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James Findley,
Complainant(s)
against

Director, Housing Authority, Town of Mansfield;
and Housing Authority, Town of Mansfield,
Respondent(s)

Notice of Meeting

Docket #FIC 2011-615

September 19, 2012

Transmittal of Proposed Final Decision Dated September 19, 2012

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 dated September 19, 2012, 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, October 10, 2012.** 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 September 28, 2012.* 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, the Commission requests that an **original and fourteen (14) copies** be filed *on or before September 28, 2012.* **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 **fourteen (14) copies** be filed *on or before September 28, 2012* 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: James Findley
Barbara S. McGrath, Esq.

2012-09-19/FIC# 2011-615/Trans/wrbp/KKR//PSP

FREEDOM OF INFORMATION COMMISSION
OF THE STATE OF CONNECTICUT

In the Matter of a Complaint by

Third Report of
Hearing Officer

James Findley,

Complainant

against

Docket #FIC 2011-615

Director, Housing Authority,
Town of Mansfield, and Housing
Authority, Town of Mansfield,

Respondents

September 19, 2012

The above-captioned matter was heard as a contested case on February 23, 2012, at which time the complainant and the respondents appeared and presented testimony, exhibits and argument on the complaint. A Report of Hearing Officer, dated March 5, 2012, and issued to the parties on June 5, 2012, was subsequently withdrawn by the hearing officer. A Second Report of Hearing Officer, dated July 16, 2012 (the "Second Report"), was issued to the parties on July 18, 2012. At its regular meeting of August 8, 2012, the Commission considered the Second Report and voted to remand the matter to the hearing officer for the limited purpose of conducting an in camera review of the records being claimed exempt.

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

2. It is found that, by letter dated October 1, 2011, the complainant requested from the respondents copies of:

> (a) written "telephone logs" compiled by Director Rebecca Fields during the time period from January 1, 2011 through September 30, 2011; and
>
> (b) Wrights Village numbered "maintenance request" tickets compiled by the MHA office during the time period from January 1, 2011 through April 30, 2011.

3. It is found that, by letter dated October 6, 2011, the respondents informed the complainant that "the documents you requested are ready for your review" and that if he required "copies of any of the documents, the cost is .50 per page."

4. It is found that, on October 12, 2011, the complainant obtained the records, described in paragraphs 2(a) and 2(b), above, from the respondents, but upon review, discovered that the respondents had redacted certain information from such records. By letter dated October 24, 2011, the complainant informed the respondents that the redactions were not acceptable to him, and again, requested unredacted copies of the records, described in paragraphs 2(a) and 2(b), above.

5. It is found that, by letter dated October 31, 2011, the respondents informed the complainant that they would provide him with an unredacted copy of the record, described in paragraph 2(b), above, but would not provide him with an unredacted copy of the record, described in paragraph 2(a), above.

6. By letter of complaint, dated November 9, 2011 and filed November 10, 2011, the complainant appealed to this Commission, alleging that the respondents violated the Freedom of Information ("FOI") Act by failing to comply with the request for records described in paragraph 2(a), above.

7. It is found that the complainant received an unredacted copy of the record, described in paragraph 2(b), above, on November 21, 2011.

8. 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.

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

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

10. 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."

11. At the hearing in this matter, the respondent director argued that the record, described in paragraph 2(a), above, is not a public record, because it is not an "official telephone log," required to be kept by her employer, but rather, is a list of notes concerning her work that she uses daily to "jog her memory" (the "list"). It is found that examples of notes handwritten on the list include:

> 2/?[1] Engineer -- wants to stop by and look at
> Jim Smart units re: heat pump;"
> .....
>
> 3/29 Brad→ Town of Mans. Clean up around Dumpster
> between 1 + 2 bldg + out to street.

It is found that the respondent director used a "check-mark" system to indicate when a certain task on the list had been completed. Based upon the testimony of the respondent director, it is further found that all of the notes on the list pertain to her job, and that none of the notes on the list pertains to personal matters of the respondent director.

12. It is found that the list consists of multiple pages of handwritten notes that include the names and phone numbers of individuals who called and spoke to the respondent director and the reason for the call. It is found that virtually all of the notes on the list have check-marks beside them. It is further found that the notes on the list are arranged chronologically by date, not by name.

13. It is found that the record described in paragraph 2(a), above, is a public record within the meaning of §§1-200(5), 1-210(a) and 1-212(a).

14. On September 5, 2012, the respondents submitted the unredacted list to the Commission for in camera inspection. On the index to the in camera records (the "index"), the respondents claimed that the redactions are required/permited pursuant to §§1-210(b)(1) G.S., 1-210(b)(10), G.S., and 5 U.S.C. §522a.[2]

15. First, the respondents claim that the list, in its entirety, is exempt from disclosure pursuant to §1-210(b)(1), G.S.[3]

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[1] The date is illegible on the copy submitted to the Commission.

