FREEDOM OF INFORMATION COMMISSION
OF THE STATE OF CONNECTICUT

In the Matter of a Complaint by | FINAL DECISION

Cherlyn Poindexter and
The New Haven Management and
Professional Union,

Complainants

against | Docket #FIC 2016-0381

Toni Harp, Mayor, City of New
Haven; and City of New Haven,

Respondents | April 12, 2017

The above-captioned matter was heard as a contested case on August 17, 2016, at which time the complainants and the respondents appeared, stipulated to certain facts and presented testimony, exhibits and argument on the complaint. The respondents submitted the records at issue in this case for in camera inspection.

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 letter of complaint filed May 20, 2016, the complainants appealed to the Commission, alleging that the respondents violated the Freedom of Information ("FOI") Act by failing to provide certain records, and requesting the imposition of civil penalties against the respondents.

3. It is found that, the complainants made a May 5, 2016 request to the respondents for copies of "any and all communications (correspondence, memo, and emails) from and to Michael Bayonne and/or McCarter and English from and to John Rose, Michael Dolan, Matthew Nemerson, Lillia Snyder, Daryl Jones, Tomas Reyes, Toni Harp, and Marcus Paca regarding CEO, CWI1, CWI2, CWI3 or Nicole Jefferson."

4. It is found that, at all times relevant, the respondents were engaged with a legal dispute with Nicole Jefferson over her employment by the respondents and others.

5. It is found that the respondents provided 899 pages of responsive emails on August 15, 2016, together with an email from the respondents' network administrator, describing the configuration parameters used in the search.

6. It is found that the 899 pages, which were submitted to the Commission for in camera inspection and numbered 000001 through 000899, are not 899 unique records. Many of the pages are duplicates.

7. It is found that the respondents redacted portions of the records that they asserted were exempt from disclosure pursuant to §§1-210(b)(2), (b)(4) and (b)(10), G.S.

8. 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.

9. Section 1-210(a), G.S., provides in relevant part:

> 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., 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 concluded that the 899 pages are public records within the meaning of §§1-200(5), 1-210(a) and 1-212(a), G.S.

12. The respondents contended that portions of the requested records are exempt from disclosure under §1-210(b)(10), G.S., as "communications privileged by the attorney-client relationship."

13. The applicability of the exemption contained in §1-210(b)(10), G.S., is governed by established Connecticut law defining the privilege. Maxwell v. FOI Commission, 260 Conn. 143 (2002). In Maxwell, the Supreme Court stated that §52-146r, G.S., which established a statutory

privilege for communications between public agencies and their attorneys, merely codifies "the common-law attorney-client privilege as this court previously had defined it." *Id.* at 149.

14. Section 52-146r(2), G.S., defines "confidential communications" as:

> ... all oral and written communications transmitted in confidence between a public official or employee of a public agency acting in the performance of his or her duties or within the scope of his or her employment and a government attorney relating to legal advice sought by the public agency or a public official or employee of such public agency from that attorney, and all records prepared by the government attorney in furtherance of the rendition of such legal advice. . . .

15. The Supreme Court has also stated that "both the common-law and statutory privileges protect those communications between a public official or employee and an attorney that are confidential, made in the course of the professional relationship that exists between the attorney and his or her public agency client, and relate to legal advice sought by the agency from the attorney." Maxwell, supra at 149.

16. It is found that John Rose, Michael Dolan, and Michael Bayonne of the law firm McCarter and English are all attorneys who represented the respondents in an underlying matter concerning Nicole Jefferson.

17. It is found that the vast majority of the in camera records claimed to be exempt pursuant to the attorney-client privilege are written communications transmitted in confidence between New Haven public officials or employees acting in the performance of their duties within the scope of their employment, and attorneys for New Haven, relating to legal advice sought by New Haven public officials or employees.

18. Is also found, however, that the following in camera records claimed to be exempt pursuant to the attorney client privilege either were not transmitted to or from officials or employees of the City of New Haven, or were additionally transmitted to an individual who was neither an official or employee of the City of New Haven, nor an attorney for the City of New Haven: 000191, 000192, 000193 (not transmitted to an official or employee of the City of New Haven); 000195, 000274, 000275, 000276, 000328 and 00329 (copied to an individual who is not an official or employee of the City of New Haven, thereby waiving the privilege).

19. It is therefore concluded that the records described in paragraph 18, above, are not exempt from disclosure pursuant to the attorney client privilege, and that the respondents violated §§1-210(a) and 1-212(a), G.S., by failing to disclose them.

20. The respondents maintain that record 000195 is exempt from disclosure pursuant to §1-210(b)(4), which provides that disclosure is not required of:

> Records pertaining to strategy and negotiations with respect to pending claims or pending litigation to which the public agency is a party until such litigation or claim has been finally adjudicated or otherwise settled ....

