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FREEDOM OF INFORMATION

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Marc Schwab and the City of Waterbury,
Complainant(s)
against

Notice of Meeting

Docket #FIC 2014-032

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

October 24, 2014

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, November 19, 2014**. 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 November 7, 2014**. 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 November 7, 2014**. 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 November 7, 2014**, 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: Kevin J. Daly, Jr.
James Neil, Esq.

2014-10-24/FIC# 2014-032/Trans/wrbp/VDH/LFS

FREEDOM OF INFORMATION COMMISSION
OF THE STATE OF CONNECTICUT

In The Matter of a Complaint by

Report of Hearing Officer

Kevin J. Daly, Jr. and the
City of Waterbury,

Complainants

against

Docket #FIC 2014-032

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

Respondents

October 17, 2014

The above-captioned matter was heard as a contested case on August 20, 2014, at which time the complainants and the respondents appeared, stipulated to certain facts and presented testimony, exhibits and argument on the complaint. Ms. Athena Wagner, whose records are at issue in this case, also appeared at the contested case hearing and presented testimony and argument on the complaint. Ms. Wagner appeared as a witness, but did not move to intervene in the case. The Commission notes that one of the original complainants in the case, Attorney Marc Schwab, left the employment of the City of Waterbury after the complaint was filed. On August 14, 2014, Attorney Kevin J. Daly, Jr. moved to intervene in the case and be substituted as party-complainant in lieu of Attorney Schwab. The respondents did not object to Attorney Daly's motion, and the motion was granted. The case caption has been amended to reflect Attorney Daly's party status. 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 December 23, 2013, the complainants made a request to the respondents for a copy of the following records: "the complete personnel record of Ms. Athena Wagner, a former employee of the Department of Correction ("DOC"), including but not limited to records of all performance appraisals and disciplinary records."

3. It is found that, on January 9, 2014, Ms. Wagner objected in writing to the release of her personnel records, stating that disclosure of the records would constitute an invasion of her personal privacy.

4. It is found that, by letter dated January 9, 2014, the respondents acknowledged the complainants' request, but indicated that Ms. Wagner had objected to disclosure.

5. By letter dated January 13, 2014 and filed January 16, 2014, the complainants appealed to this Commission, alleging that the respondent violated the Freedom of Information ("FOI") Act by denying their request for the records.

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

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

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

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

8. Section 1-212(a)(1), G.S., provides in relevant part that:

Any person applying in writing shall receive, promptly upon request, a plain, facsimile, electronic or certified copy of any public record. The type of copy provided shall be within the discretion of the public agency, except (1) the agency shall provide a certified copy whenever requested, and (2) if the applicant does not have access to a computer or facsimile machine, the public agency shall not send the applicant an electronic or facsimile copy.

9. 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.

10. On September 3, 2014, the respondents submitted the records described in paragraph 2, above, to the Commission for an in camera inspection (hereinafter the “in camera records”). The in camera records consist of seven hundred and sixteen pages of records, and such records shall be identified as IC-2014-032-01 through IC-2014-032-716.

11. At the contested case hearing, the respondents did not present a case in opposition to disclosure. It is found that their sole reason for not disclosing Ms. Wagner’s personnel records is Ms. Wagner’s written objection to disclosure.

12. Ms. Wagner contended at the hearing that the disclosure of her personnel file would constitute an invasion of her personal privacy. Ms. Wagner testified that, while she was a former employee of the DOC, she is currently retired. Ms. Wagner further testified that she is not seeking employment with the City of Waterbury, and could see no legitimate reason for the city to want a copy of her personnel file. When questioned as to whether there were any records in the personnel file that were personal in nature and which did not reflect her performance as a state employee, the complainant testified that she objected to the file as a whole, and not to any specific record. Finally, Ms. Wagner testified that she had not reviewed her personnel file before objecting to its disclosure.

13. Section 1-210(b)(2), G.S., provides in relevant part that nothing in the FOI Act shall require disclosure of “. . . personnel or medical files and similar files the disclosure of which would constitute an invasion of personal privacy”

14. The Supreme Court set forth the test for the exemption contained in §1-210(b)(2), G.S., in Perkins v. Freedom of Information Commission, 228 Conn. 158, 175 (1993). The claimant must first establish that the files in question are personnel, medical or similar files. Second, the claimant must show that disclosure of the records would constitute an invasion of personal privacy. In determining whether disclosure would constitute an invasion of personal privacy, the claimant must establish both of two elements: first, that the information sought does not pertain to legitimate matters of public concern, and second, that such information is highly offensive to a reasonable person.

15. Sections 1-214(b) and (c), G.S., state in relevant parts:

Whenever a public agency receives a request to inspect or copy records contained in any of its employees’ personnel or medical files and similar files and the agency reasonably believes that the disclosure of such records would legally constitute an invasion of privacy, the agency shall immediately notify in writing (1) each employee concerned . . . and (2) the collective bargaining representative, if any, of each employee concerned. Nothing herein shall require an agency to withhold from disclosure the contents of personnel or medical files and similar files when it does not reasonably believe that such disclosure would legally constitute an invasion of personal privacy.

