



FREEDOM OF INFORMATION



Connecticut Freedom of Information Commission • 18-20 Trinity Street, Suite 100 • Hartford, CT 06106
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Ally Sexton and the
Administrative and Residual Union,
Complainant(s)
against

Notice of Meeting

Docket #FIC 2016-0416

Commissioner, State of Connecticut,
Department of Revenue Services; and
State of Connecticut, Department of
Revenue Services,
Respondent(s)

April 20, 2017

Transmittal of Proposed Final Decision

In accordance with Section 4-179 of the Connecticut General Statutes, the Freedom of Information Commission hereby transmits to you the proposed finding and decision prepared by the hearing officer in the above-captioned matter.

This will notify you that the Commission will consider this matter for disposition at its meeting which will be held in the Freedom of Information Commission Hearing Room, 18-20 Trinity Street, 1st floor, Hartford, Connecticut, at **2 p.m. on Wednesday, May 10, 2017**. At that time and place you will be allowed to offer oral argument concerning this proposed finding and order. Oral argument shall be limited to ten (10) minutes. For good cause shown, however, the Commission may increase the period of time for argument. A request for additional time must be made in writing and should be filed with the Commission **ON OR BEFORE April 28, 2017**. Such request **MUST BE (1) copied to all parties, or if the parties are represented, to such representatives, and (2) include a notation indicating such notice to all parties or their representatives.**

Although a brief or memorandum of law is not required, if you decide to submit such a document, an **original and fourteen (14) copies** must be filed **ON OR BEFORE April 28, 2017**. **PLEASE NOTE: Any correspondence, brief or memorandum directed to the Commissioners by any party or representative of any party MUST BE (1) copied to all parties, or if the parties are represented, to such representatives, (2) include a notation indicating such notice to all parties or their representatives and (3) be limited to argument. NO NEW EVIDENCE MAY BE SUBMITTED.**

If you have already filed a brief or memorandum with the hearing officer and wish to have that document distributed to each member of the Commission, it is requested that **fifteen (15) copies** be filed **ON OR BEFORE April 28, 2017**, and that **notice be given to all parties or if the parties are represented, to their representatives, that such previously filed document is being submitted to the Commissioners for review.**

By Order of the Freedom of
Information Commission

W. Paradis

Acting Clerk of the Commission

Notice to: Ally Sexton and the Administrative and Residual Union
Attorney Shawn M. Sims and Attorney Marilee A. Clark

FIC# 2016-0416/Trans/wrbp/VRP//TAH/2017-04-20

FREEDOM OF INFORMATION COMMISSION
OF THE STATE OF CONNECTICUT

In the Matter of a Complaint by

Report Of Hearing Officer

Alice Sexton and the Administrative
and Residual Union,

Complainants

against

Docket #FIC 2016-0416

Commissioner, State of Connecticut,
Department of Revenue Services; and
State of Connecticut, Department of
Revenue Services,

Respondents

April 11, 2017

The above-captioned matter was heard as a contested case on September 8, 2016, at which time the complainants and the respondents appeared, stipulated to certain facts and presented testimony, exhibits and argument on the complaint. The respondents submitted for in camera inspection the records as described in paragraph 17, below.

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 complaint filed June 6, 2016, the complainants appealed to the Commission, alleging that the respondents violated the Freedom of Information (“FOI”) Act by denying their requests for public records.
3. It is found that the complainants, by five emails dated May 1, 2016, requested the following:
 - a. “electronic copies of all emails sent between two employees of the respondent DRS [Department of Revenue Services], Michele Greaves and Dennis Haskell, from June 1, 2014 to the present”
 - b. “a copy of any and all discipline logs kept by the Department of Revenue Services Human Resources Office or Internal Audits, or other office, for all “browsing”¹ allegations since January 1, 2006”

¹ “Browsing” is unauthorized inspection of tax return information.

