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FREEDOM OF INFORMATION



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Adam Osmond,
Complainant(s)
against

Notice of Meeting

Docket #FIC 2013-105

Commissioner, State of Connecticut, Department of
Social Services; State of Connecticut, Department of
Social Services; Director, State of Connecticut, Bureau of
Rehabilitation Services; and State of Connecticut, Bureau
of Rehabilitation Services,

Respondent(s)

January 2, 2014

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, January 22, 2014**. 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 January 10, 2014**. 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 January 10, 2014**. **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 January 10, 2014**, 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: Adam Osmond
Patrick B. Kwanashie, Esq.

1/2/14/FIC# 2013-105/Trans/wrbp/TCB/LFS

An Affirmative Action/Equal Opportunity Employer

FREEDOM OF INFORMATION COMMISSION
OF THE STATE OF CONNECTICUT

In The Matter of a Complaint by

Report of Hearing Officer

Adam Osmond,

Complainant

against

Docket #FIC 2013-105

Commissioner, State of Connecticut,
Department of Social Services; State
of Connecticut, Department of Social
Services; Director, State of Connecticut,
Bureau of Rehabilitation Services; and
State of Connecticut, Bureau of
Rehabilitation Services,

Respondents

December 31, 2013

The above-captioned matter was heard as a contested case on November 25, 2013 at which time the complainant and the respondents appeared, stipulated to certain facts and presented testimony, exhibits and argument on the complaint. By order of the hearing officer, the parties submitted additional evidence and representations after the hearing on this matter which have been marked as after filed Complainant's Exhibits D and Respondent's Exhibits 1 through 5.

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. By e-mail dated February 24, 2013 and filed on February 25, 2013, the complainant appealed to this Commission alleging that the respondents violated the Freedom of Information ("FOI") Act by failing to comply with his records requests.
3. 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.

4. 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.

5. Section 1-211, G.S., provides in relevant part that:

(a) [a]ny public agency which maintains public records in a computer storage system shall provide, to any person making a request pursuant to the Freedom of Information Act, a copy of any nonexempt data contained in such records, properly identified, on paper, disk, tape or any other electronic storage device or medium requested by the person, including an electronic copy sent to the electronic mail address of the person making such request, if the agency can reasonably make any such copy or have any such copy made....

(b) The fee for any copy provided in accordance with subsection (a) of section 1-211 shall not exceed the cost thereof to the public agency. In determining such costs for a copy, other than for a printout which exists at the time that the agency responds to the request for such copy, an agency may include only:

(1) An amount equal to the hourly salary attributed to all agency employees engaged in providing the requested computer-stored public record, including their time performing the formatting or programming functions necessary to provide the copy as requested, but not including search or retrieval costs except as provided in subdivision (4) of this subsection....

6. 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.”

7. It is found that by e-mails dated December 21, and December 30, 2012 the complainant made separate requests for certain records from the respondents.

8. It is found that the respondent Department of Social Services ("DSS") and the respondent Bureau of Rehabilitation Services ("BRS") collaborate for administrative purposes and collaborated to respond to the complainant's request.

9. It is found that at the request of the respondents, the complainant consolidated his request into one request for a total of 15 different records.

10. It is found that as of the date of the hearing the respondents had provided the complainant with all responsive records except the following:

- a. emails and email attachments pertaining to the Associate Accountant position that was offered to the complainant by David Doukas at BRS;
- b. all documents that were relied on when the offer for the position was rescinded;
- c. all emails that were sent or received by Melvin Jackson, Kathleen Blewett, David Doukas, Peter Zelez, and Sandra Washington, or anyone else involved with the position where "Adam", "Osmond", "DFC", "Department of Children of Families", or "Associate Accountant" appears in the subject or the body of the emails or in the signature section, including all attachments, from September 1, 2012 to December 31, 2012;
- d. internet usage report including all websites visited by Melvin Jackson, Kathleen Blewett, David Doukas, Peter Zelez, and Sandra Washington;
- e. all metadata for emails sent or received by Melvin Jackson, Kathleen Blewett, David Doukas, Peter Zelez, and Sandra Washington or anyone who was a decision maker for the Associated Administrative position between September 1, 2012 and December 31, 2012;
- f. current DSS and BRS employees (Full name, Employee number, Date of hire, Current job title, Department Name, Department Number, Current salary, sex and Race);
- g. names of DSS and BRS employees who were promoted from January 1, 2008 through December 20, 2012 including employee full name, employee number, old position, new position, sex and race; and
- h. an all non-exempt records of the successful candidate for the following positions (including but not limited to the application, emails, email attachment, notes, interview questions, interview answers, memos, scoring sheets, letters of recommendations, research documents, salary research,

affirmative action goals, tracking letters and any other related documents):

Supervising Accounts Examiner #101994
Supervising Accounts Examiner #101492
Fiscal Adm. Assistant #102744
Associated Accountant #102743
FAO #97745
FAO #98463
FAO #98465.

