FREEDOM OF INFORMATION COMMISSION
OF THE STATE OF CONNECTICUT

In The Matter of a Complaint by FINAL DECISION

AFSCME Council 4 and the New London Police Union,

Complainant

against Docket #FIC 2016-0651

Chief, Police Department, City of New London; Police Department, City of New London; and City of New London,

Respondents August 9, 2017

The above-captioned matter was heard as a contested case on November 15, 2016, at which time the complainants and the respondents appeared, stipulated to certain facts and presented testimony, exhibits and argument on the complaint. At the hearing on this matter, Cynthia Olivero requested, through counsel, and was granted, intervenor status in these proceedings.

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 August 10, 2016, the complainants made a request to the respondents for a copy of the internal affairs investigation of a city employee named Cynthia Olivero (hereinafter "the record").

3. It is found that by letter dated August 29, 2016, the respondents informed the complainants that Ms. Olivero had objected to the disclosure of the record and that the record would not be disclosed.

4. By letter dated September 9, 2016 and filed on September 12, 2016, the complainants appealed to this Commission alleging that the respondents violated the Freedom of Information ("FOI") Act by failing to disclose the requested record.

5. 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.

6. 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.

7. 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."

8. It is found that the requested record is a public record within the meaning of §§1-200(5), 1-210(a), and 1-212(a), G.S.

9. At the request of the hearing officer, the respondent department submitted the requested record for an in camera inspection. The record has been identified as in camera record #s 2016-0651-001 through 2016-0651-135.

10. At the hearing on this matter, the respondents argued that the requested record was exempt from disclosure pursuant to §1-210(b)(2), G.S.

11. Section 1-210(b)(2), G.S., permits the nondisclosure of "personnel or medical files and similar files the disclosure of which would constitute an invasion of personal privacy."

12. The Supreme Court set forth the test for the §1-210(b)(2), G.S., exemption in Perkins v. Freedom of Information Commission, 228 Conn. 158, 175 (1993), which test has been the standard for disclosure of records pursuant to that exemption since 1993. The Commission takes administrative notice of the multitude of court rulings, Commission final decisions and instances of advice given by Commission staff members which have relied upon the Perkins test, since its release in 1993.

13. Specifically, under the Perkins test, the claimant must first establish that the files in question are personnel, medical or similar files. Second, the claimant must show that disclosure of the records would constitute an invasion of personal privacy. In determining whether disclosure would constitute an invasion of personal privacy, the claimant must establish both of two elements: first, that the information sought does not pertain to legitimate matters of public concern, and second, that disclosure of such information is highly offensive to a reasonable person.

14. Further, §1-214, G.S., provides in relevant part that:

> . . .
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> (b) Whenever a public agency receives a request to inspect or copy records contained in any of its employees' personnel or medical files and similar files and the agency reasonably believes that the disclosure of such records would legally constitute an invasion of privacy, the agency shall immediately notify in writing (1) each employee concerned . . . and (2) the collective bargaining representative, if any, of each employee concerned. Nothing herein shall require an agency to withhold from disclosure the contents of personnel or medical files and similar files when it does not reasonably believe that such disclosure would legally constitute an invasion of personal privacy.

15. It is found that the in-camera records are "personnel or medical files and similar files" within the meaning of §1-210(b)(2), G.S.

16. It is found that the respondents, upon review of the requested record, determined that its disclosure would constitute an invasion of Ms. Olivero's personal privacy and notified her of the complainants' request. It is also found that the respondents provided Ms. Olivero with notice of the proceedings in this matter at which she appeared through counsel.

17. It is further found that Ms. Olivero objected to the disclosure of the requested record contending that its disclosure would invade her personal privacy. At the hearing on this matter, she contended, through counsel, that disclosure of the information contained in the requested record included allegations of untrustworthiness and would cause embarrassment.

18. It is found that, in this regard, the respondents and the intervenor offered conclusory language rather than evidence to prove the application of the claimed exemption.[1]

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[1] "[U]nsupported conclusory allegations of counsel are not evidence and are insufficient for the application of an exemption from disclosure." New Haven v. Freedom of Information Commission, 205 Conn. 767,

19. In addition, it is found that, upon careful review of the in camera record, the record was not sufficient on its face to establish that the exemption was applicable because: the information contained in the record pertains to official police business and therefore, does pertain to legitimate matters of public concern; there are no unsubstantiated allegations contained in the record; and finally, while the disclosure of the information may be embarrassing to Ms. Olivero, it would not be highly offensive to a reasonable person within the meaning of Perkins.[2]

20. It is found, therefore, that the respondents and the intervenor failed to prove that the information contained in the requested record does not pertain to a legitimate matter of public concern and that disclosure would be highly offensive to a reasonable person. It is concluded therefore that §1-210(b)(2), G.S., does not apply to the requested record.

21. Consequently, it is further concluded that the respondents violated the disclosure provisions of §§1-210(a), and 1-212(a), G.S., by denying the complainants' request for a copy of the record 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 provide the complainants with an unredacted copy of the internal affairs investigation described in paragraph 2, of the findings, above, free of charge.

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

Approved by Order of the Freedom of Information Commission at its regular meeting of August 9, 2017.

Cynthia A. Cannata
Acting Clerk of the Commission

776, 535 A.2d 1297 (1988). "The burden of establishing the applicability of an exemption ... requires the claimant ... to provide more than conclusory language, generalized allegations or mere arguments of counsel. Rather, a sufficiently detailed record must reflect the reasons why an exemption applies to the materials requested." (Citations omitted.) Id., at 775-76, 535 A.2d 1297; Superintendent of Police v. Freedom of Information Commission, 222 Conn. 621, 627, 609 A.2d 998 (1992); Hartford v. Freedom of Information Commission, 201 Conn. 421, 434-35, 518 A.2d 49 (1986).

[2]The courts have established that disclosure of reports of internal investigations of police misconduct does not constitute an invasion of personal privacy, except in the rare case where the misconduct does not relate to official business, and the misconduct is unsubstantiated by the investigation. See e.g., Department of Public Safety v. FOI Commission, 242 Conn. 79, 85 (1997) (report of even unsubstantiated claim of use of excessive force by state trooper not exempt from disclosure).

PURSUANT TO SECTION 4-180(c), G.S., THE FOLLOWING ARE THE NAMES OF EACH PARTY AND THE MOST RECENT MAILING ADDRESS, PROVIDED TO THE FREEDOM OF INFORMATION COMMISSION, OF THE PARTIES OR THEIR AUTHORIZED REPRESENTATIVE.

THE PARTIES TO THIS CONTESTED CASE ARE:

AFSCME COUNCIL 4, AND THE NEW LONDON POLICE UNION, c/o Attorney Tricia Johnson, 444 East Main Street, New Britain, CT 06051 and John Miller, and Troy Raccuia, Staff Representative, AFSCME, Council 4, 444 East Main Street, New Britain, CT 06051

CHIEF, POLICE DEPARTMENT, CITY OF NEW LONDON; POLICE DEPARTMENT, CITY OF NEW LONDON; AND CITY OF NEW LONDON, c/o Attorney Brian Estep, Conway, Londregan, Sheehan & Monaco, PC, 38 Huntington Street, P.O. Box 1351, New London, CT 06320

Intervenor: Cynthia Olivero, 23 Blumenthal Drive, Uncasville, CT 06382

Cynthia A. Cannata
Acting Clerk of the Commission

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