NO. CV 10 6006708S	:	SUPERIOR COURT
UNIVERSITY OF CONNECTICUT HEALTH CENTER	:	JUDICIAL DISTRICT OF
v.	:	NEW BRITAIN
FREEDOM OF INFORMATION COMMISSION ET AL.	:	JUNE 28, 2011

MEMORANDUM OF DECISION

The plaintiff, State of Connecticut, University of Connecticut Health Center (the university) appeals[1] from a July 28, 2010 final decision of the defendant freedom of information commission (FOIC) in response to the complaint of the defendant Priscilla Dickman (Dickman). In this appeal, the university has only appealed from the portion of the final decision in which the FOIC rejected the applicability of an exemption to the freedom of information act (FOIA), General Statutes § 1-210 (b) (1) ("Preliminary drafts

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[1] The FOIC raised in its Finding 53 that this proceeding arose on a claim by the defendant Dickman that the university had not complied with an earlier FOIC final decision. The parties briefed the effect of the prior order on this present appeal. Due to the outcome of the administrative appeal, the court does not find it necessary to analyze the appeal in the context of a compliance action. Rather the court has ruled directly on the validity of the university's claimed exemption from FOIA. Also the university is aggrieved for purposes of § 4-183 (a), as it has been ordered to release certain records to Dickman.

or notes provided the public agency has determined that the public interest in withholding such documents clearly outweighs the public interest in disclosure.")

The relevant findings of the FOIC on the appealed issue in the final decision are as follows:

> 2. By letter dated September 23, 2009 and filed September 24, 2009, the complainant [Dickman] appealed to the Commission, alleging that the respondents [the university] violated the Freedom of Information ("FOI") Act by not complying with an order in a final Commission decision reached in a previous complaint, which the complainant had filed against these respondents.
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> 4. In the instant case, the complainant contends that the respondents failed to comply with the Commission's July 8, 2009 order by failing to provide her with copies of Karen Duffy Wallace's emails, from January 2005 through August 2008.
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> 6. At the non-compliance hearing, the hearing officer issued an order directing the respondents to submit copies of the records being claimed as exempt to the FOI Commission for an *in camera* inspection.
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> 24. The respondents . . . contend that portions of the . . . *in camera* records are exempt pursuant to § 1-210(b) (1). . . .
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> * * *

27. The respondents testified that the *in camera* records identified in paragraph 24, above, concern the preliminary notes of an investigator conducting an investigation into an employee's conduct.

28. It is found that the respondents' procedure for investigating employee conduct includes having the investigator interview as many individuals as possible. The respondents further testified that the investigator takes notes during such interviews for the purpose of preparing a final investigatory report. The respondents conceded, however, that, because the requested records are not handwritten notes, but emails, the *in camera* records identified in paragraph 24 above, were not maintained by the investigator for his or her personal reference, but rather were distributed to at least one other party.

29. After a careful review of the *in camera* records, it is found that none of the *in camera* records identified in paragraph 24 above, can fairly be described as "notes" of an investigator. It is further found that the necessary circulation of these emails negates their preliminary or "for personal use" nature. . . .

30. Based on the finding at paragraph 29, above, it is concluded that the records identified in paragraph 24, above, are not exempt from mandatory disclosure pursuant to § 1-210(b)(1), G.S.

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 to the complainant, free of charge, a copy of all requested records that have not been previously provided. . . .

The university timely appealed from the FOIC's final decision. Subsequently on June 1, 2011, the parties agreed to submit the *in camera* records[2] under seal to the court.[3] The court has reviewed each of the records submitted *in camera* to determine whether the FOIC has acted correctly in determining whether the exemption applies. The court has conducted its own review under the authority of § 1-206 (d) and *Shew* v. *Freedom of Information Commission*, 44 Conn. App. 611, 621, 691 A.2d 29 (1997), aff'd, 245 Conn. 149, 714 A.2d 664 (1998) (approving trial court's conclusion after *in camera* review that five documents were "either unfinished or preliminary.")

