

FREEDOM OF INFORMATION COMMISSION
OF THE STATE OF CONNECTICUT
18-20 Trinity Street Hartford, CT 06106
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Cheryl Eberg,
Complainant(s)
against

Notice of Meeting

Docket #FIC 2014-879

Human Resources Manager, State of Connecticut,
Military Department; Adjunct General, State of
Connecticut, Military Department; and State of
Connecticut, Military Department,
Respondent(s)

October 29, 2015

Transmittal of Proposed Final Decision Dated October 29, 2015

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 October 29, 2015 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 18, 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 November 6, 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, the Commission requests that an **original and fourteen (14) copies** be filed *on or before November 6, 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 November 6, 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: Michael Wishnie, Esq.
Assistant Attorney General Stephen Sarnoski

FREEDOM OF INFORMATION COMMISSION
OF THE STATE OF CONNECTICUT

In The Matter of a Complaint by

Revised Report of Hearing Officer

Cheryl Eberg,

Complainant

against

Docket #FIC 2014-879

Human Resources Manager, State of Connecticut,
Military Department; Adjutant General,
State of Connecticut, Military Department;
and State of Connecticut, Military Department,

Respondents

October 29, 2015

The above-captioned matter was heard as a contested case on August 24 and September 28, 2015, at which times the complainant and the respondents appeared and presented testimony, exhibits and argument on the complaint. A report of hearing officer dated October 6, 2015 was transmitted to the parties as a proposed final decision. At the October 28, 2015 meeting of the Commission, an amendment offered by the hearing officer was adopted, resulting in this revised report of hearing officer.

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 November 19, 2014 to the FOIA Manager of the Connecticut Army National Guard, the complainant requested eight categories of records (the "requested records"). Five record requests expressly related to complaints of sexual assault, sexual harassment, or equal employment opportunity violation, to wit:
 - a. complaints by the complainant, from January 1, 1990 to August 27, 2011, including her EEO complaint submitted while deployed in Iraq in 2006 and an Inspector General harassment complaint submitted while in Connecticut in 2007 (request 1 of 11/19/2014 letter);
 - b. complaints by third persons concerning acts perpetrated against the complainant from January 1, 1990 to August 27, 2011 (request 2 of 11/19/2014 letter);
 - c. complaints against Col. William Adams, including a complaint submitted by Chris Gutierrez on or after January 1, 2005 (request 4 of 11/19/2014 letter);

- d. complaints against Major Timothy Krusko at any time (request 5 of 11/19/2014 letter); and
- e. complaints against any current or retired Connecticut Army National Guard officers from January 1990 to November 2014 (request 6 of 11/19/2014 letter).

A further request was for all records concerning any court martial proceedings involving Col. William Adams (request 3 of 11/19/2014 letter). Finally, the last requests were for records concerning the award of the Combat Action Badge and the Bronze Star to the complainant (requests 7 and 8 of 11/19/2014 letter).

3. It is found that, by letter dated November 25, 2014, the respondent Human Resources Manager acknowledged the complainant's request, noting its extensive nature. By additional letter dated December 8, 2014, the respondent Human Resources Manager stated that the State of Connecticut Military Department does not control the records in the possession of the Connecticut Army National Guard (sometimes herein "CTARNG") and that federal law governs CTARNG records. The December 8, 2014 letter added that the respondent Military Department had conducted a search of its records and concluded that it does not maintain any records within the scope of the request.

4. By letter dated and filed with the Commission on December 5, 2014, the complainant appealed to the Commission, alleging that the respondents violated the Freedom of Information Act ("FOIA") by failing to comply with her November 19, 2014 records request.

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

"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. Sections 1-210(a) and 1-212(a), G.S., state, respectively, in relevant parts:

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. (emphasis added)

...

Any person applying in writing shall receive, promptly upon request, a plain or certified copy of any public record.

7. It is found that the Connecticut Army National Guard is a unit within the State of Connecticut Military Department. As discussed further below, members of the CTARNG have been subject to a dual enlistment system pursuant to federal law since 1933. At any given time, individual soldiers can be serving in the National Guard of the United States, subject to federal law (Titles 10 and 32 of the U.S. Code), in the National Guard of Connecticut, subject to state law (Title 27 of the Connecticut General Statutes), or be civilians who are not currently in active military service. Examples of Title 10 missions include Operation Enduring Freedom and Operation Iraqi Freedom; Title 32 missions include Hurricanes Katrina and Rita as well as Presidential Inauguration Support; and Title 27 missions include Hurricane Sandy Response and Winter Storm Nemo Response.

