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FREEDOM OF INFORMATION



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Michael Aronow,
Complainant(s)
against

Notice of Meeting

Docket #FIC 2012-484

Director, Health Affairs Policy Planning, State of
Connecticut, University of Connecticut Health
Center; and State of Connecticut, University of
Connecticut Health Center,
Respondent(s)

March 15, 2013

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, April 10, 2013**. 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 March 29, 2013**. 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 March 29, 2013**. **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 March 29, 2013**, 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: Heena Kapadia, Esq.,
William N. Kleinman, Esq. and Jeffrey M. Blumentahl, Esq.,
Jeffrey J. Mirman, Esq., Henry F. Murray, Esq.

3/15/13/FIC# 2012-484/Trans/wrbp/VDH/TCB

FREEDOM OF INFORMATION COMMISSION
OF THE STATE OF CONNECTICUT

In The Matter of a Complaint by

Report of Hearing Officer

Michael Aronow,

Complainant

against

Docket #FIC 2012-484

Director, Health Affairs Policy Planning,
State of Connecticut, University of
Connecticut Health Center; and
State of Connecticut, University
of Connecticut Health Center,

Respondents

March 13, 2013

The above-captioned matter was heard as a contested case on February 5, 2013, at which time the complainant, the respondents and two interveners appeared, stipulated to certain facts and presented testimony, exhibits and argument on the complaint. On November 13, 2012, Jay R. Lieberman, M.D. moved to intervene in this matter as a full party respondent. On January 23, 2013, The American Association of University Professors, University of Connecticut Health Center Chapter, also moved to intervene in this case as a full party complainant. No party objected or otherwise responded to these motions, and the motions to intervene were granted.

After consideration of the entire record, the following facts are found and conclusions of law are reached:

1. The University of Connecticut respondents are public agencies within the meaning of §1-200(1), G.S.

2. It is found that, by email correspondence dated August 23, 2012, the complainant requested that the respondents' FOI Officer provide him with copies of the following records:

- a. A copy of the Health Center Appeals Committee ("HCAC") report concerning the grievance the complainant filed against Dr. Jay Lieberman; and
- b. A copy of Dr. Phil Austin's written decision with respect to the HCAC's report.

3. It is found that, by email correspondence dated August 27, 2012, the respondents' FOI Officer acknowledged the complainant's request.

4. It is found that, by email correspondence dated August 30, 2012, the complainant queried the respondents' FOI Officer as to when he might expect to receive the copies of the requested records. It is found that, by reply email dated August 30, 2012, the FOI Officer responded that, while he had the records in his possession, legal issues with regard to the disclosure of the records had arisen and had to be resolved before the records could be disclosed. The FOI Officer further informed the complainant that, if he believed the resolution of the legal issues were not being handled in a timely manner, he could file a complaint with the Commission.

5. By letter dated and filed September 4, 2012, the complainant appealed to this Commission, alleging that the University of Connecticut respondents violated the Freedom of Information ("FOI") Act by denying him a copy of the records described in paragraph 2, above.

6. In his complaint, the complainant requested that the Commission give his complaint expedited consideration. On September 6, 2012, the complainant's request for expedited consideration was denied.

7. 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 section 1-218, whether such data or information be handwritten, typed, tape-recorded, printed, photostated, photographed or recorded by any other method.

8. 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 (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.

9. Section 1-212(a), G.S., provides in relevant part that "[a]ny person applying in writing shall receive, promptly upon request, a plain, facsimile, electronic or certified copy

of any public record.”

10. It is found that the University of Connecticut respondents maintain the records described in paragraph 2, above, and it is therefore concluded that such records are “public records” and must be disclosed in accordance with §§1-210(a) and 1-212(a), G.S., unless they are exempt from disclosure.

11. It is found that, by letter dated September 28, 2012, the FOI Officer informed the complainant that the records he requested were exempt from disclosure pursuant to Conn. Gen. Stat. §10a-154a, entitled “Performance and evaluation records of faculty and professional staff members not public records.”

12. Conn. Gen. Stat. §10a-154a provides as follows:

Any record maintained or kept on file by a board of trustees of a constituent unit of the state system of higher education which is a record of the performance and evaluation of a faculty or professional staff member of such constituent unit shall not be deemed to be a public record and shall not be subject to disclosure under the provisions of section 1-210, unless such faculty or professional staff member consents in writing to the release of his records by the board of trustees of the constituent unit. Such consent shall be required for each request for a release of such records.

