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Joanna James and the Connecticut State Employees Union,
Complainant(s)
against

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

Notice of Meeting

Docket #FIC 2016-0460

April 11, 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, lst 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: Attorney Zachary L. Rubin and Attorney Daniel E. Livingston
Attorney Emily V. Melendez

FIC# 2016-0460/Trans/wrbp/VDH//KKR/2017-03-01

FREEDOM OF INFORMATION COMMISSION
OF THE STATE OF CONNECTICUT

In the Matter of a Complaint by

Joanna James and the Connecticut
State Employees Association,
SEIU Local 2001,

Complainant

against

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

Respondents

Report of Hearing Officer

Docket #FIC 2016-0460

April 10, 2017

The above-captioned matter was heard as a contested case on September 23, 2016 and December 13, 2016, at which times the complainants and the respondents appeared, stipulated to certain facts and presented testimony, exhibits and argument on the complaint. At the first contested case hearing, the complainants provided the Commission with the correct name of the union complainant and the case caption has been amended to reflect such correction.

After consideration of the entire record, the following facts are found and conclusions of law are reached:

1. The respondents are public agencies within the meaning of §1-200(1), G.S.

2. It is found that, by email dated June 7, 2016, the complainants requested that the respondents provide them with copies of the following records:

a. All communications that relate to any pending job cuts in the P3B Bargaining Unit, including program or position reductions, transition planning, change in anticipated federal reimbursement, notifications to parents and guardians, and any outsourcing of this work;
b. The reason for notice for any potential layoffs, names of all bargaining unit members who will be impacted by layoffs, their classification code and title, anticipated date of notification of layoff and separation date;

c. A list of all clients and programs associated with our bargaining unit members[1];
d. Any and all records related to DDS's[2] budget recommendation to OPM[3];
e. A list of DDS staff who provide training to any public or private staff;
f. Training compliance records for all providers who provide any type of day program; and
g. A list of all DDS [personnel] who monitor said training compliance by said providers.

3. It is found that, by email dated June 7, 2016, the respondents acknowledged the request, indicated that they were in the process of gathering responsive records, and informed the complainant of the standard per page cost.

4. By letter dated June 21, 2016 and filed June 23, 2016, the complainants appealed to this Commission, alleging that the respondents violated the Freedom of Information ("FOI") Act by failing to provide them with copies of the records described in paragraph 2, above.

5. Section 1-200(5), G.S., provides:

> "Public records or files" means any recorded data or information relating to the conduct of the public's business prepared, owned, used, received or retained by a public agency, or to which a public agency is entitled to receive a copy by law or contract under section 1-218, whether such data or information be handwritten, typed, tape-recorded, printed, photostated, photographed or recorded by any other method.

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

> Except as otherwise provided by any federal law or state statute, all records maintained or kept on file by any public agency, whether or not such records are required by any law or by any rule or regulation, shall be public records and every person shall have the right to (1) inspect such records promptly during regular office or business hours, (2) copy such records in accordance with subsection (g) of section 1-212, or (3) receive a copy of such records in accordance with section 1-212.

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[1] With regard to the requested list of clients, the complainants indicated that a list of first names and last initials would suffice.
[2] "DDS" is the acronym for the Department of Developmental Services.
[3] "OPM" is the acronym for the Office of Policy and Management.

7. Section 1-212(a), G.S., provides in relevant part that "[a]ny person applying in writing shall receive, promptly upon request, a plain, facsimile, electronic or certified copy of any public record."

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

9. Based on the evidence from the September 23, 2016 contested case hearing, it is found that the respondents do not maintain records responsive to paragraphs 2.b and 2.c, above. With respect to paragraph 2.f, above, it is found that, while the respondents do not maintain the requested training compliance records, they referred the complainants to a website that contains related information in the form of a list of providers who are not in compliance with training requirements. With respect to paragraphs 2.e, and 2.g, above, it is found that the respondents electronically provided the complainant with the responsive records in their possession.

10. Accordingly, what remains at issue in this case are the requests for records in paragraph 2.a and 2d, above—that is, "all communications that relate to any pending job cuts in the P3B Bargaining Unit . . ." and "any and all records related to DDS' budget recommendation to OPM."

11. It is found that the respondents provided the complainants with two pages responsive to the request in paragraph 2.d, above. It is found that one page is an August 16, 2016 memorandum, entitled "FY 2017 Spending Plan," which was sent from the Commissioner of DDS to the Secretary of OPM; the second page is a chart attached to the August 16th memorandum.

12. At the conclusion of the September 23, 2016 contested case hearing, the complainants moved to have the Commission conduct an in camera inspection of the records claimed to be exempt from public disclosure. The hearing officer granted the complainants' motion.

