



FREEDOM OF INFORMATION



Connecticut Freedom of Information Commission • 18-20 Trinity Street, Suite 100 • Hartford, CT 06106
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Renee LaMark Muir,
Complainant(s)
against

Notice of Meeting

Docket #FIC 2015-323

Chief, Police Department, City of Hartford; Police
Department, City of Hartford; and City of Hartford,
Respondent(s)

December 8, 2015

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 13, 2016**. 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 December 30, 2015**. 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 December 30, 2015**. **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 December 30, 2015**, 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: Attorney Alexa J.P. Lindauer
Attorney Cynthia Lauture

2015-12-08/FIC# 2015-323/Trans/wrbp/FJB/MES/VB

FREEDOM OF INFORMATION COMMISSION
OF THE STATE OF CONNECTICUT

In the Matter of a Complaint by

Report of Hearing Officer

Renee LaMark Muir,

Complainant

against

Docket #FIC 2015-323

Chief, Police Department, City of
Hartford; Police Department, City
Of Hartford; and City of Hartford,

Respondents

October 8, 2015

The above-captioned matter was heard as a contested case on September 8, 2015, 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. The respondents are public agencies within the meaning of §1-200(1), G.S.
2. It is found that, in 2014, the complainant filed a complaint of discrimination against the respondents. It is also found that the respondents hired Attorney Nicole Chomiak of the law firm of Nuzzo & Roberts, L.L.C., to perform an investigation of such complaint.
3. It is found that, in the course of her investigation, Attorney Chomiak interviewed a number of witnesses and made audio recordings of such interviews.
4. It is found that, at the conclusion of her investigation, in May, 2014, Attorney Chomiak prepared a written report summarizing her investigation (hereinafter "the report"), and provided it to the respondents. It is also found that, at such time, Attorney Chomiak did not provide to the respondents copies of the audio recordings described in paragraph 3, above, nor did she provide any other records relating to the investigation.
5. It is found that, by letter dated April 27, 2015, the complainant requested that the respondents provide her with copies of any and all records related to the investigation described in paragraph 2, above, including all audio recordings of interviews.

6. It is found that, by letter dated April 28, 2015, the respondents acknowledged the complainant's request described in paragraph 5, above, and informed her that the only record responsive to such request maintained by the respondents was the report, which would be provided upon payment of the statutory copying fee. It is found that the respondents ultimately provided a copy of the report to the complainant.

7. By notice of appeal dated May 6, 2015, and filed with the Commission on May 8, 2015, the complainant appealed, alleging that the respondents violated the Freedom of Information ("FOI") Act by denying her copies of all requested records, including the audio recordings of interviews described in paragraph 3, above. The complainant seeks as relief an order for the disclosure of all requested records, attorney's fees, and any other appropriate relief.

8. Section 1-200(5), G.S., defines "public records or files" as:

...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.

9. Section 1-210(a), G.S., further 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.

10. Section 1-212(a), G.S., further 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."

11. It is found that, upon their receipt of the complainant's request described in paragraph 5, above the respondents made no attempt to contact Attorney Chomiak to ask whether she possessed any responsive records. As of the time of the hearing in this matter, the respondents had not asked Attorney Chomiak for copies of the audio recordings and any other responsive records.

12. The respondents have not claimed that the requested records are exempt from disclosure by virtue of the attorney-client privilege as set forth in §1-210(b)(10), G.S., or by any other exemption. Rather, the respondents contend that they have fulfilled their obligations under the FOI Act in this matter because they were not in possession of any other responsive records at the time of the request described in paragraph 5, above, and because they provided to the complainant the one record which they did possess, the report.

13. The respondents further contend that Attorney Chomiak is not a public agency, but merely an attorney contracted to perform a service for the government and thus not subject to the FOI Act, citing to Envirotest Systems Corporation v. Freedom of Information Commission et al, 59 Conn. App. 753 (2000) (company performing emission testing not the functional equivalent of a public agency) and an earlier case, Hallas v. Freedom of Information Commission et al, 18 Conn. App. 291 (1989) (law firm hired by a public agency as bond counsel is not the functional equivalent of a public agency).

14. However, neither Envirotest nor its predecessor Hallas is on point, since in both cases the facts involved a request for records made to an entity which had contracted with a public agency, and the question decided was whether that contracting agency was the functional equivalent of a public agency.¹ In this matter, the request was made to the public agency, and the question before the Commission is whether, in these circumstances, the public agency need only provide responsive records which are physically in its possession at the time of the request.

