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Luis Sola
Complainant(s)
against

Director of Legal Services, State of Connecticut, Judicial Branch; and State of Connecticut, Judicial Branch
Respondent(s)

Notice of Meeting

Docket #FIC 2017-0080

July 21, 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, August 9, 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 July 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 July 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 July 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

Wendy R.B. Paradis
Acting Clerk of the Commission

Notice to: Luis Sola
Attorney Martin R. Libbin

FIC# 2017-0080/ITRA/LFS//KKR/WRBP/2017-07-21

FREEDOM OF INFORMATION COMMISSION
OF THE STATE OF CONNECTICUT

In the Matter of a Complaint by

Luis Sola,

Complainant

against

Director of Legal Services, State of Connecticut, Judicial Branch; and State of Connecticut, Judicial Branch,

Respondents

Report of Hearing Officer

Docket #FIC 2017-0080

July 3, 2017

The above-captioned matter was heard as a contested case on March 28, 2017, 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. It is found that the complainant is an employee of the respondent Judicial Branch.

2. On January 9, 2017, the complainant requested correspondence and other records concerning a disciplinary matter against him.

3. Section 1-200(1)(A), G.S., defines "public agency" in relevant part as "any judicial office, official, or body or committee thereof but only with respect to its or their administrative functions."

4. The respondents do not contest, and it is found, that the complainant requested records with respect to the respondents' administrative functions.

5. It is found, therefore, that with respect to the records requested by the complainant, the respondents are public agencies within the meaning of §1-200(1), G.S.

6. It is found that the respondents provided copies of some responsive records.

7. It is found, however, that the respondents withheld some handwritten questions and notes created in the course of the respondents' investigation of the complainant's alleged misconduct.

8. By letter filed February 7, 2017, the complainant appealed to this Commission, alleging that the respondents violated the Freedom of Information ("FOI") Act by failing to provide copies of the handwritten notes.

9. 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, ...whether such data or information be handwritten, typed, tape-recorded, printed, photostated, photographed or recorded by any other method.

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

> 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, ... or (3) receive a copy of such records in accordance with section 1-212.

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

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

13. During the hearing in this matter, the hearing officer ordered the respondents to submit for in camera inspection the records for which they claim an exemption, and to provide an accompanying index indicating the exemption(s) claimed.

14. On May 19, 2017, the respondents submitted records for in camera inspection. Such records shall be referenced herein as IC-2017-0080-1 through IC-2017-0080-29.

15. The respondents do not claim an exemption for IC-2017-0080-8 through IC-2017-0080-23, IC-2017-0080-26, and IC-2017-0080-27.

16. It is found that the respondents claim that §1-210(b)(1), G.S., exempts from disclosure the remaining in camera records, i.e., IC-2017-0080-1 through IC-2017-0080-7, IC-2017-0080-24 and IC-2017-0080-25, and IC-2017-0080-28 through IC-2017-0080-29.

17. Section 1-210(b)(1), G.S., provides that disclosure shall not be required of "[p]reliminary drafts or notes provided the public agency has determined that the public interest in withholding such documents clearly outweighs the public interest in disclosure."

18. The respondents' Index states that IC-2017-0080-1 through IC-2017-0080-7 are interview notes written by an attorney investigator. It is found that the investigator used such notes to draft a report and conclusion, which were provided to the complainant. It is found that IC-2017-0080-24 and IC-2017-0080-25, and IC-2017-0080-28 through IC-2017-0080-29 are another Judicial Branch investigator's handwritten notes of her predisciplinary interview of the complainant.

19. Upon careful inspection of the records referenced in paragraph 18, above, it is found that such records are notes within the meaning of §1-210(b)(1), G.S.

20. However, §1-210(b)(1), G.S., also requires the respondents to prove that they determined that the public interest in withholding records clearly outweighs the public interest in disclosure. "The statute's language strongly suggests that the agency may not abuse its discretion in making the decision to withhold disclosure. *The agency must, therefore, indicate the reasons for its determination to withhold disclosure* and those reasons must not be frivolous or patently unfounded." Van Norstrand v. FOI Commission, 211 Conn. 339, 345 (1989). (Emphasis added.)