21. It is found that record 000195 does not on its face pertain to a pending claim or pending litigation to which the respondents were a party.

22. It is therefore concluded that record 000195 is not exempt from disclosure pursuant to §1-210(b)(4), and that the respondents violated §§1-210(a) and 1-212(a), G.S., by failing to disclose it.

23. Finally, the respondents maintain that records 000099 and 000100 are exempt from disclosure pursuant to §1-210(b)(2), G.S., which provides that disclosure is not required of: "[p]ersonnel or medical files and similar files the disclosure of which would constitute an invasion of personal privacy."

24. The Supreme Court set forth the test for the exemption contained in §1-210(b)(2), G.S., in Perkins v. Freedom of Information Commission, 228 Conn. 158, 175 (1993). The claimant must first establish that the files in question are personnel, medical or similar files.

25. It is found that records 000099 and 000100 are not personnel or medical or similar files.

26. It is concluded that records 000099 and 000100 are not exempt from disclosure.

27. It is concluded that the respondents violated §§1-210(a) and 1-212(a), G.S., by failing to provide records 000099 and 00100 to the complainants.

28. It is also concluded that the respondents did not violate §§1-210(a) or 1-212(a), G.S., by withholding any of the other in camera records from the complainants.

29. The complainants additionally contended that the respondents did not provide any of the attachments to the emails that were provided to the complainants.

30. It is found that the respondents did not provide attachments.

31. Section 1-211(a), G.S., provides:

> (a) Any 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. Except as otherwise provided by state statute, the cost for providing a copy of such data shall be in accordance with the provisions of section 1-212.

32. Section 1-212(b), G.S., provides:

> 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;
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> (2) An amount equal to the cost to the agency of engaging an outside professional electronic copying service to provide such copying services, if such service is necessary to provide the copying as requested;
>
> (3) The actual cost of the storage devices or media provided to the person making the request in complying with such request; and
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> (4) The computer time charges incurred by the agency in providing the requested computer-stored public record where another agency or contractor provides the agency with computer storage and retrieval services. Notwithstanding any other provision of this section, the fee for any copy of the names of registered voters shall not exceed three cents per name delivered or the cost thereof to the public agency, as determined pursuant to this subsection, whichever is less. The Department of Administrative Services shall provide guidelines to agencies regarding the calculation of the fees charged for copies of computer-stored public records to ensure that such fees are reasonable and consistent among agencies.

33. While the respondents did not argue that the attachments are exempt from disclosure, they contended that the complainants' request did not encompass attachments to emails, and that the respondents do not have a program for printing attachments.

34. However, it is found that the respondents provided no evidence to prove that it could not print or otherwise provide copies of email attachments.

35. While the complainants' request did not expressly request attachments to emails, it is found that attachments are a material part of the communications requested by the complainant.

36. It is therefore concluded that the respondents violated the FOI Act by failing to provide attachments to the emails.

37. The complainants additionally contended that the records provided to them were not provided promptly.

38. The meaning of the word "promptly" is a particularly fact-based question that has been previously addressed by the FOI Commission. In Advisory Opinion #51, In the Matter of a Request for Declaratory Ruling, Third Taxing District of the City of Norwalk, Applicant (Notice of Final Decision dated January 11, 1982) the Commission advised that the word "promptly" as used in §1-210(a), G.S., means quickly and without undue delay, taking into consideration all of the factors presented by a particular request. The Commission also gave the following guidance:

> [t]he Commission believes that timely access to public records by persons seeking them is a fundamental right conferred by the Freedom of Information Act. Providing such access is therefore as much a part of their mission as their other major functions. Although each agency must determine its own set of priorities in dealing with its responsibilities within its limited resources, providing access to public records should be considered as one such priority. Thus, it should take precedence over routine work that has no immediate or pressing deadline.

39. The advisory opinion goes on to describe some of the factors that should be considered in weighing a request for records against other priorities: the volume of records requested; the time and personnel required to comply with a request; the time by which the person requesting records needs them; the time constraints under which the agency must complete its other work; the importance of the records to the requester, if ascertainable; and the importance to the public of completing the other agency business without the loss of the personnel time involved in complying with the request.

40. It is found that the volume of records requested was large. The respondents' email search produced many duplicates, and the duplicates would have required considerably less intensive review by the respondents.

41. It is found that some of the requested records are the same records requested and provided (albeit not promptly) in Docket #FIC 2015-459, Poindexter et al. v. New Haven et al. However, the request for emails in Docket #FIC 2015-459 did not specify attorney Michael Bayonne, who was a focus of the instant matter.

42. It is also found that the request that is the subject of this complaint had originally been made three months previously on February 2, 2016. The complainant waited until May before inquiring as to the status of her request, and was informed that it was "in the queue."

