

FREEDOM OF INFORMATION

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

Notice of Meeting

Docket #FIC 2016-0430

Commissioner, State of Connecticut, Department of Banking; and
State of Connecticut, Department of Banking,
Respondent(s)

April 25, 2017

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, May 24, 2017**. 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 May 12, 2017**. 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 May 12, 2017**. **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 May 12, 2017**, 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 Jeffrey J. White
Attorney John Langmaid and Attorney Matthew J. Budzik

FIC# 2016-0430/Trans/wrbp/LFS//PSP/2017-04-25

FREEDOM OF INFORMATION COMMISSION
OF THE STATE OF CONNECTICUT

In the Matter of a Complaint by

Report of Hearing Officer

Robert Morrin,

Complainant

against

Docket #FIC 2016-0430

Commissioner, State of Connecticut,
Department of Banking; and State of
Connecticut, Department of Banking,

Respondents

April 13, 2017

The above-captioned matter was heard as a contested case on August 26, 2016, November 15, 2016, and January 11, 2017, at which times 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 on May 13, 2016, the complainant requested a copy of records pertaining to the respondents' communication with any media outlet about two specified matters of ongoing litigation in which the respondents were parties (hereinafter "the Actions"). As part of the request, the complainant sought copies of all responsive social media communications by employees of the respondents.
3. It is found that the Actions concerned the respondents' enforcement of so-called payday lending laws.
4. By letter filed June 9, 2016, the complainant appealed to this Commission, alleging that the respondents violated the Freedom of Information ("FOI") Act by failing to provide all the records he requested on May 13, 2016. The complainant subsequently requested the imposition of a civil penalty.
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, ...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:

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, ... 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: "Any 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 complainant's May 13, 2016, request was a duplicate of a request made by his attorney on his behalf on September 15, 2015.

9. It is found that, in 2015, while serving as the respondents' General Counsel and Acting Commissioner, Bruce Adams posted many publicly available comments about the Actions on his personal social media pages (Facebook, Linked In, Twitter). It is found that Adams posted the public comments during his personal time and on his personal devices.

10. It is found that on September 14, 2015, one day before the September 15, 2015 request, and while Adams was serving as General Counsel and Acting Commissioner, the complainant's attorney retained a computer forensics expert "to collect publicly available content for the social media accounts (Twitter, LinkedIn, and Facebook) registered to Bruce Adams."

11. It is found that on September 14, 2015, the computer forensics expert collected and provided all publicly available data from Adams's social media accounts to the complainant's attorney.

12. It is found that on the following day, September 15, 2015, the complainant made his request for records, described in paragraph 2, above, including his request for social media postings by Department of Banking employees.

13. It is found that at about the same time that the respondents received the complainant's September 15, 2015 request, Adams received a request from Governor Malloy's chief legal counsel that he "take down" or "hide" his public posts concerning the Actions. It is found that Adams complied with that request.

14. It is found that Adams took down the posts after the complainant's forensic expert captured the public posts from Adams's accounts; therefore, the posts that the forensic expert

collected and provided to the complainant included the posts that Adams subsequently removed from public view.

15. It is found that in response to the complainant's September 15, 2015 request, Adams searched for and printed several pages of postings and provided such pages to the respondents' staff attorney who was responsible for coordinating the agency's response to the request.

16. It is found that Adams's social media posts were the only ones responsive to the complainant's request for social media posts, other than where another employee may have "liked" one of Adams's posts.

17. It is found that Adams did not provide the posts he had "taken down" from public view. It is also found that he did not inform anyone at the Department of Banking that he had removed some posts from public view. It is found that Adams did not inform the staff attorney responsible for complying with the complainant's FOI request that he did not include the removed posts with the other social media records he provided.

18. It is also found that the staff attorney did not know that Adams had posted comments about the Actions on his personal social media accounts, or that he had removed such posts from public view and did not provide them with the other social media records he gave to her for disclosure to the complainant.

19. It is found that the respondents provided copies of Adams's records to the complainant on February 26, 2016. It is found that the respondents also provided other responsive records at an earlier date, in November 2015.