21. At the hearing in this matter, the respondent legal director stated in conclusory fashion only that the respondents had determined that the public interest in withholding records clearly outweighed the public interest in disclosure. It is found that the respondents failed to present any evidence or further explanation of the reasons for their determination. "The burden of establishing the applicability of an exemption clearly rests upon the party claiming the exemption. This burden requires the claimant of the exemption to provide more than conclusory language, generalized allegations or mere arguments of counsel." New Haven v. FOI Commission, 205 Conn. 767, 775 (1987).

22. It is found that the respondents failed to indicate the reasons for their determination to withhold disclosure. It is found, therefore, that the respondents failed to prove an essential element of the exemption – that they made a non-frivolous determination that the public interest in withholding records clearly outweighs the public interest in disclosure.

23. It is found, therefore, that the respondents failed to prove that §1-210(b)(1), G.S., exempts from mandatory disclosure the records referenced in paragraph 18, above.

24. The respondents also claim that the records referenced in paragraph 16, above, are exempt pursuant to §1-210(b)(4), G.S., which provides that disclosure is not required of records "pertaining to strategy and negotiations with respect to pending claims or pending litigation to which the public agency is a party until such litigation or claim has been finally adjudicated or otherwise settled."

25. It is found that on the date of the request there existed a pending claim by the complainant against the respondents in federal court alleging discrimination, harassment, and retaliation. It is found that such claim had not been finally adjudicated or otherwise settled as of the date of the hearing in this matter.

26. As to whether the records pertain to strategy or negotiation with respect to the pending claim, the Connecticut Supreme Court in Stamford v. FOI Commission, 241 Conn. 310, 318 (1997), cited with approval the definitions in Webster's Third New International Dictionary of the words "strategy" and "negotiations" within the meaning of §1-210(b)(4), G.S:

> Strategy is defined as 'the art of devising or *employing plans or stratagems*.' [Emphasis in original.] .... Negotiation is defined as 'the action or process of negotiating,' and negotiate is variously defined as: 'to communicate or confer with another so as to arrive at the settlement of some matter: meet with another so as to arrive through discussion at some kind of agreement or compromise about something;' 'to arrange for or bring about through conference and discussion: work out or arrive at or settle upon by meeting or agreements or compromises;' and 'to influence successfully in a desired way by discussions and agreements or compromises.'

27. After review in camera of the records referenced in paragraph 16, above, it is found that such records do not reveal a plan or stratagem to be employed in the pending claim, nor do they reflect negotiation.

28. It is found that the in camera records do not pertain to strategy or negotiations with respect to a pending claim within the meaning of §1-210(b)(4), G.S.

29. It is concluded that §1-210(b)(4), G.S., does not exempt the redacted records from disclosure.

30. Last, the respondents claim that IC-2017-0080-1 through IC-2017-0080-7 are exempt as "attorney work product."

31. It is concluded, however, that the "attorney work product" doctrine is derived from an interpretation of the rules of discovery of federal civil procedure.

32. It is concluded that to consider the "attorney work product" doctrine to be an exception to disclosure under the FOI Act would be to contradict the Connecticut Supreme Court's ruling in Chief of Police, Hartford Police Department v. FOIC, 252 Conn. 377, 386 (2000). In that case, the Court concluded that "... requests for records under the [FOI] act are to be determined by reference to the provisions of the act, irrespective of whether they are or otherwise would be disclosable under the rules of state discovery ... whether civil or criminal."

33. It is concluded, therefore, that the "attorney work product" exception to the rules of discovery does not constitute an exception to the FOI Act. Jean McCarthy v. First Selectman, Town of Redding; et al, Docket #FIC 2013-022 (November 13, 2013).

34. It is found, therefore, that the records submitted for in camera inspection are not exempt from disclosure as claimed by the respondents.

35. It is concluded, therefore, that the respondents violated §§1-210(a) and 1-212(a), G.S., by withholding such records from the complainant.

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 to the complainant, free of charge, copies of the records submitted for in camera inspection, referenced as IC-2017-0080-1 through IC-2017-0080-7, IC-2017-0080-24 and IC-2017-0080-25, and IC-2017-0080-28 through IC-2017-0080-29 in the findings of fact, above.

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

Lisa Fein Siegel
as Hearing Officer

2017-0080/hor/lfs/070317