11. It is found that the requested records, to the extent they exist, are public records within the meaning of §§1-200(5), 1-210(a), and 1-212(a), G.S.

12. With respect to the request described in paragraphs 10a and 10c, above, it is found that the respondents strongly believed that all emails responsive to the complainant's request had been provided to him. However, the respondents stated at the hearing on this matter that, based on the complainant's further clarification of his request in this regard, they would conduct another search and that any additional records that were found would be provided to him. The respondents also agreed to provide an affidavit attesting to the nature of the search and the records that were found and provided.

13. At the order of the hearing officer, the respondents submitted an after-filed affidavit attesting to the search that was conducted and the additional records that were provided to the complainant. Such affidavit has been marked as respondent's exhibit 1.

14. It is found that the respondents have conducted reasonable searches in good faith, on both occasions, for records responsive to the complainant's request. It is found that while additional records were provided to the complainant as a result of the second search, they were found after the respondents changed the method in which they searched for responsive e-mails and not a result of the first search being careless.

15. It is found that the respondents have complied with the complainant's requests described in paragraphs 10a and 10c, above.

16. With respect to the records request described on paragraph 10b, above, it is found that there are no records responsive to the complainant's request.

17. With respect to the records requests described in paragraphs 10d and 10e, above, it is found that at the time of the hearing on this matter, the respondents were working with IT personnel at the Bureau of Enterprise and Technology ("BEST") in an effort to provide the complainant with responsive records. It is found that both the metadata and the internet usage report are maintained by BEST and not the respondents.

18. It is found that, with respect to the internet usage report, the time period for which the complainant was requesting is no longer available because BEST only maintains the last three months of an employee's internet usage.

19. With respect to the metadata for the e-mails accounts, it is found that BEST provided the records for the time period that was currently available which was between September 1, 2013 and December 3, 2013 and that to go back further would require BEST to retrieve the records from archives. It is found, however, that BEST is backlogged with requests and can not fulfill the complainant's request for approximately 18 months.

20. At the hearing on this matter, the complainant contended that the respondents unduly delayed in making efforts to respond to this portion of his request.

21. It is found, however, that the respondents were working on the complainant's request in the order of the items requested and that having never received a request for such records before the complainant's request, they had no reason to know that reports of employee internet usage were retained for only three months or that there was such a long waiting period to retrieve the metadata. It is further found that the records were maintained by BEST and that the respondents were compelled to rely on that agency's IT personnel for assistance which assistance was not expeditious.

22. It is found that the respondents did not unduly delay compliance with the complainant's requests described in paragraphs 10d and 10e, above, and it is concluded that they did not violate the promptness provisions of the FOI Act in this regard.

23. With respect to the records requests described in paragraphs 10f and 10g, above, the respondents do not maintain a record that lists the information the complainant requested. It is found, therefore, that they accurately responded that no such records exists. Consequently, the respondents did not violate the disclosure provision of the FOI Act in this regard.

24. However, at the hearing on this matter, the complainant stated that he would have accepted, and still would accept, any records from which he could glean the information requested in those requests. The respondents stated at the hearing on this matter that they would collect records from which the complainant could glean the information he was seeking.

25. It is found that after the hearing on this matter, the respondents provided the records from which the complainant could glean the information he requested as described in paragraphs 10f and 10g, above, in PDF even though the complainant requested that the records be provided in Excel format. The complainant objected to the format in which the records were provided.

26. Section 1-211(a), G.S., cited in paragraph 5, above, only provides that the requester has the option to request a specific method of delivery of nonexempt computer stored data and that the public agency is required to use the method of delivery requested if it reasonably can do so or have it done (e.g., have the data copied or burned to a disk by some other agency). Section 1-211(a), G.S., does not, however, by any of its terms, obligate a public agency to provide a copy of computer stored public record in the computer format requested by a requester.

27. It is found that while the complainant is entitled pursuant to §1-211(a), G.S., to request that a copy of the records be provided to him at his electronic mail address, the

respondents are not required by the FOI Act to provide the data in the format specifically requested. It is concluded, therefore, that the respondents did not violate the FOI Act by providing the complainant with the records in PDF format.