13. On October 7, 2016, the respondents lodged in camera records with the Commission. The in camera records consist of thirty-one documents, comprising 112 pages. Such records shall be identified as IC-2016-0460-01 through IC-2016-0460-112.

14. Thereafter, at the December 13, 2016 continued contested case hearing, upon learning that the October 7th in camera submission did not contain emails or other forms of written communication, the complainants questioned the sufficiency of the respondents' search for responsive records. The hearing officer ordered the respondents to conduct another search for records responsive to the requests in paragraph 2, above, and, if appropriate, lodge an additional set of in camera records with the Commission, or, if no additional records were located, file an affidavit attesting to the parameters of post-hearing search for records.

15. On January 17, 2017, the respondents filed the affidavit of Attorney M. J. McCarthy, the agency's Director of Legal & Governmental Affairs, with the Commission. In the affidavit, Attorney McCarthy avers that, subsequent to the December 13, 2016 contested

case hearing, she sent emails to all employees of DDS who were involved in the agency's budget process, and requested that such employees again review their emails and produce all responsive records to her. Attorney McCarthy further avers that she also contacted the IT Division of DDS and requested a computer search. Attorney McCarthy further avers that DAS-BEST[4] also performed a search with regard to several employees, including employees who had retired or were out on medical leave. Finally, Attorney McCarthy avers that she did ultimately gather additional responsive records and that the respondent agency planned to disclose the records which it believes are non-exempt to the complainant and lodge the remainder of the records with the Commission for an in camera inspection.

16. The Commission finds that the respondents conducted a thorough search for responsive records.

17. On January 17, 2017, the respondents also lodged a second set of in camera records with the Commission. The in camera records consist of thirty-eight documents, comprising 479 pages. Such records shall be identified as IC-2016-0460-113 through IC-2016-0460-591.[5]

18. The respondents contend that the remaining records that are responsive to either the request in paragraph 2.a or 2.d, above, are exempt from disclosure pursuant to §1-210(a) (right of access provision), G.S.,§1-210(b)(1) (preliminary drafts), G.S., and §1-210(b)(10) (attorney client privilege).

19. Section 1-210(a), G.S., which provision is cited in part in paragraph 6, above, does not contain an exemption to disclosure. Accordingly, the Commission will not further address this contention.

20. Section 1-210(b)(1), G.S., provides, in relevant part, that nothing in the FOI Act shall be construed to require disclosure 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....

21. In 1980, the Connecticut Supreme Court interpreted the phrase "preliminary drafts and notes" in the FOI Act. See Wilson v. FOIC, 181 Conn. 324 (1980) ("Wilson"). The Wilson Court ruled that "preliminary drafts or notes reflect that aspect of an agency's function that precedes formal and informal decision making. . . . It is records of this preliminary, deliberative and predecisional process that . . . the exemption was meant to encompass." Wilson, 181 Conn. at 332. In addition, the Wilson Court interpreted the phrase "preliminary drafts and notes" in the FOI Act as identical to the deliberative process privilege found in 5 U.S.C. §552(b)(5) of the federal Freedom of Information Act, with the exception

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[4] "DAS-BEST" is the acronym for the Department of Administrative Services' Bureau of Enterprise Systems and Technology.

[5] The Commission penciled in a page number on the bottom right-hand corner of each page of the in camera records submitted for inspection.

that, under Connecticut's FOI Act, the public agency carried the additional burden to show that "the public interest in withholding such document clearly outweighs the public interest in disclosure." See Wilson, 181 Conn. at 333-340.

22. The year following Wilson, the Connecticut legislature adopted Public Act 81-431, which added to the FOI Act the language now codified in §1-210(e)(1). See ¶ 24, below.

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

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

> Notwithstanding the provisions of [§1-210(b)(1), G.S.], disclosure shall be required of:
>
> (1) Interagency or intra-agency memoranda or letters, advisory opinions, recommendations or any report comprising part of the process by which governmental decisions and policies are formulated, except disclosure shall not be required of a preliminary draft of a memorandum, prepared by a member of the staff of a public agency, which is subject to revision prior to submission to or discussion among the members of such agency.

25. The respondents main contention with regard to §1-210(b)(1), G.S., is that the two pages that they provided to the complainants (see ¶11, above) comprise the final version of DDS' proposed 2017 fiscal year spending plan, while the in camera records IC-2016-0460-1 through IC-2016-0460-112 are a preliminary draft of DDS' 2017 fiscal year spending plan.

26. The respondent agency's Chief of Staff, Kathryn Rock-Burns, appeared at the December 13, 2016 continued contested case hearing to testify.