[2] The respondents' reference to 5 U.S.C. §522a, appears to be in error. The Commission presumes the respondents intended to cite 5 U.S.C. §552a, known as the federal Privacy Act.

[3] On the index to the in camera records, the respondents claimed that only certain portions of the list are exempt pursuant to §1-210(b)(1), G.S. However, the Commission will consider the argument the respondents' made in their post-hearing brief--that the entire list is exempt from disclosure pursuant to this provision.

16. Section 1-210, G.S., states in relevant part:

> (b) Nothing in the Freedom of Information Act shall be construed to require disclosure of:
>
> 1) 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;
>
> ....
>
> (e) Notwithstanding the provisions of subdivisions (1) and (16) of subsection (b) of this section, 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....

17. In Strillacci v. FOI Commission, superior court, judicial district of Hartford-New Britain at New Britain, Docket No. CV084018120, *7 (April 20, 2009) (2009 Conn. Super. LEXIS 1046), the superior court upheld the Commission's decision that a list containing notes jotted down as a memory aide by the Chief of Police, consisting of his own thoughts, interpretations, and comments about lawsuits filed against him and the officers in his department, was a "note" within the meaning of §1-210(b)(1), G.S., but that such note was not preliminary, and therefore must be disclosed. Citing Shew v. Freedom of Information Commission, 245 Conn. 149, 165 (1998), the court explained that a document is "preliminary" if it "precedes formal and informed decision making....It is records of this preliminary, deliberative and predecisional process that we conclude the exemption was meant to encompass." In addition, as our Supreme Court has stated, a "preliminary" record is one containing "data not required or germane to the eventual purpose for which [it] was undertaken and it was therefore modified to excise the material that was irrelevant to its...purpose." Van Norstrand v. Freedom of Information Commission, 211 Conn. 339, 343 (1989).

18. In the present case, as in Strillacci, it is found that the list is a completed document used by the respondent director in the course of her public duties. The document was not expected to be modified nor did it contain information not "required or germain" to its ultimate purpose. Accordingly, it is found that the list, described in paragraph 2(a), above, is not preliminary, and therefore, is not exempt from disclosure pursuant to §1-210(b)(1), G.S.

19. Next, the respondents claim that certain information contained in the in camera records may constitute "attorney communications re: pending litigation or claim," pursuant to §1-210(b)(10), G.S., and may therefore be redacted.

20. Section 1-210(b)(10), G.S., permits an agency to withhold from disclosure records of "communications privileged by the attorney-client relationship."

21. 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.

22. 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. . . .

23. 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.

24. Recently, the Supreme Court reaffirmed that for a communication to be privileged, all four parts of a four-part test must be met: "(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 for 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. 516 (2011), citing Shew v. Freedom of Information Commission, 245 Conn. 159 (1998).

25. After careful review of the redactions claimed pursuant to §1-210(b)(10), G.S., it is found that such redactions consist of phone messages pertaining to ministerial matters, such as the scheduling of meetings, depositions, phone conferences and filings; and notations of missing pages. As such, it is further found that such proposed redactions do not relate to any legal advice sought by the respondents. Accordingly, because at least

one part of the four-part test has not been satisfied, it is concluded that the redactions described in paragraphs 21 and 27, above, are not exempt from disclosure pursuant to §1-210(b)(10), G.S.

26. With regard to the Privacy Act claim (5 U.S.C. §552a), the respondents indicated on the index that the first names of individuals who are (a) tenants or applicants of the housing authority, (b) "Section 8 Participants," and (c) phone numbers of these individuals, are required to be redacted.

27. The pertinent section of the Privacy Act provides[4], in relevant part, that:

> No agency shall disclose any record which is contained in a system of records by any means of communication to any person, or to another agency, except pursuant to a written request by, or with the prior written consent of, the individual to whom the record pertains....

5 U.S.C. §552a(b).

"System of records" is defined in the Privacy Act as:

> a group of any records under the control of any agency from which information is retrieved by the name of the individual or by some identifying number, symbol, or other identifying particular assigned to the individual...

5 U.S.C. §552a(a)(5).

"Agency" is defined in the Privacy Act as "each authority of the Government of the United States, whether or not it is within or subject to review by another agency..." 5 U.S.C. §552a(a)(1)[5].