The university argues that the records in question are "preliminary drafts or notes."[4] A record is "preliminary" if it "precedes formal and informed decisionmaking . . . It is records of this preliminary, deliberative and predecisional process that we conclude the exemption was meant to encompass." *Shew* v. *Freedom of Information*

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As shown in the June 6, 2011 index to these records, if § 1-210 b (1) were applicable, then either an entire record would be exempt from disclosure or that portion of the record not already exempt by the attorney client privilege would be exempt from disclosure.

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The appropriate steps under Practice Book § 11-20A to seal the records in this court were taken by the FOIC.

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The university also argues that it further met the second requirement of the exemption, that the release of these allegedly"preliminary" drafts and notes would not be in the public interest. Because the court agrees with the FOIC on its finding that the records are not preliminary, the court need not rule on this second requirement to meet the § 1-210 (b) (1) exemption from FOIA.

Commission, 245 Conn. 149, 165, 714 A.2d 664 (1998), quoting *Wilson* v. *Freedom of Information Commission,* 181 Conn. 324, 332-33, 435 A.2d 353 (1980). 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, 559 A.2d 200 (1989).

Shew v. *Freedom of Information Commission*, supra, 245 Conn. 164-65, further analyzes "preliminary," quoting in part from *Van Norstrand* and *Wilson*: "Examining, first, the common meaning of the words contained in this phrase, we observed that 'preliminary' is defined as 'something that precedes or is introductory or preparatory.' As an adjective it describes something that is 'preceding the main discourse or business.' A 'draft' is defined as 'a preliminary outline of a plan, document or drawing . . . .' American Heritage Dictionary of the English Language. By using the nearly synonymous words 'preliminary' and 'draft,' the legislation makes it very evident that preparatory materials are not required to be disclosed. . . . Furthermore, the concept of preliminary, as opposed to final, should not depend upon . . . whether the actual documents are subject to further alteration. " (Brackets omitted; internal quotation marks omitted.) See also *Coalition to Save Horsebarn Hill* v. *Freedom of Information Commission*, 73 Conn. App.

89, 98, 806 A.2d 1130 (2002) (agency had complied documents contemplating future contract).

This precedent was also followed in *Lewin* v. *Freedom of Information Commission*, 91 Conn. App. 521, 881 A.2d 519 (2005). There the Appellate Court did not have to determine whether the records were "preliminary," as the parties did not dispute "that the notes taken by the acting chairman are preliminary notes." Id., 526. These were handwritten notes taken during a probable cause investigation of a town officer for violation of municipal ethics code, "containing the acting chairman's summary of witness testimony, his impressions of the credibility of witnesses and his theories of the case." Id., 523.[5]

The mere fact that the records in the present case are computerized print-outs (mostly e-mail) does not change the analysis of "preliminary." It is true that the notes in *Lewin* were handwritten; but that was irrelevant to the fact that in that case the chairman's notes were personal and predecisional. The court thus does not fully agree with Finding 28, and does not rule that an e-mail document may never be subject to the FOIA exemption for preliminary drafts and notes. It is the "preparatory" nature of the record that defines the exemption.

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In *Lewin*, the Appellate Court affirmed the FOIC's and the trial court's finding that the public interest would not be served by release of these handwritten notes.

Under these constraints, the court has undertaken an *in camera* review of the documents under seal in this appeal. These were held by the FOIC not to be exempt. See Finding 30. There were separate sets of documents submitted. The first were those where the FOIC had found no other exemption, so that the only claimed exemption for the whole document would 1-210 (b) (1). The court cannot find any reason to differ with the FOIC's analysis. Only a few documents had any substance at all. One document discussed a concluded investigation in a prior case[6] and another was a statement sent to a superior for further action. Most were cover letters ("attached is an affidavit," "ok, ready to go," "thanks in advance"). Other pages were merely blank. These are completed actions and are not "preliminary."

The second set of documents are those in which a portion of the document was exempt due to other FOIA exemptions. The court looked at these documents in their entirely and again could find nothing "preliminary." Most refer to setting a time for a meeting and others merely state "please review." Again these documents were complete when sent and do not represent preliminary decision-making.

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The FOIA exemption for invasion of personal privacy has not been asserted by the university.

The court concludes that based on its review, the university failed to meet the preliminary draft and note exception, and that the FOIC did not err in reaching the same conclusion. Therefore the appeal is dismissed.

Henry S. Cohn, Judge