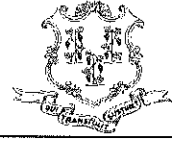


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FREEDOM OF INFORMATION



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Barry Natale,
Complainant(s)
against

Notice of Meeting

Docket #FIC 2015-109

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

Respondent(s)

September 25, 2015

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, October 14, 2015**. 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 October 2, 2015**. 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 October 2, 2015**. **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 October 2, 2015**, 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: Barry Natale
Ralph E. Urban, Esq.

2015-09-25/FIC# 2015-109/Trans/wrbp/CAL/TAH

FREEDOM OF INFORMATION COMMISSION
OF THE STATE OF CONNECTICUT

In The Matter of a Complaint by

Report of Hearing Officer

Barry Natale,

Complainant

against

Docket #FIC 2015-109

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

Respondents

August 18, 2015

The above-captioned matter was heard as contested case on August 3, 2015, at which time the complainant and the respondents appeared, stipulated to certain facts and presented testimony, exhibits and argument on the complaint.

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 January 24, 2015, the complainant renewed a previous request to the respondents for certified copies “of the complete CT-HR-12 forms, or its equivalent, that were submitted by any and all General Trades Workers currently employed by the State of Connecticut Department of Education” (the “requested records”).
3. It is found that, by email dated January 28, 2015, the respondents acknowledged and denied the complainant’s request, claiming that the requested records were exempt from mandatory disclosure pursuant to §§5-225 and 1-210(b)(6), G.S.
4. By notice of appeal dated February 8, 2015 and filed February 11, 2015, the complainant appealed to this Commission, alleging that the respondents violated the Freedom of Information Act by denying his request for the records.
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 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 . . . (3) receive a copy of such records in accordance with section 1-212.

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

Nothing in the Freedom of Information Act shall be construed to require disclosure of . . . (6) Test questions, scoring keys and other examination data used to administer . . . [an] examination for employment . . .

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. Section 5-225, G.S., which provides in relevant part:

All persons competing in any examination shall be given written notice of their final earned ratings and the minimum earned rating necessary to pass the examination. Not later than thirty days after the issuance of the final earned rating, a person who has not achieved a passing rating may inspect his or her papers, markings, background profiles and other items used in determining the final earned ratings, other than examination questions and other materials constituting the examination . . . Not later than ten days after inspecting his or her papers, a person may, in writing, appeal to the Commissioner of Administrative Services the accuracy of his or her final earned rating, as based on the original examination paper or responses. The commissioner shall render a final decision on the person's appeal within thirty days thereafter and correct candidate lists as appropriate (emphasis added)

10. 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.

11. At the hearing, the complainant argued that the completed CT-HR-12 forms for positions such as General Trades Worker, where there is no examination or written test, were applications for employment that are not exempt from mandatory disclosure. The respondents argued that the completed CT-HR-12 forms for positions such as General Trades Worker were examined in a competitive process, constituting an “examination” in a broader sense, so that the completed CT-HR-12 forms were exempt from mandatory disclosure pursuant to §§5-225 and 1-210(b)(6), G.S.

12. It is found that the position of General Trades Worker is a classification in the maintenance bargaining unit that is used throughout the classified service of state government. General Trades Workers frequently are charged with maintaining heating, ventilation and air conditioning systems (HVAC). The Department of Administrative Services (“DAS”) considers the position “non-competitive”, because there is no written examination for the position.

13. It is found that, for the position of General Trades Worker at the respondent Department, vacancies are first posted on the DAS and respondent Department websites, and then individuals submit completed CT-HR-12 forms. A committee of three persons at the respondent Department screens all completed CT-HR-12 forms to determine if applicants meet the minimum experience requirements for the position. The screening committee does not attempt to evaluate the specific skills of the applicants and no scores are assigned to individual applicants. There is therefore no list evaluating the relative merits of different applicants. The screening committee simply determines whether each individual applicant is or is not admitted for an interview. After interviews, an individual is chosen for the position.

14. It is further found that the CT-HR-12 form is entitled “Application for Examination or Employment (Form CT-HR-12)” and includes at section 2 a statement of “Purpose of Application (Check One)”, followed by a place to check either “State Examination” or “State Position/Job Posting”, and then an instruction to “[c]omplete the required information below for one examination OR one position ONLY” (capitalization and underlining in original).