8. It is also found that, at present in Connecticut, there are approximately 5,180 persons in the respondent Military Department, including but not limited to 3,570 civilians, 1,108 federal employees, and 115 state employees. The state employees are mostly janitors and other maintainers. The federal employees are, most of the time, regulated by Title 32 of the U.S. Code. During Title 32 missions, federal law is controlling, the federal government pays for the operations, but the Governor continues to serve as Commander-in-Chief.

9. It is also found that the Connecticut Army National Guard maintains two entirely separate record systems, federal records which are maintained in Hartford by Col. Witford and state records maintained by the respondent Human Resources Manager, Anthony Lewis. Col. Witford maintains his records subject to federal law and supervision by the National Guard Bureau in the U.S. Department of Defense.

10. Against this general background, it is further found that the respondent Human Resources Manager personally conducted a search of the state personnel files, medical files, automated files and historical files of the respondent Military Department for records concerning the complainant, Col. William Adams, and Major Timothy Krusko. None of the three persons has an employee identification number in the CORE personnel system that was established for the entire state government in 2003. The search included old paper records in the storage room of the respondent Military Department. It is found that this search did not result in the identification of any records within the scope of the complainant's request, except that by letter dated May 20, 2014, the complainant was provided with a copy of the certificate awarding her with The Army Commendation Medal.

11. It is also found that the respondent Human Resources Manager personally conducted an initial search, and again a supplemental search after the August 24, 2015 hearing, of all the complaints of sexual assault, sexual harassment, or equal employment opportunity violation that had been filed with the respondent Military Department from January 1990 to November 2014. He stated that generally three or four such complaints are filed each year, but that the respondent Military Department does not maintain any complaints against any current or retired Connecticut Army National Guard officers from January 1990 to November 2014 (see paragraph 2e, above; request 6 of 11/19/2014

letter). The supplemental search after the August 24, 2015 hearing focused on officers who might have been state employees at some time in the past, even though these officers are now federal employees.

12. It is also found that the complainant has made a similar, but not identical, request for records, dated April 17, 2014, pursuant to the federal FOIA. Some redacted records were provided to the complainant pursuant to the federal FOIA. Nonetheless, an appeal concerning the federal FOIA request was pending in U.S. District Court as of the hearing dates before the Commission.

13. It is further found that at least some of the requested records were generated when the complainant was in federal service in Iraq. While the complainant suggested that copies of some requested records may be on file with the Connecticut Army National Guard, it is found that the declaration of Sgt. Christopher Clark, the Chief Legal Noncommissioned Officer of the CTARNG, filed in U.S. District Court, states that, except for The Army Commendation Medal discussed at paragraph 10, above, the CTARNG has no records for the complainant or Col. Adams. (The federal FOIA request does not appear to include records relating to Major Timothy Krusko.) Sgt. Clark's declaration adds that: "[t]his was an 'Active-Duty' complaint, so any... records... would reside with the Active Army."

14. It is further found that the U.S. Department of the Army would have conducted any court martial proceedings directed against Col. William Adams. The respondent Adjutant General testified that he had no knowledge of any such proceedings.

15. Finally, it is found that the complainant issued a subpoena for Col. William Adams to appear at the Commission's August 24, 2015 hearing. At this hearing, the respondents asserted that Col. Adams had to receive permission to testify pursuant to the Department of the Army's so-called Touhy regulations. 32 C.F.R. §516, Appendix F. United States ex rel. Touhy v. Ragen United States ex rel. Touhy, 71 S. Ct. 416 (1951).

16. However, at the September 28, 2015 hearing, the respondents entered into evidence a letter from the Chief, General Litigation Branch, Department of the Army, denying the request for Col. William Adams to testify at the Commission's hearing. His single spaced letter of nearly three pages included a series of assertions and legal citations, detailing: the ongoing litigation in federal court concerning the federal FOIA request and the disclosures that have been made pursuant to the federal FOIA request; Col. Adams' Active Duty mobilization orders from June 20, 2006 to August 11, 2007 under the authority of Title 10 of the U.S. Code; the extensive regulatory authority of the Department of the Army over the Connecticut Army National Guard under the authority of Title 32 of the U.S. Code; the Department of the Army's maintenance of all records, pursuant to Army regulations, for the Connecticut Army National Guard concerning sexual assault, sexual harassment, equal employment opportunity as well as personnel matters generally; the Department of the Army's view that Col. Adams is "DA personnel", an individual with whom a federal interest is involved; and finally, that the refusal to allow Col. William Adams to testify at the Commission's hearing was grounded upon the sovereign immunity of the federal government.