28. With respect to the records request described in paragraph 10h, above, it is found that the respondents maintain completed application packets of the successful candidates for the seven positions listed by the complainant which include the applicant flow report, candidate summary forms with notes, and the Form CT-HR-12 with attachments. The respondents maintain that these records are exempt from disclosure pursuant to §§1-210(b)(6), and 5-225, G.S.

29. Section 1-210(b)(6), G.S., provides in relevant part that nothing in the FOI Act shall require the disclosure of "test questions, scoring keys and other examination data used to administer a licensing examination, examination for employment or academic examinations"

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

[a]ll 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. Within thirty days of receipt of the final earned rating, a person may inspect his papers, markings, background profiles and other items used in determining the final earned ratings, other than examination questions and other materials constituting the examination, subject to such regulations as may be issued by the Commissioner of Administrative Services. Within thirty days of inspecting his papers, a person may, in writing, appeal to the Commissioner of Administrative Services the accuracy of his 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.

31. In Washington v. FOIC, 25 Conn. L. Rptr. 334 (1999), the Superior Court concluded that, "[b]ased on the testimony at the FOIC hearing," oral board panelists' scoring sheets were "the equivalent of a scoring key" which is specifically exempted from disclosure under §1-210(b)(6), G.S.

32. The Commission has previously interpreted Washington to mean that certain oral interview scoring sheets were exempt from disclosure pursuant to §1-210(b)(6), G.S. See Docket #FIC 2000-501, Randal Edgar et al. v. Waterbury Superintendent of Schools (scores assigned by interviewers to each candidate for the position of superintendent of schools constitute examination data used to administer an examination for employment within the meaning of §1-210(b)(6), G.S., and Washington v. FOIC); Docket #FIC 2003-377, Casey v. Department of Correction (forms containing questions asked by the interview panel, candidates' responses, ratings given by the interview panel members and any comments made by such members

constituted test questions, scoring keys and other examination data used to administer an examination for employment within the meaning of §1-210(b)(6), G.S., and Washington v. FOIC;

33. See also Personnel Director, Department of Income Maintenance v. FOIC, 214 Conn. 312 (1990); Miller v. Department of Labor, Docket #FIC 2012-203 (2013) (applications of individuals who applied for positions with Department of Labor exempt from disclosure pursuant to §5-225, G.S.), and Fisi v Department of Health and Addiction Services, Docket #FIC 1994-055 (1995) (job applications for director's position exempt from disclosure pursuant to §5-225, G.S.).

34. The Commission also takes administrative notice of its records and files in Winkler and Administrative and Residual Employees Union v. Commissioner, State of Connecticut, Department of Administrative Services, Docket #FIC 2005-492 (2006). In Winkler, the complainant requested "examination applications or PLD-1s" and all attachments submitted...for the Fiscal Administrative Manager 1 examination..." The Commission concluded such records were exempt from disclosure, under §5-225 G.S., as construed by the Supreme Court in Personnel Director, because the PLD-1 constitutes "recorded data used to determine promotions of state employees." See Personnel Director supra at 314. According to the Court in Personnel Director, under §5-225, G.S., such information may be disclosed only to the applicant who is the subject of such application or examination. Personnel Director, Id. at 316.

35. The respondents submitted an un-redacted copy of the records responsive to the request described in paragraph 10h for in camera inspection which records have been identified as in camera record #s IC 2013-105-001 through IC 2013-105-017.

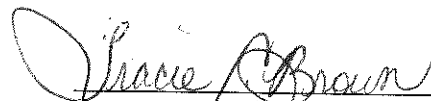
36. It is found, after careful review of the in camera records, that such records constitute "recorded data used to determine promotions of state employees" pursuant to Personnel Director, Id., and that because the Form CT-HR-12 and its attachments constitute an employment examination, it therefore follows that the records related thereto are other examination data used to administer the examination for employment within the meaning of §1-210(b)(6), G.S.

37. It is concluded therefore that the in camera records are exempt from mandatory disclosure pursuant to §§1-210(b)(6), and 5-225, G.S., and that the respondent did not violate §§1-210(a) and 1-212(a), G.S., by withholding the in camera records.

38. The Commission notes that resumes and job applications of individuals maintained by public agencies *other than state agencies* have been held by the Commission to be subject to disclosure to the public, but that §5-225, G.S., dictates a different conclusion for the job applications for state employment.

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

1. The complaint is hereby dismissed.



Attorney Tracie C. Brown
as Hearing Officer

FIC2013-105/hor/tcb/20131230