....

A public agency which has provided notice under subsection (b) of this section shall disclose the records requested unless it receives a written objection from the employee concerned....

16. It is found that the in camera records constitute a “personnel” file within the meaning of §1-210(b)(2), G.S.

17. It is found that the respondents timely notified Ms. Wagner of the request at issue in this matter, and that Ms. Wagner timely filed an objection to the disclosure of the in camera records, within the meaning of §1-214, G.S.

18. Despite Ms. Wagner’s contention that the complainants should not be able to obtain a copy of her personnel file from the respondents because she is not seeking public employment, and that she could see no legitimate reason for the request, the Supreme Court has clarified that “disclosures relating to the employees of public agencies are presumptively legitimate matters of public concern.” Perkins, 228 Conn. at 174 and 177 (“Finally, we note that when a person accepts public employment, he or she becomes a servant of and accountable to the public. As a result, that person’s reasonable expectation of privacy is diminished, especially in regard to the dates and times required to perform public duties. The public has a right to know not only who their public employees are, but also when their public employees are and are not performing their duties.”). Moreover, a complainant’s motive in making a request for public records is irrelevant to the determination of whether such records are subject to disclosure. See Chief of Police, Hartford Police Dep’t v. FOIC, 252 Conn. 377, 387 (2000).

19. Based on the in camera inspection, it is found that the following in camera records contain Ms. Wagner’s various insurance elections while she was a state employee; medical testing that she was required to undergo prior to being hired by the state; personal loan and housing documents; a copy of her social security card and her driver’s license¹; and other letters and documents provided to the DOC by Ms. Wagner during her employment to explain family and personal matters, including details related to medical issues, which information is unrelated to and does not reflect how or when Ms. Wagner performed her job as a state employee: IC-2014-032-020 through IC-2014-032-022; IC-2014-032-123 and IC-2014-032-124; IC-2014-032-170 through IC-2014-032-172; IC-2014-032-183 and IC-2014-032-184; IC-2014-032-189 and IC-2014-032-190; IC-2014-032-195 through IC-2014-032-198; IC-2014-032-207 through IC-2014-

¹ The Commission notes that Ms. Wagner’s social security number, employee identification number, and driver’s license number are listed throughout the in camera records. The Commission has consistently declined to order disclosure of social security numbers, employee identification numbers, and drivers’ license numbers contained in personnel, medical or similar files pursuant §1-210(b)(2), G.S, as such disclosure would constitute an invasion of personal privacy. Accordingly, prior to disclosure, the respondents shall review the in camera records and redact Ms. Wagner’s social security number, employee identification number and driver’s license number, wherever such numbers are located.

032-209; IC-2014-032-355 and IC-2014-032-357; IC-2014-032-362 through IC-2014-032-372; IC-2014-032-381; IC-2014-032-396 through IC-2014-032-398; IC-2014-032-411 and IC-2014-032-412; IC-2014-032-461 through IC-2014-032-464; IC-2014-032-491 and IC-2014-032-492; IC-2014-032-586 through IC-2014-032-609; IC-2014-032-619; IC-2014-032-629 through IC-2014-032-657; IC-2014-032-659 and IC-2014-032-660; IC-2014-032-662; IC-2014-032-664 through IC-2014-032-685; and IC-2014-032-687 through IC-2014-032-716.

20. In addition, it is found that certain sections of the in camera records contain information that Ms. Wagner provided to the DOC during the interview process as well as during her employment, while other sections of the in camera records contain information that DOC provided to Ms. Wagner during her employment. It is found that such sections contain information regarding religion, family and personal matters, as well as insurance and other benefit elections, which matters are unrelated to and do not reflect how or when Ms. Wagner performed her job as a state employee. These sections are identified as follows: IC-2014-32-49, line² 25; IC-2014-32, the handwritten notes on the bottom of the page; IC-2014-32-347, lines 17 through 19; IC-2014-32-351, lines 20 and 21. With regard to IC-2014-032-456, IC-2014-032-527, IC-2014-032-529, IC-2014-032-530 and IC-2014-032-533, no information other than lines 1 through 4 may be disclosed.

21. It is found that the information contained in the records identified in paragraphs 19 and 20, above, are not matters of legitimate public concern and the disclosure of these records would be highly offensive to a reasonable person. It is therefore concluded that such records are exempt from mandatory disclosure pursuant to §1-210(b)(2), G.S., and that the respondents did not violate the FOI Act by withholding such records from the complainants.

22. Moreover, because it is found that Ms. Wagner was a classified service employee when she worked for the DOC, certain exemptions to disclosure apply to the requested records.

23. First, §1-217, G.S., entitled "Nondisclosure of residential addresses of certain individuals," provides, in relevant part, as follows:

(a) No public agency may disclose, under the Freedom of Information Act, from its personnel, medical or similar files, the residential address of any of the following persons employed by such public agency: . . . (3) An employee of the Department of Correction

24. It is found that, because Ms. Wagner changed her residential address while she was an employee of the DOC, it is found that the in camera records contain multiple

² For the benefit of all of the parties, the Commission clarifies that, while the in camera records contained page numbers from 1 through 716, they did not contain line numbers. Where the Commission finds that certain information contained in an in camera record may be redacted or only certain lines may be disclosed, see ¶ 20, line numbers have been added to the record at issue.

residential addresses for Ms. Wagner. It is found that all forms of Ms. Wagner's residential address are exempt from public disclosure and may be redacted from the in camera records, wherever located. It is therefore concluded that the respondents did not violate the FOI Act by withholding Ms. Wagner's residential addresses from the complainants.