c. “electronic copies of all emails sent between two employees of DRS, Jeanette Perez and David Burke, from December 1, 2015 to the present. This includes all emails sent by Ms. Perez to Mr. Burke where Mr. Burke is either on the TO, CC or BCC line, and vice versa”

d. (i) “copies of any and all procedures or policies which currently govern or specifically apply to the Department of Revenue Services’ Internal Audit Division’s investigation of “browsing” incidents; and

(ii) “a copy of the *two* most recent reports used by the Department’s Internal Audit Division to identify any “browsing” incidents by employees, whether or not said reports have led to discipline of any employees” [emphasis in original]; and

e. “copies of any and all email and meeting requests between any or all of the following people for the period April 1, 2014 to the present that reference Cassandra Thompson *or* Denise Duda by name, either first, last or both. Jeanette Perez, Benjamin Alejandro, Vinnie (aka Vincent aka Vinny) Pinchera, Pam Doolin, and/or Denise Duda.” [Emphasis in original.]

4. It is found that the respondents acknowledged the request on May 6, 2016. The respondents indicated that the requests for emails would be very time consuming, and that several other prior FOI Act requests were pending before the respondents.

5. It is found that on June 6, 2016 the respondents provided the complainants with records responsive to the requests described in paragraph 3.b and 3.d(i), above.

6. It is found that the respondents provided an additional update on July 5, 2016 regarding the request for emails, indicating that they were “continuing the process of obtaining access to and reviewing email folders of the several Department employees identified in your remaining requests for records.”

7. It is found that the respondents provided an additional update on August 5, 2016, in which they indicated that the respondents had “recently obtained access to the email folders of the numerous Department employees identified in your requests and [have] begun reviewing said folders for the records you have requested.”

8. As of the date of the hearing in this matter, no emails had been provided to the complainants.

9. On September 12, 2016, the respondents submitted to the Commission for an in camera inspection three pages of records responsive to the portion of the complainants’ request, described in paragraph 3.d(ii), above, for the two most recent reports used to identify “browsing” incidents. These reports are in the form of spreadsheets that are lightly annotated.

10. 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.

11. Section 1-210(a), G.S., provides in relevant part:

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.

12. It is concluded that the requested records, to the extent they exist, are public records within the meaning of §§1-200(5) and 1-210(a), G.S.

13. The respondents contend that the records submitted for in camera inspection all consist of information that is exempt from disclosure pursuant to §§1-210(b)(10) and 12-15(a) and (h)(2), G.S.

14. Section §1-210(b)(10), G.S., provides that disclosure is not required of:

Records, tax returns, reports and statements exempted by federal law or the general statutes or communications privileged by the attorney-client relationship, marital relationship, clergy-penitent relationship, doctor-patient relationship, therapist-patient relationship or any other privilege established by the common law or the general statutes, including any such records, tax returns, reports or communications that were created or made prior to the establishment of the applicable privilege under the common law or the general statutes

15. Section 12-15(a), G.S., prohibits the disclosure of “return information.”

16. Section 12-15(h)(2), G.S., defines “return information” to mean:

... a taxpayer's identity, the nature, source, or amount of the taxpayer's income, payments, receipts, deductions, exemptions, credits, assets, liabilities, net worth, tax liability, tax collected or withheld, tax underreportings, tax overreportings, or tax payments, whether the taxpayer's return was, is being, or will be examined or subjected to other investigation or processing, or any other data received by, recorded by, prepared by, furnished to, or collected by the commissioner with respect to a return or with respect to the determination of the existence, or possible existence, of liability of any person for any tax, penalty, interest, fine, forfeiture, or other imposition, or offense. *"Return information" does not include data in a form which cannot be associated with, or otherwise identify, directly or indirectly, a particular taxpayer.* Nothing in the preceding sentence, or in any other provision of law, shall be construed to require the disclosure of standards used or to be used for the selection of returns for examination, or data used or to be used for determining such standards or the disclosure of the identity of a confidential informant, whether or not a civil or criminal tax investigation has been undertaken or completed. [Emphasis added.]