13. It is found that the records at issue in this case are the end result of a University of Connecticut Health Center (“UCHC”) grievance procedure. It is found that the UCHC grievance procedure was triggered when, on September 30, 2011, the complainant filed a grievance with the University’s HCAC against Dr. Jay Lieberman.

14. It is found that the UCHC’s grievance procedure provides in part, as follows:

If the HCAC believes that there may be such substance to the grievance as to justify further investigation, it shall appoint a five member ad hoc committee called the Hearing Committee. . . .

...

The Hearing Committee will issue its report and recommendations to the Provost and Executive Vice President for Academic Affairs. . . . Within thirty days of the Hearing Committee’s report, the President or the Provost and Executive Vice President for Academic Affairs shall inform the Hearing Committee in writing, of his or her response to its recommendations, with copies to the grievant; the person(s) against whom the grievance is lodged, and the

HCAC. Final disposition of grievances by the [HCAC] shall be effected without unnecessary delay.

If not satisfied with the outcome of the [HCAC's] investigation and the action of the President or the Provost and Executive Vice President for Academic Affairs in response thereto, the grievant, [and] the person or persons against whom the grievance is lodged. . . may, within thirty days of receiving the response, address a written appeal to the [UCHC] Board of Directors through the President or Provost and the Executive Vice President for Academic Affairs.

15. It is found that, at the time he filed his grievance with the HCAC, the complainant was an orthopedic surgeon employed by UCHC.

16. It is found that, on or around May 25, 2012, the complainant, invoking his standing as a grievant, first attempted to obtain copies of the HCAC's written recommendation to the Executive Vice President of Academic Affairs, and the Executive Vice President of Academic Affairs's written decision with regard to such recommendation.

17. It is found that, on May 29, 2012, the Grievance/Appeal Liaison for the HCAC informed the complainant that the Executive Vice President of Academic Affairs had delegated his responsibility to review and act on the recommendation of the HCAC to Dr. Philip E. Austin. It is further found that Grievance/Appeal Liaison informed the complainant that Dr. Austin needed additional time to complete his due diligence in reviewing the HCAC recommendation. Finally, it is found that the Grievance/Appeal Liaison informed the complainant that, because he was no longer an employee of the Health Center, he no longer had standing as a grievant.

18. Thereafter, on August 10, 2012, it is found that the complainant, continuing to invoke his standing as a grievant, again communicated with the Grievance/Appeal Liaison, requesting that the two reports be released to him immediately.

19. It is found that, on August 13, 2012, the Grievance/Appeal Liaison responded to the complainant that, due to the nature of the findings of the HCAC and the decision of Dr. Austin, "both reports are considered performance evaluations of a faculty member of a Connecticut institution of higher learning and as such, are protected from release to anyone other than the person's supervisor unless the person gives permission in writing." It is found that the Grievance/Appeal Liaison further informed the complainant, that without Dr. Lieberman's consent to disclosure, she was unable to release either the HCAC report or Dr. Austin's written decision to him.

20. It is found that, ten days following the August 13, 2012 correspondence, the complainant requested copies of the records pursuant to the FOI Act. (See ¶ 2, above).

21. It is the respondents' position that, while UCHC grievance process was triggered by the filing of grievance, the records resulting from the process, that being the HCAC's recommendation and Dr. Austin's written decision, could be construed as performance reviews of Dr. Lieberman. The respondents' FOI Officer readily conceded in his denial letter that the construction being applied to Conn. Gen. Stat. §10a-154a in this case was broad. He also testified credibly that he had lingering concerns about the application of §10a-154a to the records at issue and, because he not completely sure whether the records were covered by the protection of the statute, he denied the complainant's request because he wanted to err on the side of preserving confidentiality.

22. At the close of the hearing on the matter, the respondents' FOI Officer 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 submitted consist of one four-page letter from the HCAC dated April 13, 2012, and one one-page letter from Dr. Austin dated April 14, 2012.

23. On February 14, 2013, the complainant filed a motion requesting that the Commission order the respondents to authenticate that the records submitted for in camera submission are final versions of the HCAC written recommendation and Dr. Austin's written decision with regard to such recommendation. On February 25, 2013, the hearing officer ordered the respondents to resubmit the in camera records with proof, such as an affidavit, verifying the records' authenticity.