17. At the hearings, the complainant generally argued that the Connecticut Army National Guard was a state agency and that any records maintained in the files of a state agency, even copies of records originating from federal service, were subject to the jurisdiction of this Commission. The complainant's legal team ably cited a variety of law standing for the proposition that members of the CTARNG only serve the federal military when they are formally called into the military service of the United States. They also cited two earlier, companion FOIC decisions wherein the FOIC ordered disclosure of records of the Connecticut Army National Guard: Docket #FIC 2000-303, Rempfer v. Cugno (January 10, 2001), and Docket #FIC 2000-304, Dingle v. Cugno (January 10, 2001). Finally, they argued that Col. William Adams serves fulltime and cited the complainant's twenty eight years of service to Connecticut and the United States, particularly as this service contrasted with the lack of redress she has received for the sexual abuse that she alleged.

18. The respondents countered that the complainant, Col. William Adams, and Major Timothy Krusko were all federal employees and that the records concerning their employment were federal records. Since these three individuals never were state employees, the Connecticut Army National Guard as a state agency has no records relating to them, except for the single certificate discussed at paragraph 10, above. Moreover, neither the state nor the federal authorities have the "power to invade the records of the other." Respondent's Brief, September 15, 2015, p. 6.

19. The history of the federal-state relationship in governing the National Guard originates with the Constitutional Convention in 1787 and its subsequent development mirrors the history of the United States, especially the wartime history. The contemporary legal standard was set forth in Perpich v. Department of Defense, 496 U.S. 334 (1990) ("Perpich"), where the U.S. Supreme Court stated:

Since 1933 all persons who have enlisted in a state National Guard unit have simultaneously enlisted in the National Guard of the United States. In the latter capacity they became a part of the Enlisted Reserve Corps of the Army, but unless and until ordered to active duty in the Army, they retain their status as members of a separate state Guard unit.

Id. at 345. The Court further stated:

[T]he members of the National Guard of Minnesota who are ordered into federal service with the National Guard of the United States lose their status as members of the State militia during their period of active duty.

Id. at 347. The Supreme Court continued with a "hat" analogy:

[A]ll of [the National Guard members] now must keep three hats in their closets—a civilian hat, a state militia hat, and an army hat—only one of which is worn at any particular time.

Id. A U.S. Court of Appeals has confirmed:

We understand *Perpich* to stand for the proposition that members of the National Guard only serve the federal military when they are formally called into the military service of the United States. At all other times, National Guard members serve solely as members of the State militia under the command of a state governor.

Clark v. United States, 322 F. 3d 1358, 1366 (2003) (“Clark”). The Court of Appeals added:

These cases recognize that the status of a National Guard member, in terms of whether he is in federal service or in state service, affects the extent to which, in a given situation, various requirements of law apply to him. (emphasis added)

Id. at 1367.

20. More directly, concerning the Connecticut FOIA, the complainant correctly asserts that Commission did issue orders in 2001 concerning records of the Connecticut Army National Guard. Docket #FIC 2000-303, Rempfer v. Cugno (January 10, 2001), and Docket #FIC 2000-304, Dingle v. Cugno (January 10, 2001). However, the issue of federal preemption was not raised in those cases, and the respondents testified herein that the respondents in the 2001 cases were not represented by the Attorney General.

21. Given these findings of fact and statement of relevant law, it is concluded that the Connecticut Army National Guard is a dual status public agency, part state agency and part federal agency. There is precedent in Connecticut FOIA law for analogous bifurcation of legal entities. Cos Cob Fire Department v FOIC, 212 Conn. 100 (1989); §1-218, G.S., concerning “records and files related to the performance of the governmental function...” Accordingly, in order to adjudicate requests for specific records maintained by the CTARNG, the status of a specific soldier at a specific time must be determined. This inquiry follows from the “hat” analogy of the U.S. Supreme Court in Perpich as well as the Clark decision. (See paragraph 19, above).