15. The respondents next claim that the audio recordings were utilized and maintained solely by Attorney Chomiak and are the sole property Nuzzo & Roberts, L.L.C., citing Town of Windham v. Freedom of Information Commission, 48 Conn. App. 522, 528 (1998). In Windham, the records at issue were affidavits prepared by an attorney hired by the Town of Windham to represent it in an FOI Commission proceeding. The affidavits were not put into evidence in the underlying FOI proceeding. Although the requester in that matter ultimately received the affidavits, the case went forward. Based on the evidence presented in that case, the Appellate Court concluded that the Commission's earlier decision concluding that the affidavits were prepared and used by a public agency and that they related to the conduct of the public's business, was not supported by substantial evidence. Based on the evidence in that case, the Court concluded that the affidavits were not used by the public agency, but only by its private attorney in preparing for a FOI hearing in which the affidavits were ultimately not used. The Court further concluded that the affidavits were not public records.

16. In this case, however, it is found that the respondents used the audio recordings, since they are apparently the entire basis of the report; indeed numerous

¹ It should be noted that the 2000 Envirotest decision was largely overturned by the General Assembly in the following legislative session. Public Act 2001-169.

quotes are used throughout the report, which is the culmination of the respondents' investigation of the complaint described in paragraph 2, above.

17. Finally, the respondents cite to Docket #FIC 2009-103; William Comerford v. Stephen P. Nere, Executive Director, Housing Authority, Town of Wallingford; Robert Prentice, Chairman, Housing Authority, Town of Wallingford; and Board of Commissioners, Housing Authority, Town of Wallingford (September 23, 2009), a prior Commission Final Decision which held that an audio recording made by a recording secretary to assist her in preparing meeting minutes was not a public record since the audio recording was owned by the recording secretary, and not the public agency.

18. The complainant contends that the respondents own the requested records, and cites to a decision of the Statewide Grievance Committee, Machado v. Johnson, Grievance Complaint, # 11-0618 (original file documents are property that a client is entitled to receive on demand under the Rules of Professional Conduct 1.15 (e)).

19. It is found that the respondents paid the firm of Nuzzo & Roberts, L.L.C., an hourly fee to investigate the discrimination complaint described in paragraph 2, above. It is further found that requested records were prepared exclusively for the benefit of the respondents. It is also found that the respondents own the audio recordings and, to the extent that they exist, other requested records created in the course of the investigation.

20. Consequently, it is concluded that the requested records are public records within the meaning of §1-200(5), G.S.

21. It is concluded that the respondents cannot avoid disclosure of a public record merely by avoiding physical possession of such record. See e.g., First Selectman, Town of Columbia v. State of Connecticut, Freedom of Information Commission and John M. Leahy, Docket #CV 00 0501055, Judicial District of New Britain, November 28, 2000 (Owens, J.) (claim that records are not in the physical possession of public agency, but rather are in the physical possession of its attorney, is unavailing).

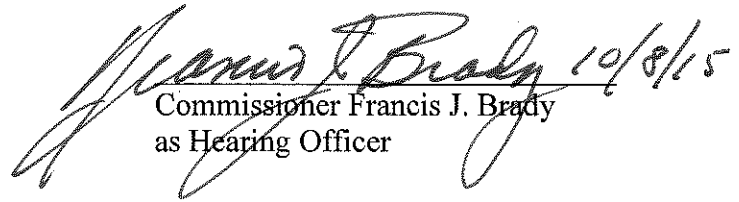
21. It is therefore concluded that respondents violated to §§1-210(a) and 1-212(a), G.S., by failing to provide to the complainant all requested records, including the audio recordings discussed herein.

22. The Commission notes that the FOI Act does not specifically set forth as a remedy the award of attorney's fees, as requested by the complainant. Under the facts and circumstances of this case, the Commission believes that only an order of disclosure is warranted.

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 contact the law firm of Nuzzo & Roberts, L.L.C., and demand copies of the contents of its file relative to the investigation

described in paragraph 2, above, including the audio recordings at issue herein. Upon receipt of such copies, the respondents shall promptly forward same to the complainant, free of charge.

 10/8/15
Commissioner Francis J. Brady
as Hearing Officer

FIC2015-323/HOR/FJB/MES/10082015