; IC 2015-794-354, lines 11-12; IC 2015-794-355 through 357; and IC 2015-794-364, lines 10-15. It is also found that the attachments were the subject of the legal advice sought.

98. With regard to IC 2015-794-147, and IC 2015-794-289, it is found that such records are emails that include recipients or senders whom the respondents failed to prove were “attorneys” or “clients,” (nor are these facts evident from the records themselves), and that therefore, the respondents failed to prove such communications are protected by the attorney-client privilege.

99. Accordingly, it is concluded that, except for the information contained in paragraph 16, above, the portions of the Hellier 2006-2008 records, described in paragraph 97, above, are communications protected by the attorney-client privilege.

100. The respondents also claimed that certain of the Hellier 2006-2008 records are exempt from disclosure pursuant to §1-210(b)(13), G.S. After careful inspection of such records, it is concluded that the following are “records of an investigation,” of a whistleblower complaint: IC 2015-794-243; IC 2015-794-247, and IC 2015-794-248, lines 22-29. It is concluded, therefore, that such records, or portions thereof, are exempt from disclosure.

101. Finally, the respondents claim that IC 2015-794-130 through 132, and IC 2015-794-359 through 363 are exempt from disclosure pursuant to §1-210(b)(3)(H), G.S.

102. After careful inspection of IC 2015-794-130 through 132, and IC 2015-794-359 through 363, however, it is concluded that such records were not compiled in connection with the detection or investigation of crime. It is therefore concluded that such records are not exempt from disclosure pursuant to §1-210(b)(3)(H), G.S.

103. Although the respondents submitted IC 2015-794-60 through 065 and IC 2015-794-082 through 091, for in camera inspection, they indicated on the index that they claimed no exemption for such records.

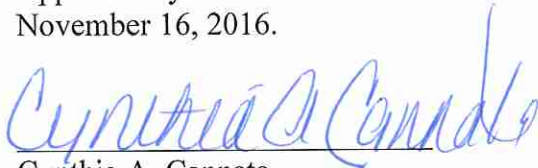
104. Based upon the foregoing, it is concluded that the respondents violated §§1-210(a) and 1-212(a), G.S., by withholding the portions of the Hellier 2006-2008 records, not specifically identified as exempt from disclosure in paragraphs 22, 99, and 100, above.

105. Finally, after careful inspection of the Hellier 2006-2008 records, it is found that the following are not responsive to the request and need not be disclosed: IC 2015-794-007, IC 2015-794-014, IC 2015-794-096, IC 2015-794-101, IC 2015-794-119, IC 2015-794-150, IC 2015-794-234, IC 2015-794-249 through 251, IC 2015-794-278 through 280, IC 2015-794-314, IC 2015-794-332, and IC 2015-794-358.

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 22, 28, 36, 37, 42, 46, 52, 62, 69, 75, 86, 92, 99, and 100, 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.

Approved by Order of the Freedom of Information Commission at its regular meeting of November 16, 2016.



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:

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Acting Clerk of the Commission