27. It is found that in camera records IC-2016-0460-01 through IC-2016-0460-112 comprise a single recommendation or report with regard to the respondent agency's proposed budget for the upcoming fiscal year (the "proposed budget"). It is found that a major component of the proposed budget was a significant reduction of state employees with a concomitant outsourcing of public services. It is found that the proposed budget was created in a team setting through a series of group meetings. It is further found that the team was comprised of the respondent agency's former commissioner, deputy commissioner, Jordan Scheff (who is now the agency's acting commissioner), as well other members of the respondent agency's strategic leadership team, including, but not limited to, the respondent agency's fiscal administrator, regional directors, and director of legislative affairs.

28. It is found that, on May 2, 2016, the respondent agency transmitted its proposed budget to OPM.

29. It is found that OPM did not accept the proposed budget. Thereafter, it is found that the respondent agency and OPM held discussions regarding the proposed budget and the respondent agency revised the May 2nd budget proposal. It is found that, by memorandum dated August 16, 2016, the respondent agency issued a Fiscal Year 2017 Spending Plan, which plan was accepted by OPM and has been disclosed to the complainants. See ¶ 11, above. It is found that the Fiscal Year 2017 Spending Plan contained final determinations with regard to the reduction of state employees and the level of outsourcing of public services.

30. It is found that the respondents' May 2nd proposed budget is not a preliminary draft, within the meaning of §1-210(b)(1), G.S. In this regard, it is found that the proposed budget does not reflect the respondents' preliminary, deliberative or predecisional process, nor does it reflect an aspect of the respondent agency's function that precedes formal or informal decision-making. Rather, it is found that the proposed budget was the culmination of the respondents' budget deliberations and overall budget process and the agency's formal proposal to OPM.

31. Furthermore, even if the May 2nd proposed budget could somehow be considered a preliminary draft, it is nonetheless subject to disclosure as an interagency recommendation or report "comprising part of the process by which governmental decisions. . . are formulated," within the meaning of §1-210(e)(1), G.S.

32. Upon careful review of in camera records IC-2016-0460-1 though IC-2016-0460-112, however, it is found that within these records are names of clients who receive services from the respondent agency.[6] It is found that such names are exempt from disclosure and may be redacted from these records. See §17a-238, G.S. (Persons under the supervision of the Commissioner of Developmental Services have "the right to have the complete record maintained by [DSS] concerning such person released for review, inspection and copying to such person's attorney or other legal representative. . . .").[7]

33. It is found that, other than the portions of the records specifically described in paragraph 32, above, the remainder of the records comprising IC-2016-0460-1 through IC-2016-0460-112 are not exempt from disclosure and therefore it is concluded that the respondents violated the FOI Act when they refused to disclose these records to the complainants.

34. The respondents also claim that IC-2016-0460-113 through IC-2016-0460-306; IC-2016-0460-309 through IC-2016-0460-318; IC-2016-0460-329 through IC-2016-0460-337; IC-2016-0460-339 through IC-2016-0460-369; IC-2016-0460-375 through IC-2016-0460-382; IC-2016-0460-385 through IC-2016-0460-401; IC-2016-0460-406 through IC-

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[6] See IC-2016-0460-14 through IC-2016-21, referred to in the in camera index as "record ref. #9."

[7] See also Reg. of Conn. State Agencies, §19-570-5 ("Individual client records are maintained by the superintendents of the respective regional centers and training schools. These records are confidential and will only be released to the individual client or her/her representative. . . .").

2016-0460-460; IC-2016-0460-463 through IC-2016-0460-464; and IC-2016-0460-484 through IC-2016-0460-589 are exempt from disclosure pursuant to §1-210(b)(1), G.S.

35. Upon a careful review of the in camera records it is found that IC-2016-0460-113 through IC-2016-0460-116; IC-2016-0460-214 through IC-2016-0460-306; IC-2016-0460-309 through IC-2016-0460-318; IC-2016-0460-329 through IC-2016-0460-337; IC-2016-0460-339 through IC-2016-0460-354; IC-2016-0460-360 through IC-2016-0460-369; IC-2016-0460-375 through IC-2016-0460-382; IC-2016-0460-385 through IC-2016-0460-389; IC-2016-0460-392 through IC-2016-0460-401; IC-2016-0460-406 through IC-2016-0460-460; IC-2016-0460-463 through IC-2016-0460-464; and IC-2016-0460-484 through IC-2016-0460-589 are preliminary drafts. It is further found that these documents contain the respondents' deliberative process which led to the issuance of the May 2nd proposed budget. It is further found that the respondents determined that the public interest in withholding these records clearly outweighed the public interest in disclosure. Finally, it is found that these records, which are fairly described as draft documents containing incomplete fragments of information, which preceded the proposed budget, are not interagency or intra-agency memoranda, letters, advisory opinions, recommendations or reports, within the meaning of §1-210(e)(1), G.S.

