

FREEDOM OF INFORMATION COMMISSION
OF THE STATE OF CONNECTICUT

In The Matter of a Complaint by

FINAL DECISION

Noah Snyder,

Complainant

against

Docket #FIC 2018-0295

Scott Semple, Commissioner,
State of Connecticut, Department
of Correction; and State of Connecticut,
Department of Correction,

Respondents

April 24, 2019

The above-captioned matter was heard as a contested case on September 11, 2018, at which time the complainant and the respondents appeared, stipulated to certain facts and presented testimony, exhibits and argument on the complaint. The complainant, who was incarcerated at the time of the September 11th hearing, appeared via teleconference, pursuant to the January 2004 memorandum of understanding between the Commission and the Department of Correction. See Docket No. CV 03-0826293, Anthony Sinchak v. FOIC et al, Superior Court, J.D. of Hartford at Hartford, Corrected Order dated January 27, 2004 (Sheldon, J.).

On November 15, 2018, pursuant to an order of the hearing officer, the respondents submitted an after-filed exhibit, which has been marked as: Respondents' Exhibit 11 (after-filed): Affidavit of CS Washington, dated November 13, 2018.

Subsequently, on the hearing officer's own motion, the hearing was reopened for the purpose of taking additional evidence. Such reopened hearing was held on January 7, 2019, at which time the complainant and the respondents appeared and presented additional testimony, exhibits and argument on the complaint.¹

A Report of Hearing Officer was issued on February 4, 2019. The Commission considered such report at its regular meeting of March 13, 2019.² At such time, the Commission remanded the matter to the hearing officer for further review.

On April 5, 2019, pursuant to two separate orders of the hearing officer, the respondents submitted the following after-filed exhibits: Respondents' Exhibit 17 (after-filed): Affidavit of

¹ The Commission notes that, at the time of the January 7th hearing, the complainant was not incarcerated, but remained in the custody of the Department of Correction.

² The Commission notes that, at the time of the Commission's March 13th meeting, the complainant was again incarcerated, and appeared via teleconference.

CS Campanelli, dated April 5, 2018 (regarding in camera attachments); and Respondents' Exhibit 18 (after-filed): Affidavit of CS Campanelli, dated April 5, 2018 (regarding redaction of first names).

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 May 23, 2018, the complainant made a request to the respondents for the following:

[a] Any written correspondence between any and all DOC [Department of Correction] staff especially kitchen staff or staff holding the titles CFSS I, CFSS II, or CFSS III, or regional institutional or district food service managers, to and/or from any and all UCONN and/or CMHE staff discussing, referencing, and/or referencing myself specifically (inmate Noah Snyder #282683) by name, pseudonym, inmate number, or any other manner identifying me specifically and/or by reference, including electronic correspondence.

[b] All invoices for food and kitchen supplies ordered for use at CRCI and/or an enumeration of all individual food items ordered for use at CRCI from October 1, 2017, to the date this request is fulfilled. ("May 23rd request").

The complainant also requested that the costs of copying the requested documents be waived.

3. It is found that, by letter dated May 29, 2018, the respondents acknowledged the complainant's May 23rd request, and requested that the complainant provide a date range for the requested correspondence described in paragraph 2[a], above.

4. It is found that, by inmate request form dated May 31, 2018, the complainant informed the respondents that he did not wish to limit the date range in the request described in paragraph 2[a], above.

5. By letter filed on June 5, 2018, the complainant appealed to this Commission alleging that the respondents violated the Freedom of Information ("FOI") Act by failing to comply with his May 23rd request, described in paragraph 2, above. The complainant also requested that a civil penalty be imposed against the respondents.

6. It is found that, by letter dated June 21, 2018, the respondents informed the complainant that the DOC's Management Information Systems department runs email queries by name, and therefore, the respondents would need the names of people from whom the complainant sought correspondence in order to search for records responsive to the request

described in paragraph 2[a], above. The respondents also informed the complainant that his request for invoices, described in paragraph 2[b], above, was forwarded to the Director of Food Services to compile.

7. It is found that, by letter dated July 10, 2018, the complainant informed the respondents that he did not wish to limit the scope of his request to specific employees.

8. It is found that, by letter dated July 20, 2018, the respondents informed the complainant that documents (totaling 229 pages) responsive to his May 23rd request, as well as a similar request made by the complainant to the University of Connecticut Health Center, Correctional Managed Health Care, were ready for dissemination. The respondents requested prepayment in the amount of \$57.25, and informed the complainant that, in accordance with the DOC's Administrative Directive ("A.D.") 6.10,³ if his balance did not exceed \$5.00 for 90 days he would be considered indigent and the copies would be provided free of charge. It is found that, by letter dated August 1, 2018, the complainant objected to the fee charge, and to the respondents' attempts to modify his May 23rd request.