24. On March 6, 2013, the respondents complied with the above-described order, and it is found that the records that were submitted for in camera inspection on February 5, 2013 were correct and accurate versions of the requested records.¹

25. After a careful review of the in camera records, it is found that the two requested records evidence the work of professionals involved in the resolution of a grievance. The records further evidence that such resolution is accomplished by means of a bifurcated process in which the first stage of the process includes a fact-finding procedure and a recommendation with regard to the substantive allegations, and the second stage of the process involves a final decision as to whether a violation has occurred. It is found that the procedure at issue is unlike a "performance review" in that its main focus concerns the allegations of a grievance, and not an in-depth, year-long focus on an employee's development, work product and behavior. It is further found that the fact that a grievance procedure and the resulting records may include reference to fact-based events does not transform the procedure into something other than a mechanism for resolving

¹ On March 6, 2013, the respondents filed a motion to strike the complainant's motion for authentication from the administrative record because it contained irrelevant, inaccurate and unverified information. Because there is no mechanism to remove a filing from the administrative record once it is delivered to the Commission, the respondents' motion to strike was denied. However, the Commission agrees with the respondents that much of the content of the motion was unnecessary to achieve its stated purpose, which was the establishment that accurate versions of the requested records had been submitted for in camera inspection. The respondents have gone above and beyond what was asked of them, submitting two affidavits with the Commission to authenticate the in camera submission. The Commission appreciates the respondents' cooperation throughout this process.

workplace disputes, nor does it transform the records into something other than the written recommendation and the final decision with regard to the filed grievance.

26. Respondent Lieberman contends that the Commission should follow the precedent set in Karen Mahoney v. Associate Dean, State of Connecticut, University of Connecticut Health Center, Department of Faculty Affairs, Docket #FIC 2007-506 (May 14, 2008) and in Matthew McDermott v. Gateway Community-Technical College, Docket #FIC 93-131 (Jan. 26, 1994). However, both cases are distinguished from the instant case.

27. In Mahoney, the complainant made a request for copies of all investigation materials that were used in determining the outcome of a nepotism grievance she filed concerning the hiring of a particular faculty member. Some of the records submitted for in camera inspection were found to be exempt from disclosure pursuant to Conn. Gen. Stat. §10a-154a. However, the records in Mahoney are clearly described in the decision as “two performance evaluations,” and, thus are not records resulting from a grievance process as we have in this case.

28. In McDermott, the complainant requested a copy of a report concerning an investigation of a college faculty member. The college in McDermott had retained an investigator to investigate a professor, and thereby help it respond to student grievances concerning the professor’s performance of her professional duties. The investigator submitted a memorandum of her findings along with attached appendices to the president. The Commission found that the investigator’s memorandum was akin to “a record of the performance or evaluation” of the professor which was exempt from disclosure under §10a-154a, while the appendices were not. While we do not have the benefit of reviewing the investigator’s findings in McDermott for content, the records at issue in this case contain a recommended resolution and final decision with regard to allegations of misconduct, and do not have as their focus the comprehensive evaluation of professional performance. See ¶ 25, above. For this reason, the records in McDermott should be distinguished from the records in the instant case.

29. The Commission find the facts of Jean M. Morningstar and University of Professionals Local 3837, AFT-CFEPE, AFL-CIO v. Executive Vice President for Health Affairs, State of Connecticut, University of Connecticut Health Center, Docket #FIC 2001-421 (Aug. 28, 2001) more analogous to the facts in the instant matter. In Morningstar, the complainants requested, inter alia, a copy of a report issued by a special review board (“SRB”) of the University of Connecticut, which board investigated allegations of a doctor’s misconduct. The report included the SRB’s findings, conclusions and recommendations with regard to the alleged misconduct. The respondents contended that the SRB’s report was exempt from disclosure pursuant to Conn. Gen. Stat. §10a-154 as records of employee performance and evaluation. However, the Commission in Morningstar clearly distinguished records concerning the investigation of misconduct from employee performance-based or evaluative records, finding that the records at issue were the former, and thus not subject to the protection of the statute: “the records at issue are not records of employee performance and evaluation, but are records pertaining to a specific

incident of misconduct and the subsequent investigation of such incident.”

30. Furthermore, based on the testimony of a permanent member of the HCAC, it is found that, over the past seven years, UCHC has not attempted to withhold either an HCAC recommendation or the resulting decision on the basis that such documents constitute a performance review.

31. It is therefore concluded that the requested records are not exempt from public disclosure as records “maintained or kept on file by a board of trustees of a constituent unit of the state system of higher education which [are records] of the performance and evaluation,” pursuant to §10a-154a, G.S.

32. Based on the foregoing, it is concluded that the University of Connecticut respondents violated the disclosure provisions of §§1-210(a) and 1-212(a), G.S., by denying the complainant’s request for access to the records described in paragraph 2, above.

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 complainant with a copy of the records at issue, free of charge.



Valicia Dee Harmon
Valicia Dee Harmon
as Hearing Officer