36. In addition, it is found that the following records were not claimed exempt as preliminary drafts, but rather were only claimed exempt as "DDS client identifying information": IC-2016-0460-319 to IC-2016-0460-328.[8] It is found that these in camera records do contain the names of clients who receive services from the respondent agency. It is further found that such names are exempt from disclosure and may be redacted from these records. See §17a-238, G.S.

37. Finally, it is found that the following records are not preliminary drafts within the meaning of §1-210(b)(1), G.S.: IC-2016-0460-117 through IC-2016-0460-313; and IC-2016-0460-355 through IC-2016-0460-359, but rather are completed records, which contain final agency determinations.

38. It is found that, other than the records identified in paragraph 35, above, and the portions of the records specifically described in paragraph 36, above, the remainder of the records are not exempt from disclosure and therefore it is concluded that the respondents violated the FOI Act when they refused to disclose these records to the complainants.

39. Finally, the respondents contend that the following in camera records are exempt from disclosure pursuant to §1-210(b)(10), G.S., which permits an agency to withhold from disclosure records of "communications privileged by the attorney-client relationship": IC-2016-0460-307 through IC-2016-0460-308; IC-2016-0460-338; IC-2016-0460-370 through IC-2016-0460-374; IC-2016-0460-383 through IC-2016-0460-383; IC-2016-0460-390 through IC-2016-0460-391; IC-2016-0460-402 through IC-2016-0460-405; IC-2016-0460-461 through IC-2016-0460-462; IC-2016-0460-465 through IC-2016-0460-483; and IC-2016-0460-590 through IC-2016-0460-591.

[8] See IC-2016-0460-319 through IC-2016-328, referred to in the in camera index as "record ref. #40".

40. 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.

41. 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. . . .

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

43. After a careful review of the in camera records, it is found that the following in camera records evidence communications that occurred by way of an email or other written communication between a public agency client and the public agency's attorney: IC-2016-0460-307 through IC-2016-0460-308; IC-2016-0460-338; IC-2016-0460-383 through IC-2016-0460-384; IC-2016-0460-402 through IC-2016-0460-405; IC-2016-0460-461 through IC-2016-0460-462; IC-2016-0460-465 through IC-2016-0460-483; and IC-2016-0460-590 through IC-2016-0460-591.

44. It is further found that the in camera records referenced in paragraph 43, above, evidence written communications transmitted in confidence between counsel and public agency officials or employees acting within the scope of their employment within the respondent agency. It is further found that the records relate to legal advice sought by the public agency officials and/or employees from their attorneys, and received by said officials and employees from their attorneys. Finally, it is found that the respondents did not waive the privilege.

45. Accordingly, it is concluded that the respondents did not violate the FOI Act as alleged in the complaint with regard to the in camera records set forth in paragraph 43, above.

46. It is found, however, that the following records are not privileged attorney-client communications: IC-2016-0460-370 through IC-2016-0460-374; and IC-2016-0460-390 through IC-2016-0460-391.

47. While it is found that the records identified in paragraph 46, above, neither contain a request for legal advice from a public agency client, nor contain the provision of legal advice to a public agency client from an attorney, it is further found that IC-2016-0460-390 through IC-2016-0460-391 do contain the names of clients who receive services from the respondent agency and other client-identifying information.[9] It is found that such names and identifying information are exempt from disclosure and may be redacted from these records. See §17a-238, G.S.

48. It is found that, other than the portions of the in camera records specifically described in paragraph 47, above, the in camera records identified in paragraph 46, above, are not exempt from disclosure and therefore it is concluded that the respondents violated the FOI Act when they refused to disclose these records to the complainants.

49. It is further concluded that, other than the records identified in paragraphs 35 and 43, above, and the portions of records specifically described in paragraphs 32, 36 and 47, above, the respondents violated the disclosure provisions of §§1-210(a) and 1-212(a), G.S., when they declined to disclose the requested records to the complainants.

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

1. The respondents shall forthwith provide the complainants with a copy of the records identified in paragraphs 13, 36, 37 and 46 of the findings, above, free of charge. In complying with this order, the respondents may redact from these records the portions of records specifically described in paragraphs 32, 36, and 47 of the findings, above.

Valicia Dee Harmon

Valicia Dee Harmon
as Hearing Officer

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[9] See IC-2016-0460-390 through IC-2016-391, referred to in the in camera index as "record ref. #53".