9. It is found that in mid-August 2018, Counselor Supervisor ("CS") Washington, the respondents' FOI Administrator at that time, met with the complainant regarding narrowing his request described in paragraph 2[a], above. It is found that, based on his conversation with the complainant, CS Washington requested that the respondents' Management Information Systems, in cooperation with the Department of Administrative Services Bureau of Enterprise Systems and Technology, conduct a search for emails. The search included emails for the Carl Robinson Correctional Institution ("CRI") kitchen staff, during the period when the complainant was incarcerated at CRI, and up to the date of the records request (i.e., October 1, 2017, through May 23, 2018). The complainant did not identify specific employees.

10. It is found that on August 29, 2018, the respondents attempted to deliver certain responsive records to the complainant, but when the complainant refused to sign an acknowledgement form for the receipt of such records, the respondents withheld the records. Subsequently, in early September 2018, the respondents delivered to the complainant responsive records, including redacted emails, without requiring a signature, and free of charge.

³ The Commission notes that DOC's A.D. 3.10 (Fees, Reimbursements and Donations), provides, in relevant part: "An inmate shall be charged twenty-five cents for each page copied. The fee shall be waived if an inmate is indigent. For copies of records pursuant to the [FOI] Act, an inmate shall be considered indigent if the monetary balance in his or her inmate trust account, or any other known account, has not equaled or exceeded five dollars (\$5.00) at any time (1) during the ninety (90) days preceding the receipt by the Department of the request for records and (2) during the days preceding the date on which the request for records is fulfilled (up to a maximum of ninety (90) days after the date of the request)." Further, A.D. 6.10 (Inmate Property) provides, in relevant part, that "[a]n inmate shall be considered indigent when he or she has less than five dollars (\$5.00) on account at admission or when the monetary balance in his or her inmate trust account, or in any other known account, has not equaled or exceeded five dollars (\$5.00) at any time during the preceding ninety (90) days." See Docket #FIC 2015-644; Andres Sosa v. Scott Semple, Commissioner, State of Connecticut, Department of Correction; and State of Connecticut, Department of Correction (June 28, 2016).

11. 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.

12. 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.

13. 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."

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

15. At the hearings, the complainant acknowledged receiving records responsive to his request, but contended that the respondents did not conduct an exhaustive search and there were documents missing (e.g., written correspondence, text messages, invoices). The complainant also challenged the copying fees, DOC's indigency policy, and redactions made to emails.

16. With respect to the copying fees and indigency policy, the Commission has previously approved the DOC's standard of indigence insofar as it looks at the inmate's trust account balance as of the date of the request, and looks back in time on the inmate's trust account history. See Docket #FIC 2010-030; Bryant Rollins v. Freedom of Information Officer, State of Connecticut, Department of Correction; and State of Connecticut, Department of Correction (September 22, 2010); Docket #FIC 2009-137; Bryant Rollins v. Administrator, State of Connecticut, Department of Correction, Freedom of Information Office; and State of Connecticut, Department of Correction (February 24, 2010); Docket #FIC 2009-483; Bryant K. Rollins v. Executive Director, State of Connecticut, University of Connecticut Health Center, Correctional Managed Health Care; and State of Connecticut, University of Connecticut Health Center, Correctional Managed Care (July 14, 2010); and Docket #FIC 2015-644; Andres Sosa v. Scott Semple, Commissioner, State of Connecticut, Department of Correction; and State of Connecticut, Department of Correction (June 28, 2016).

17. In addition, as already found in paragraph 10, above, the respondents provided the complainant with copies of records responsive to his May 23rd request free of charge.

18. With respect to the requests described in paragraph 2[a], above, it is found that, in addition to conducting the search for emails, as described in paragraph 9, above, CS Washington searched for written correspondence and facsimiles. With respect to text messages, at the April 24, 2019 Commission meeting, the complainant clarified that he sought text messages only to and from those employees with the specific titles “CFSS I, CFSS II, or CFSS III” and “Regional Institutional or District Food Service Managers.” At the hearing, CS Washington testified that he does not have a mechanism by which to “capture” text messages. CS Washington testified that he contacted the respondents’ telephone service provider regarding retrieving text messages, and was informed that such information would not be provided without a warrant. It is found, however, that the respondents did not provide any testimony as to whether DOC staff members searched their personal and/or department-issue cellphones for any responsive text messages. It is therefore found that the respondents failed to prove that they do not maintain text messages responsive to the requests described in paragraph 2, above. Accordingly, it is concluded that the respondents violated the FOI Act by withholding text messages.