17. It is found that the three pages of in camera records are copies of the two most recent reports used by the Department's Internal Audit Division to identify any “browsing” incidents by employees, and are responsive to the portion of the complainant's request described in paragraph 3.d(ii), above.

18. In Peruta v. Commissioner of Revenue Services, docket #FIC 2004-163, the Commission concluded that reports of audits containing return information may not be disclosed even if all taxpayer identification is removed, citing Church of Scientology v. IRS, 484 U.S. 9 (1987) (holding that the language “data in a form which cannot be associated with, or otherwise identify, directly or indirectly, a particular taxpayer” was only intended to permit the continuation of the Internal Revenue Service's practice of releasing statistical studies and compilations that do not identify particular taxpayers).

19. In Jacobs v. Department of Revenue Services, docket #FIC 2008-750, the Commission concluded that records that consisted almost entirely of information from and about the petitioning taxpayers in support of their petitions for tax relief were clearly “return information” within the meaning of §12-15(h)(2), G.S., and therefore exempt from disclosure.

20. After careful review of the in camera records, it is found that they are audits of the Department's employees' access to taxpayer information, not audits of taxpayers as in Peruta, above.

21. It is found that the in camera records do not consist almost entirely of information from and about taxpayers, as was the case in Jacobs. Rather, they consist almost entirely of information about employees of the Department. One in camera record is a one-page spreadsheet with 25 columns; the other is a two-page spreadsheet with 37 columns. On both of the spreadsheets, one column appears to contain a taxpayer's first name, and one appears to contain that taxpayer's last name. One column of handwritten annotations appears to contain information pertaining to the named taxpayers. The remaining columns contain only information about Department employees, and how, where and when those employees accessed taxpayer information.

22. It is therefore found that the in camera records, with the exception of the three columns appearing to name or otherwise identify taxpayers, consist entirely of data which cannot be associated with, or otherwise identify, directly or indirectly, a particular taxpayer, within the meaning of §12-15(h)(2), G.S.

23. It is found that the in camera records are compilations that, with the exception of the three columns appearing to name or otherwise identify taxpayers, are compilations that do not identify particular taxpayers, as described in Church of Scientology, above.

24. It is found that, with the exception of the handwritten annotations in one column of the in camera records, the data printed in the spreadsheet records is maintained in a computer storage system.

25. Section 1-211(a), G.S., provides:

Any public agency which maintains public records in a computer storage system shall provide, to any person making a request pursuant to the Freedom of Information Act, a copy of any nonexempt data contained in such records, properly identified, on paper, disk, tape or any other electronic storage device or medium requested by the person, including an electronic copy sent to the electronic mail address of the person making such request, if the agency can reasonably make any such copy or have any such copy made. Except as otherwise provided by state statute, the cost for providing a copy of such data shall be in accordance with the provisions of section 1-212.

26. It is found that the in camera records are largely comprised of nonexempt data in the Department's computer storage system.

27. It is found that the names of taxpayers could be redacted from the in camera records, and in that form would be precisely responsive to the portion of the complainant's request described in paragraph 3.d(ii), above, without containing any return information.

28. It is concluded that, with the taxpayers names and the handwritten annotations redacted, the requested records are not comprised of "return information" within the meaning of §12-15(h)(2), G.S., and that the respondents violated §§1-210(a) and 1-211(a), G.S., by failing to disclose the spreadsheet records in redacted form.

29. With respect to the portion of the complainant's request described in paragraph 3.d(i), above, for "copies of any and all procedures or policies which currently govern or specifically apply to the Department of Revenue Services' Internal Audit Division's investigation of "browsing" incidents," it is found that the respondents provided a responsive memorandum (Complainant's Exhibit H).