15. It is found that the same form (CT-HR-12) is used in the state’s classified service as an examination application and also as an employment application. The key to determining whether a completed CT-HR-12 form is an application for examination or employment is whether the position at issue is classified by the Department of Administrative Services as competitive or non-competitive. Because non-competitive positions do not require examinations, the completed CT-HR-12 forms for such positions are employment applications.

16. It is further found that the term “examination” may include an examination of professional credentials, experience and evaluations, rather than a traditional written or oral examination that involves responding to questions or a hypothetical set of facts. However, this broader review of professional credentials still results in a “final earned rating” or score for each applicant, which is then compiled into a list of persons taking the examination together with their respective scores.

17. Since the Supreme Court decision in Personnel Director, Department of Income Maintenance v. FOIC, 214 Conn. 312 (1990) (“Personnel Director”), the Commission has, on numerous occasions, held that the completed Form CT-HR-12, and previously, the PLD-1 forms which Form CT-HR-12 superseded, are exempt from disclosure, except for the rights of some candidates to inspect their own examination papers. Docket #FIC 1994-055; Fisi v Department of Health and Addiction Services (applications for director’s position used in process of setting the final earned ratings exempt from disclosure pursuant to §5-225, G.S.); Docket #FIC 2005-492; Winkler v. Department of Administrative Services, (“Winkler”) (PLD-1 used for Fiscal Administrative Manager 1 examination exempt); Docket #FIC 2012-203; Miller v. Department of Labor, (applications of individuals exempt from disclosure pursuant to §5-225, G.S., Personnel Director, and Winkler); Docket #FIC 2013-129; Osmond v. Department of Administrative Services (application known as Form CT-HR-12 of person selected for Fiscal Administrative Officer exempt from disclosure pursuant to §5-225, G.S., Personnel Director, and Winkler); Docket #FIC 2013-663; Dumas v. Department of Administrative Services; (examination materials exempt from disclosure pursuant to §5-225, G.S., and Personnel Director); and Docket ##FIC 2014-330 & 389, both Kisala v Department of Public Health (records used to determine final examination rating in merit examination exempt from disclosure pursuant to §5-225, G.S., and Personnel Director).

18. However, both Personnel Director and all of the Commission decisions, with the possible exceptions of only Miller and Osmond, all involved cases where a merit examination was at issue. Most importantly, in Personnel Director, “the records [were] compiled by the director as part of the program supervisor merit promotional examination” (emphasis added) (*id.* at 317). This crucial fact is also reflected in the holding: “[w]e hold that §5-225. . . provide[s] such an exception for the requested personnel files, which contained the promotional examination records of candidates for program supervisor other than the candidate’s own records” (emphasis added) (*id.* at 321). Also see summaries at paragraph 17, above, concerning the Commission’s contested case decisions.

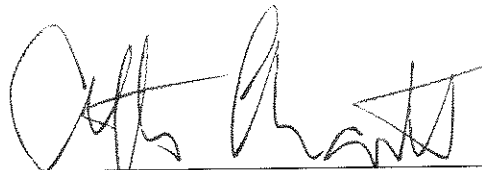
19. In contrast, in the present case, while candidates were evaluated by the respondent Department, it is concluded that there was no “final earned rating” and no “minimum earned rating necessary to pass the examination”, as required by §5-225, G.S. Nor was there any “original examination paper or responses.” Finally, there was no “candidate list” to correct, as envisioned by §5-225, G.S., if the Commissioner of Administrative Services found on appeal that a “final earned rating” was not accurate.

20. Because the completed CT-HR-12 forms submitted by General Trades Workers were not used to determine a “final earned rating” in a merit examination, it is concluded that the completed CT-HR-12 forms at issue in this case were employment applications, not examination applications. The completed CT-HR-12 forms at issue in this case are, therefore, not subject to §5-225, G.S., or exempt pursuant to §1-210(b)(6), G.S. Therefore, the respondents violated §§1-210(a) and 1-212(a), G.S., by withholding such records from the complainant.

21. The Commission notes that the fact that the same form, CT-HR-12, is used as both an examination application and also as an employment application creates some potential for confusion concerning the applicability of §5-225, G.S. The completed form may be subject to exemption or mandatory disclosure, depending on its use in individual cases. However, the employment application cases are outside the context of §5-225, G.S., which, in contrast to employment applications, includes examinations with final earned ratings subject to appeal and correction. Both the law and the public policy in favor of disclosure are particularly compelling in cases where completed form CT-HR-12 is an employment application. Employment applications for non-competitive positions should be subject to mandatory disclosure.

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 requested records to the complainant, without a copying charge.



Clifton A. Leonhardt
as Hearing Officer