19. With respect to the request described in paragraph 2[b], above, CS Washington testified that, although he was not personally involved in the search for responsive invoices, the FOI liaison who conducted the search had received FOI training from CS Washington, and informed CS Washington that he conducted an exhaustive search. Based on the facts and circumstances in this case, it is found that the respondents provided the complainant with all responsive invoices.

20. With respect to the redacted emails, described in paragraph 10, above, the respondents claim that the redacted information is exempt from disclosure pursuant to §§1-210(b)(10) and 1-210(b)(18), G.S., respectively.

21. On September 27, 2018, the respondents submitted 29 pages of unredacted emails for in camera inspection, along with an in camera Index. The in camera records have been marked as IC-2018-0295-1 through IC-2018-0295-29. On April 5, 2019, the respondents also provided, as part of Respondents’ Exhibit 17, three pages of unredacted documents, which they identify as attachments to the emails marked as IC-2018-0295-11, IC-2018-0295-14 and IC-2018-0295-28. The respondents do not claim that such attachments are exempt from disclosure.

22. With respect to the email attachments described in paragraph 21, above, in his April 5th affidavit (Respondents’ Exhibit 17), Counselor Supervisor (“CS”) Campanelli, the current FOI Administrator for the DOC, attests that the respondents “inadvertently failed to notice that there were attachments associated with the emails [IC-2018-0295-11, IC-2018-0295-14 and IC-2018-0295-28].... As a result, they were not searched for at the time of the Respondent Department’s original efforts to compile records responsive to the complainant’s request.” CS Campanelli further attests that “[t]he attachments were requested from the authors of the emails” and “[o]n April 3, 2019, the complainant was provided with unredacted copies of all the attachments, free of charge.” [Emphasis in original].

23. With respect to the respondents' claim that portions of IC-2018-0295-1 through IC-2018-0295-3 are exempt from disclosure pursuant to §1-210(b)(10), G.S., such statute permits a public agency to withhold from disclosure records of "communications privileged by the attorney-client relationship."

24. 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.

25. 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....

26. The Supreme Court has also 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.

27. As a general rule, "communications between client and attorney are privileged when made in confidence for the purpose of seeking legal advice." (Citation omitted.) Olson v. Accessory Controls and Equipment Corp., et al., 254 Conn. 145, 157 (2000). Although Connecticut courts have recognized that "statements made in the presence of third parties are usually not privileged because there is then no reasonable expectation of privacy," they have also recognized that "the presence of certain third parties . . . who are agents or employees of an attorney or client, and who are necessary to the consultation, will not destroy the privilege." Id.

28. Based upon the evidence in the record and upon careful examination of IC-2018-0295-1 through IC-2018-0295-3, it is found that the following records are communications transmitted in confidence between an attorney for the respondents and public official(s) and/or employee(s) acting within the scope of their employment: IC-2018-0295-1 (lines 21-25), IC-2018-0295-2 (lines 23-31) and IC-2018-0295-3 (lines 6-7).⁴ It is further found that such records relate to legal advice sought by the respondents or in furtherance of the rendition of such legal

⁴ For ease of reference, the hearing officer numbered the lines in pencil beginning at the left margin of each line.

advice, within the meaning of §§1-210(b)(10) and 52-146r(2), G.S. It is also found that the respondents did not waive the attorney-client privilege.

29. It is concluded, therefore, that IC-2018-0295-1 (lines 21-25), IC-2018-0295-2 (lines 23-31) and IC-2018-0295-3 (lines 6-7), are exempt from disclosure pursuant §1-210(b)(10), G.S., and that the respondents did not violate the disclosure provisions of §§1-210(a) and 1-212(a), G.S., by withholding such records.

30. With respect to the respondents' claim that portions of IC-2018-0295-1 through IC-2018-0295-29 are exempt from disclosure pursuant to §1-210(b)(18), G.S., such statute permits a public agency to withhold from disclosure the following:

Records, the disclosure of which the Commissioner of Correction, or as it applies to Whiting Forensic Hospital, the Commissioner of Mental Health and Addiction Services, has reasonable grounds to believe may result in a safety risk, including the risk of harm to any person or the risk of an escape from, or a disorder in, a correctional institution or facility under the supervision of the Department of Correction or Whiting Forensic Hospital. Such records shall include, but are not limited to:

(A) Security manuals, including emergency plans contained or referred to in such security manuals;

(B) Engineering and architectural drawings of correctional institutions or facilities or Whiting Forensic Hospital facilities;

(C) Operational specifications of security systems utilized by the Department of Correction at any correctional institution or facility or Whiting Forensic Hospital facilities, except that a general description of any such security system and the cost and quality of such system may be disclosed;

(D) Training manuals prepared for correctional institutions and facilities or Whiting Forensic Hospital facilities that describe, in any manner, security procedures, emergency plans or security equipment;

(E) Internal security audits of correctional institutions and facilities or Whiting Forensic Hospital facilities;

(F) Minutes or recordings of staff meetings of the Department of Correction or Whiting Forensic Hospital facilities, or portions of such minutes or recordings, that contain or reveal information relating to security or other records otherwise exempt from disclosure under this subdivision;

(G) Logs or other documents that contain information on the movement or assignment of inmates or staff at correctional institutions or facilities; and

(H) Records that contain information on contacts between inmates, as defined in section 18-84, and law enforcement officers....