30. It is found that the memorandum "documents the monthly process followed by the Internal Audit Division to review the audit transaction log activity; the research process used when a business purpose for an employee access can not initially be determined; and the administrative investigation process."

31. It is found that the memorandum is responsive to the portion of the complainant's request described in paragraph 3.d(i), above.

32. It is found that the memorandum alludes to "7 queries [that] are run against the monthly audit transaction log activity ..." and "[t]he results of the 7 queries [that] are reviewed for business purpose appropriateness."

33. The complainants contend that the results of the queries are "procedures or policies" responsive to the portion of her request described in paragraphs 3.d(i), above.

34. It is found, however, that the results of the queries are not "procedures or policies," but are data or information contained in reports produced as the result of following procedures.

35. It is therefore concluded that the queries referenced in the Exhibit H memorandum are not responsive to the complainant's request, and that the respondents did not violate the FOI Act by failing to produce them in response to the request.

36. The complainant maintains that the emails requested in paragraphs 3.a, 3.c, and 3.e, have not been provided promptly.

37. With respect to the general question of promptness, the meaning of the word "promptly" is a particularly fact-based question that has been previously addressed by the FOI Commission. In Advisory Opinion #51, In the Matter of a Request for Declaratory Ruling, Third Taxing District of the City of Norwalk, Applicant (Notice of Final

Decision dated January 11, 1982) the Commission advised that the word “promptly” as used in §1-210(a), G.S., means quickly and without undue delay, taking into consideration all of the factors presented by a particular request. The Commission also gave the following guidance:

The Commission believes that timely access to public records by persons seeking them is a fundamental right conferred by the Freedom of Information Act. Providing such access is therefore as much a part of their mission as their other major functions. Although each agency must determine its own set of priorities in dealing with its responsibilities within its limited resources, providing access to public records should be considered as one such priority. Thus, it should take precedence over routine work that has no immediate or pressing deadline.

38. The advisory opinion goes on to describe some of the factors that should be considered in weighing a request for records against other priorities: the volume of records requested; the time and personnel required to comply with a request; the time by which the person requesting records needs them; the time constraints under which the agency must complete its other work; the importance of the records to the requester, if ascertainable; and the importance to the public of completing the other agency business without the loss of the personnel time involved in complying with the request.

39. It is found that, despite repeated assurances in June and July 2016 that the Department was “in the process of” obtaining access to and reviewing the emails, the respondents had not accessed the email accounts until August 2016. No evidence was presented at the September hearing in this matter as to any progress made by the respondents in August or September, other than a representation by counsel that the respondents were “starting to review” the records.

40. It is found that, despite the respondents’ representations of counsel that they were “forthcoming” in their attempts to provide information in a prompt manner, the evidence does not support their claim that they were prompt.

41. The Commission takes administrative notice of the fact that production of emails is a computerized process that ordinarily does not take four months to begin.

42. It is found that no records had been provided to complainants four months after the records were requested. The Commission notes that the first portion of the complainants’ request was only for emails between two employees.

43. The respondents requested that the Commission take administrative notice of their move of offices, as a reason for the delay in compliance, which the hearing officer declined to do. The respondents were free to present evidence of that move, including when it occurred or how it affected to the respondents’ ability to provide documents.

There are no relevant facts that, “from their nature, are not properly the subject of testimony, or which are universally regarded as established by common notoriety.” See “Judicial notice,” Black’s Law Dictionary.

44. It is concluded that none of the requested emails were provided promptly, and that the respondents thereby violated §1-210(a), G.S.

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 copies of the in camera records to the complainant.
2. In complying with paragraph 1 of this order, the respondents shall redact the names of taxpayers and any handwritten annotations that identify taxpayers.
3. In complying with paragraph 1 of this order, the respondents may redact employee social security numbers, consistent with longstanding Commission precedent.
4. The respondents shall, within 90 days of the issuance of the final decision in this matter, provide all the requested emails to the complainants.



Victor R. Perpetua
As Hearing Officer