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[4] "The legislative purpose of the Privacy Act is well-established: 'The Privacy Act of 1974 safeguards the public from unwarranted collection, maintenance, use, and dissemination of personal information contained in agency records by allowing an individual to participate in ensuring that his records are accurate and properly used. To effectuate that purpose, the Act requires any agency that maintains a "system of records" to publish at least annually a statement in the Federal Register describing that system. 5 U.S.C. §552a(e). In addition, any agency that maintains a system of records and receives a request by an individual to gain access to his records or to any information pertaining to him that is contained in the system must permit him to review his records and have copies made of all or any portion of the record in a form that is comprehensible to the requester.'" 5 U.S.C.§552a(d)(1). Bridgeport Harbour Place I, LLC v. Joseph P. Ganim, superior court, judicial district of Waterbury, Complex Litigation Docket at Waterbury, Docket No. CV040184523S, *19 (June 11, 2008) (2008 Conn. Super. LEXIS 1491), citing Blazy v. Tenet, 338 U.S. App. D.C. 300, 194 F.3d 90, 96 (D.C. Cir.1999).

[5] 5 U.S.C. §552a(a)(1) defines "agency" as that term is defined in 5 U.S.C. §552(e), which in turn, defines "agency" as that term is defined in 5 U.S.C. §551(1).

28. It is found that the respondent housing authority is a department of the Town of Mansfield, and not an authority of the United States government. It is therefore concluded that the respondent housing authority is not an "agency" within the meaning of 5 U.S.C. §552a(a)(1), and that the restrictions on disclosure contained in 5 U.S.C. §552a(b), do not apply to it.

29. Moreover, even if the housing authority was an "agency" for purposes of the Privacy Act, a review of the relevant case law reveals that the Privacy Act is implicated only when a disclosure occurs from records contained within a "system of records." See, e.g., Cuccaro v. Secretary of Labor, 770 F.2d 355 (1985); Wren v. Heckler, 744 F.2d 86 (1984); Bechhoefer v. United States Department of Justice, 179 F. Supp. 2d 93 (W.D.N.Y. 2001). Not every collection of data constitutes a "system of records," see Krieger v. United States Department of Justice, 529 F Supp. 2d 29, 41 (D.D.C. 2009); and not every nonconsensual disclosure of information from an individual's records is prohibited by the Privacy Act. See Tarullo v. Defense Contract Audit Agency, United States Department of Defense, 600 F. Supp. 2d 352 (D. Conn. 2009). "A group of records should generally not be considered a system of records unless there is actual retrieval of records keyed to individuals (emphasis in original). The mere capacity to retrieve information indexed under a person's name, as opposed to a practice where agency employees in fact retrieve records in this way, is insufficient to establish the existence of a system of records under the Privacy Act." Krieger, supra at 42, citing Henke v. United States Dep't of Connerce, 317 U.S. App. D.C. 405 (1996). See also Fagot v. Federal Deposit Ins. Corp., 584 F. Supp. 1168 (D.P.R. 1984)(fact that information regarding an individual contained in file not identified by person's name can somehow be retrieved does not make records part of "system of records"), superceded by statute on other grounds, Presbyterian Church v. United States, 870 F.2d 518 (1989).

30. Based upon the foregoing, the findings of fact in paragraphs 11 and 12, above, and a careful review of the in camera records, it is found that the in camera records are not part of a "system of records" within the meaning of 5 U.S.C. §552a(a)(5).

31. Accordingly, it is concluded that the names and phone numbers, described in paragraph 26, above, are not exempt from disclosure pursuant to 5 U.S.C. §552a.[6]

32. Although counsel for the respondents did not cite any other statute or provision of law as the basis for the exemption claimed for the information described in paragraph 26, above, the Commission notes that §17b-90, G.S., requires that the "names of, and any information concerning, persons applying for or receiving assistance from the Department of Social Services or persons participating in a program administered by said department..." not be disclosed. It is found that, pursuant to §17b-2, G.S., the Department of Social Services ("DSS") administers Section 8 voucher programs.

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[6] Although counsel for the respondents argued during the August 8, 2012 Commission meeting that the names of the tenants are required by 5 U.S.C. §552a, to be redacted, it is noted that the respondents previously disclosed, on the maintenance tickets, the first and last names of certain individuals, to the complainant. See paragraphs 2(b), 5 and 7, above.

33. Based upon the foregoing, it is concluded that the respondents violated §§1-210(a) and 1-212(a), G.S., in this matter.

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 the complainant with a copy of the record, described in paragraph 2(a), above, free of charge. To the extent that names and phone numbers of any individuals on the list are Section 8 recipients or applicants, the respondents may redact such individuals' last names and phone numbers only.

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

Kathleen K. Ross
as Hearing Officer

FIC 2011-615/hor/kkr/09192012