25. Second, 5-237, G.S., provides, in relevant part, that:

[a]ny employee in the classified service shall have the right, at reasonable times during office hours, to inspect his service rating, as shown by the records of the Department of Administrative Service or the department, agency or institution in which such employee is employed. . . .”

26. In Personnel Director, Department of Income Maintenance v. FOIC, 214 Conn. 312, 320-21 (1990), the Supreme Court concluded that §5-237, G.S., provides a statutory exemption to the disclosure provisions of §1-210(a), G.S., and specifically limits access to an employee's service rating to the employee who is the subject of such rating.

27. Accordingly, it is found that the following in camera records contain Ms. Wagner's service ratings and are, therefore, exempt from disclosure: IC-2014-032-007³; IC-2014-032-09; IC-2014-032-23; IC-2014-032-52; IC-2014-032-94; IC-2014-032-211; IC-2014-032-213; IC-2014-032-399 through IC-2014-032-405; IC-2014-032-407 through IC-2014-032-410; IC-2014-032-413; IC-2014-032-423 through IC-2014-032-442; IC-2014-032-535 through IC-2014-032-538; IC-2014-032-542; and IC-2014-032-553 and IC-2014-032-554. It is therefore concluded that the respondents did not violate the FOI Act by withholding such records from the complainants.

28. In addition, §29-164f, G.S., provides, in relevant part, as follows:

The National Crime Prevention and Privacy Compact is hereby entered into and enacted into law with any and all of the states and the federal government legally joining therein. . . .

29. In Commissioner of Public Safety v. FOIC, et al., 144 Conn. App. 821, 827 (2013), the Appellate Court clarified that, “the compact provides that the NCIC⁴ database is to be used for limited purposes authorized by law, such as background checks, and that NCIC records may only be used for official purposes.” The Court concluded that §29-164f, G.S., provides a statutory exemption to the disclosure provisions of §1-210(a), G.S.

³ The Commission notes that some of the in camera records, like IC-2014-032-007, contain information on the front and on the back of the record. For purposes of clarity, a finding that a record is exempt from public disclosure applies to both sides of the records and, therefore, the entire record need not be disclosed.

⁴ NCIC stands for the “National Crime Information Center,” a computerized database of criminal history information, which is maintained by the Federal Bureau of Investigation.

Id. at 831.

30. Accordingly, it is found that the following in camera records contain NCIC information, and are, therefore, exempt from disclosure: IC-2014-32-358 through IC-2014-32-361. It is therefore concluded that the respondents did not violate the FOI Act by withholding such records from the complainants.

31. In addition, it is found that, after careful review of the in camera records, certain records contained in Ms. Wagner's personnel file do not pertain to Ms. Wagner at all; rather the records detail information about other DOC employees and inmates. It is therefore found that the following records are not responsive to the request in this case, and need not be disclosed: IC-2014-32-236 through IC-2014-32-244; IC-2014-032-256; IC-2014-032-258; IC-2014-32-582; and IC-2014-32-584.

32. It is likewise found that the following records contain only minimal information about Ms. Wagner, and that the majority of the information in these records concerns other DOC employees. It is found that the information that does not concern Ms. Wager is not responsive to the request, and need not be disclosed. It is therefore found that, with regard to these in camera records, only the following lines need be disclosed: IC-2014-032-318, lines 1 through 8, and line 13; IC-2014-032-319, lines 1 through 8, and line 10; IC-2014-032-324, line 1, and lines 24 through 29; IC-2014-032-326, line 1, and lines 19 through 24; IC-2014-032-378, line 1 and line 22; and IC-2014-032-557, line 1 and line 24.

33. It is found that the remainder of the in camera records do pertain to legitimate matters of public concern in that they reveal how and when a public employee performed her work during her tenure with the DOC. It is further found that such records reveal the degree to which the DOC could consistently rely on Ms. Wagner's work ethic. It is further found that disclosure of these in camera records would not be highly offensive to a reasonable person.

34. It is concluded that the in camera records, other than those records identified in paragraphs 19, 27, 30, and 31, and those portions specifically identified in paragraphs 20 and 32, and generally identified in paragraph 24 and footnote 1, are subject to mandatory disclosure.

35. Based on the foregoing, it is concluded that the respondents violated the disclosure provisions of §§1-210(a) and 1-212(a), G.S., when they decline to provide such 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 requested records, as described in paragraph 34 of the findings, above, free of charge.

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

A handwritten signature in cursive script that reads "Valicia Dee Harmon". The signature is written in black ink and is positioned above a horizontal line.

Valicia Dee Harmon
as Hearing Officer

FIC2014-032/HOR/vdl/10/17/2014