43. It is found, that as a union representative, the complainant Poindexter needed the requested records for purposes of representing Nichole Jefferson in pending arbitration. It is found that the respondents and corporation counsel are familiar with Ms. Poindexter and her work on behalf of the union, and that they understood the importance of the records to the complainants. It is also found, however, that the respondents have searched for, reviewed and released a great many records to the complainant, and that the pending arbitration involves hundreds of exhibits and has stretched over a long period of time. The complainants are responsible for some 39 records requests to the respondents, and/or complaints to the Commission about the respondents, over the past ten years, only some of which revolved around the employment matter that underlies the instant request.

44. It is found that complying with the request required the work of three individuals described below.

45. The IT network administrator who found and printed the emails was also responsible for several other records requests to process, and also other time-sensitive projects, such as trouble-shooting problems in the respondents' computer network, and the comprehensive migration of the city telephone Centrex system to a Voice over Internet Protocol system.

46. The paralegal who initially reviewed the printed emails is also the only paralegal handling bankruptcy, collections, workers compensation and CHRO matters, in addition to his FOI responsibilities. His other FOI responsibilities include handling hundreds of time-sensitive requests from reporters, including the review of 5,000 pages of records during the same period that the complainant's request was pending.

47. The Assistant Corporation Counsel who did the final review of the requested documents has other time-sensitive responsibilities, including representing the City of New Haven in FOI proceedings.

48. It is found that, while the complainant's request in this matter was pending, the Assistant Corporation Counsel was working to defend the respondents in a non-compliance complaint brought the complainant Poindexter in Docket #FIC 2016-223. The Commission takes administrative notice of its records and files in that matter, and it is found that that matter was dismissed for failure to prosecute. The complainant contended she had not received notice of the hearing in that matter, and also that she had a conflict with another arbitration matter that she was attending.

49. The complainant maintains that the respondents deliberately delayed compliance in order to prejudice the complainant in the pending arbitration matter. However, it is found that the respondents did not delay compliance in order to prejudice the complainant, and that the complainants did not prove that they were unfairly prejudiced by the delay in compliance.

50. Taking into consideration all of the facts that weigh on either side, it is found on balance that the respondents promptly provided the requested records, except for the attachments to the emails that were omitted and the records described in paragraphs 18, 20 and 26.

51. With respect to the complainants' request for the imposition of civil penalties, §1-206(b)(2), G.S., provides in relevant part:

> … upon the finding that a denial of any right created by the Freedom of Information Act was without reasonable grounds and after the custodian or other official directly responsible for the denial has been given an opportunity to be heard at a hearing conducted in accordance with sections 4-176e to 4-184, inclusive, the commission may, in its discretion, impose against the custodian or other official a civil penalty of not less than twenty dollars nor more than one thousand dollars.

52. The standard for when a violation is "without reasonable grounds" is analogous to the legal standard "without any substantial justification." Connecticut Department of Public Safety v. FOIC, et al., 1997 WL 537117 (Conn. Super.), affirmed, 247 Conn. 341 (1998). Similarly, the phrase "without reasonable justification" has been construed to mean "entirely unreasonable or without any basis in law or fact." Id., quoting Bursinkas v. Department of Social Services, 240 Conn. 141, 155 (1997).

53. It is found that the respondents' failure to provide attachments to emails, and failure to provide the relatively small number of records described in paragraphs 18, 20 and 26 were not without reasonable grounds.

54. It is therefore concluded that a civil penalty is not warranted.

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 complainants, free of charge, the records described in paragraphs 18, 20 and 26

2. The Commission notes that, for the first time at the April 12, 2017, meeting of the Commission, the respondents informed the Commission that they had not reviewed the attachments described in paragraph 35 of the findings, above, and that such attachments, or portions thereof, may be exempt from disclosure. The respondents are hereby ordered to review such attachments forthwith and provide copies of all such records to the complainants, free of charge.

3. Should the respondents in good faith believe that any records, or portions thereof, described in paragraph 35 of the findings, above, are exempt from disclosure, they shall so inform the complainants and provide them with an index of such records, including a description

therefor, and the claimed exemption(s), which shall be deemed to be a denial of access to such records.

4. Thereafter, should the complainants file a complaint with the Commission regarding the records described in paragraph 3 of the order, above, such complaint shall receive priority assignment from the Commission.

Approved by Order of the Freedom of Information Commission at its regular meeting of April 12, 2017.

Cynthia A. Cannata
Acting Clerk of the Commission

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:

Cherlyn Poindexter and The New Haven Management and Professional Union
492 Woodin Street
Hamden, CT 06514

Toni Harp, Mayor, City of New Haven; and City of New Haven
c/o Kathleen M. Foster, Esq.
Assistant Corporation Counsel
165 Church Street
New Haven, CT 06510

Cynthia A. Cannata
Acting Clerk of the Commission

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