20. It is found that the complainant subsequently came to believe that the respondents had not fully complied with his request. It is found, however, that he did not appeal to this Commission within the necessary time period set forth in §1-206(b)(1), G.S., which provides in relevant part:

Any person denied the right to inspect or copy records under section 1-210 ... may appeal therefrom to the Freedom of Information Commission, by filing a notice of appeal with said commission. A notice of appeal shall be filed within thirty days after such denial[.]

21. It is found that the time period within which to challenge whether the respondents had fully complied with the request lapsed on March 28, 2016.

22. It is found that on May 13, 2016, the complainant's attorney sent a letter to the respondents in which he stated: "[I]t appears the social media posts that the Department produced ... were not complete...[G]iven the apparent incomplete search by the Department ... we are ... renewing our request..." (hereinafter, "second request")

23. It is found that by the time of the second request, Adams had left the Department of Banking to take another position in state government; therefore, he was no longer an employee of the Department of Banking.

24. It is found that on May 20, 2016, the respondents sent a letter to the complainant in which they claimed that they had fully complied with the original request. It is found that the respondents also stated in the letter that they had provided Adams's social media posts as a courtesy but that such documents were not public records, and that Adams no longer worked at the Department of Banking.

25. It is found that the respondents concluded their letter: "You further appear to allege that Mr. Adams has unspecified additional social media postings responsive [to the request] ... If we have misunderstood your request and you believe that there are specific records that the Department has overlooked in its efforts to respond to these FOIA requests...please let us know."

26. It is found that the complainant did not furnish any additional information to the respondents until shortly before the hearing in this matter, although it is undisputed that, having made a forensic capture of all of Adams's publicly available social media postings, the complainant knew or could have known specifically what was missing from the respondents' production.

27. It is found that, instead, the complainant filed this appeal, on June 9, 2016.

28. The parties in this matter dispute whether Adams' social media posts about the respondents' payday lending litigation are public records.

29. Irrespective of whether the removed posts are public records, however, it is found that the respondents did not know nor should they have known of the existence of the removed posts when they received the complainant's second request.

30. As described above, in paragraphs 17 and 18, Adams did not tell the respondents that he had made the posts, then removed the posts, and had not included them with the responsive records that he did provide to the staff attorney to give to the complainant. In addition, it is found that because Adams did provide a large number of responsive posts in response to the first FOI request, and because of Adams's position as Acting Commissioner and General Counsel, it was reasonable for the staff attorney in charge of compiling responsive records not to question the diligence of Adams's search or whether he provided all responsive records.

31. It is found, therefore, that it was reasonable for the respondents to reject the complainant's allegation, as the basis for his second request, that their search for and disclosure of records responsive to his first request was "incomplete." It is also found, therefore, that it was reasonable for the respondents to believe that conducting a second search would not be productive. Moreover, it is found that because the posts had been removed from public view well before the second request, the respondents would not have discovered them had they conducted a search of publicly available postings on Adams's personal social media accounts.

32. Accordingly, it is concluded that even if the social media posts were public records, the respondents did not violate §§1-210(a) and 1-212(a), G.S., by not conducting a second search for records.

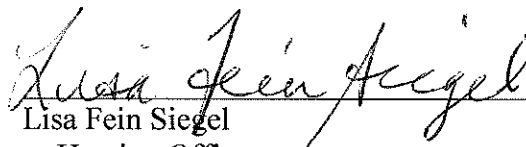
33. Moreover, even if the posts were public records maintained by Adams as a public official on his personal accounts when Adams served as Acting Commissioner and General Counsel for the respondents, by the time of the second request, Adams was no longer a member of the respondent agency, and neither the respondents nor any employee of the respondents maintained or had access to such posts.

34. Finally, even if the removed posts are public records, the Commission in its discretion declines to address the issue of whether the respondents have an obligation to attempt to retrieve such records from Adams, in light of the fact that the complainant has possessed such records since before he made his first request from the respondents in September 2015.

35. It is concluded that the respondents did not violate the FOI Act, as alleged.

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

1. The complaint is dismissed.


Lisa Fein Siegel
as Hearing Officer