31. The respondents contend that IC-2018-0295-1 through IC-2018-0295-29, respectively, contain the first names and personal cell phone numbers of DOC staff members as well as the first names of certain UConn Health Center employees, which, if disclosed, may result in a safety risk.

32. In his April 5th Affidavit (Respondents' Exhibit 18), CS Campanelli attests that:

disclosure of the first names of the staff [including the medical staff who work in the prison facilities and have direct contact with the inmate population] would make it easier for inmates or their associates to obtain information regarding them and their families and that such information could be used to undermine the staff member's authority. If the staff member's authority is undermined, inmates may be more encouraged to disobey directives which may create a safety risk in the facility. Such information may also be used to harass or otherwise threaten the harm of staff members and their families outside of the prison facility in that inmates who are dissatisfied with their treatment by a staff member may engage associates outside of the facility to retaliate against that staff member by harming, or threatening to harm, a staff member or their family member or friend.

33. At the January 7th hearing, CS Washington also testified that disclosure of the personal cell phone numbers of DOC staff members could be used to harass, intimidate, and undermine the authority of DOC staff members.

34. The Commission has previously found that the first names of DOC staff members are exempt from disclosure pursuant to §1-210(b)(18), G.S. See Docket #FIC 2009-350; Curt Rivard v. Jon Brighthaupt, Deputy Warden, State of Connecticut, Department of Correction, Northern Correctional Institution, et. al. (May 12, 2010) ("Rivard"); see also Docket #FIC 2017-0296; Alejandro Velez v. Scott Semple, Commissioner, State of Connecticut, Department of Correction; and State of Connecticut, Department of Correction (May 23, 2018).

35. In Rivard, the Commission found that "the use of only last names creates and maintains the formal relationship between staff and inmates that is necessary to maintain order in a correctional institution or facility because the formality generates respect for a staff member and his or her authority." The Commission further found that "if an inmate does not respect a staff member and his or her authority, he is more likely to disobey directives which may result in

a safety risk...within the meaning of §1-210(b)(18), G.S.” Accordingly, the Commission concluded in Rivard that the Commissioner of Correction had reasonable grounds to believe that disclosure of the first names of staff members may result in a safety risk, and that therefore, the respondents did not violate the FOI Act by withholding such information.

36. It is found that the Commissioner of Correction had reasonable grounds to believe that the disclosure of the first names and personal cell phone numbers of DOC staff members, as well as the first names of certain UConn Health Center employees, may result in a safety risk.

37. Based upon the foregoing, it is concluded that the respondents did not violate §§1-210(a) and 1-212(a), G.S., by redacting the first names and personal cell phone numbers of DOC staff members, and of the first names of the UConn Health Center employees, contained in IC-2018-0295-1 through IC-2018-0295-29.

38. Notwithstanding the conclusion reached in paragraph 18, above, the Commission in its discretion declines to impose a civil penalty in this matter.

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

1. The respondents shall undertake a search for text messages responsive to the complainant’s records request as clarified in paragraph 18 of the findings, above, and provide the complainant with a copy of such text messages, if located. The respondents shall also provide an affidavit to the complainant and the Commission, prepared by a person with knowledge of the efforts taken, and detailing the scope and results of their search.

2. Henceforth, the respondents shall strictly comply with §§1-210(a) and 1-212(a), G.S.

Approved by Order of the Freedom of Information Commission at its regular meeting of April 24, 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:

NOAH SNYDER, #282683, Willard-Cybulski CI, 391 Shaker Road, Enfield, CT 06032

SCOTT SEMPLE, COMMISSIONER, STATE OF CONNECTICUT, DEPARTMENT OF CORRECTION; AND STATE OF CONNECTICUT, DEPARTMENT OF CORRECTION, c/o Attorney Nancy Kase O'Brasky, Department of Correction, 24 Wolcott Hill Road, Wethersfield, CT 06109 and Attorney Tracie C. Brown, Department of Correction, 24 Wolcott Hill Road, Wethersfield, CT 06109

Cynthia A. Cannata
Acting Clerk of the Commission