22. Based especially on the findings at paragraphs 9 and 10, above, it is concluded that the complainant, Col. William Adams, and Major Timothy Krusko were ordered into federal service at all times relevant to this complaint, and that the Connecticut FOIA is not applicable to their personnel records which are maintained exclusively as federal records. Despite the fact that the Governor remains the Commander in Chief, federal law controls during Title 32 service. 32 U.S.C. §105(a)(5) (“Army National Guard records are being kept in accordance with this title.”); 32 U.S.C. §108 (“a State [that] fails to comply with a requirement of this title or a regulation...is barred ...from receiving money...”); and 32 U.S.C. §110 (“The President shall prescribe regulations, and issue orders, necessary to organize, discipline and govern the National Guard.”) See also Nelson v. Geringer, 295 F.3d 1082, 1087 (10th Cir. 2002) (“National

Guard remains a federal entity even when it is not in active federal service” citing federal training requirements and loss of federal funding if federal requirements are not met).

23. Based especially on the findings at paragraphs 9 and 11, above, it is also concluded that all records related to complaints of sexual assault, sexual harassment, or equal employment opportunity violation against any current or retired Connecticut Army National Guard officers from January 1990 to November 2014 are also maintained exclusively as federal records, outside the jurisdiction of the Connecticut FOIA. Again, Army regulations address sexual harassment, sexual assault, and equal opportunity complaints. Army Regulation 600-20, chapters 6, 7, and 8. All such information is official information pursuant to federal regulation. 32 C.F.R. Appendix F to Part 516.

24. The conclusions of paragraphs 22 and 23 are supported by additional federal and state law. The Army Privacy Act Program appears to prohibit disclosing personal information to third parties without the consent of the subject of the record except when the federal FOIA requires release or in twelve other limited circumstances not here relevant. 32 C.F.R. 505.7; Appendix D to Part 505. The Commission also notes the extensive, highly detailed legal system that the U.S. Army has in place for requestors of access to human resource records. Army Regulation 600-8-104, sections 2-6, 2-7, and 2-11. This detailed legal system strongly supports federal preemption. See Hillsborough County v. Automated Medical Laboratories, Inc., 471 U.S. 707 (1985); Farina v. Nokia Inc et al., 625 F.2d 97 (2010). And in Michigan Council of Trout Unlimited v. Department of Military Affairs, 213 Mich App. 203, 218 (1995), the court found that the state court had jurisdiction to apply the state FOIA law, but based upon the apparent agreement of the parties that the requested records were subject to federal regulations prohibiting their disclosure without federal approval, upheld the denial by the trial court of the plaintiff’s demand for production of the documents.

25. The Commission acknowledges that the implications for disclosure pursuant to state law following this decision have a different emphasis than some of the language quoted above in both Perpich (“unless and until ordered to active duty in the Army...”) and Clark (“only serve the federal military when they are formally called...”) But the record of this case shows that the respondent Military Department has, pursuant to federal and state law, created a system where only a small number of mostly janitorial and maintenance personnel are state employees. (See paragraph 8, above.)

26. Moreover, the Commission also acknowledges that there is a seemingly purposeful ambiguity in the ever shifting balance between the federal and state roles controlling the National Guard. The respondents’ own post hearing brief included an organizational flow chart (p. 7) from a National Guard Bureau Briefing, March 30, 2007, which included the words “friction” and “fog” on both sides of an arrow marked “coordination” between the entities reporting to the President and those reporting to the Governor. It is not surprising that Rudy Perpich, governor of Minnesota, mistakenly thought he could block “his” National Guard members from participating in a training mission in Central America in 1987. Perpich at 334.

27. After the caveats of paragraphs 25 and 26, above, are duly acknowledged, however, it remains the case that there are no substantial facts in the record that support a finding or a conclusion of law that the relevant records concerning the complainant, Col.

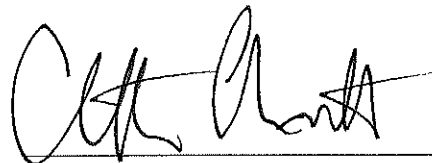
William Adams, and Major Timothy Krusko, or the relevant records concerning complaints of sexual assault, sexual harassment, or equal employment opportunity violation, are maintained by the Connecticut Army National Guard in its status as a state agency.

28. It is concluded that the requested records, except for the certificate discussed at paragraph 10, above, are not "public records" within the meaning of §§1-200(5), 1-210(a) and 1-212(a), G.S.

29. It is finally concluded that the respondents did not violate the FOIA, as alleged in the complaint.

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

1. The complaint is dismissed.



Clifton A. Leonhardt
as Hearing Officer