FREEDOM OF INFORMATION COMMISSION
OF THE STATE OF CONNECTICUT

In the Matter of a Complaint by

James Torlai,

Complainant

against

Chief, Police Department, Town of Darien; and Police Department, Town of Darien,

Respondents

FINAL DECISION
UPON REMAND

Docket # FIC 2017-0065

December 11, 2019

The above-captioned matter was heard as a contested case on November 17, 2017, at which time the complainant and respondents appeared, stipulated to certain facts and presented testimony, exhibits and argument on the complaint. For purposes of hearing, this matter was consolidated with Docket #FIC 2017-0039, James Torlai v. Chief, Police Department, Town of Darien; Police Department, Town of Darien; and Town of Darien.

On January 10, 2018, the Commission adopted a final decision in this matter. Notice of such final decision was mailed to the parties on January 18, 2018. The respondents filed an appeal of the final decision with the Superior Court on February 23, 2018. By order dated August 27, 2018 the Superior Court remanded this matter to the Commission to receive and consider evidence that was not available at the time of the hearing.

By Notice of Remanded Hearing, a hearing was conducted on April 22, 2019 to allow the parties to present additional evidence and/or argument, at which time the complainant and the respondents appeared.

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 January 15, 2017, the complainant requested that the respondents provide him with copies of the following records related to the arrest of an identified individual on or around December 20, 2016:

a – the full name of the person arrested;
b – the address of the person arrested;
c – the race of the person arrested;

d – the date and time of arrest;
e – the place of arrest;
f – a list of all charges;
g – the complete arrest report;
h – records containing any DUI test results such as breath, urine, or blood tests;
i - any records prepared for the Department of Motor Vehicles; and
j – all recordings, including audio, video, and bodycam recordings.

3. It is found that, on January 20, 2017, the respondents acknowledged the complainant's request.

4. By letter dated January 28, 2017, and filed January 31, 2017, the complainant appealed to the Commission, alleging that the respondents violated the Freedom of Information ("FOI") Act by failing to provide the records described in paragraph 2, above.

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:

> 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] person applying in writing shall receive, promptly upon request, a plain, facsimile, electronic or certified copy of any public record."

8. It is concluded that the requested records, to the extent that they are maintained by the respondents, are public records within the meaning of §§1-200(5), 1-210(a), and 1-212(a), G.S.

9. Section 1-215, G.S., provides, in relevant part, as follows:[1]

[1] The language of §1-215(b), G.S., was subsequently amended by Public Act 19-43, however such amendments are not pertinent to the issues herein.

(a) For the purposes of this section, "record of the arrest" means (1) the name, race and address of the person arrested, the date, time and place of the arrest and the offense for which the person was arrested, and (2) in addition, in a case in which (A) the arrest has been by warrant, the arrest warrant application, including any affidavit in support of such warrant, or (B) the arrest has been made without a warrant, the official arrest, incident or similar report, provided if a judicial authority has ordered any such affidavit or report sealed from public inspection or disclosure, in whole or in part, the portion of the affidavit or report that has not been sealed, if applicable, as well as a report setting forth a summary of the circumstances that led to the arrest of the person in a manner that does not violate such order. . . .

(b) Notwithstanding any provision of the general statutes, and except as otherwise provided in this section, any record of the arrest of any person shall be a public record from the time of such arrest and shall be disclosed in accordance with the provisions of section 1-212 and subsection (a) of section 1-210. No law enforcement agency shall redact any record of the arrest of any person, except for (1) the identity of witnesses, (2) specific information about the commission of a crime, the disclosure of which the law enforcement agency reasonably believes may prejudice a pending prosecution or a prospective law enforcement action, or (3) any information that a judicial authority has ordered to be sealed from public inspection or disclosure....

(c) In addition, any other public record of a law enforcement agency that documents or depicts the arrest or custody of a person during the period in which the prosecution of such person is pending shall be disclosed in accordance with the provisions of subsection (a) of section 1-210 and section 1-212, unless such record is subject to any applicable exemption from disclosure contained in any provision of the general statutes.

...

(e) The provisions of this section shall only be applicable to any record described in this section during the period in which a prosecution is pending against the person who is the subject of such record. At all other times, the applicable provisions of the Freedom of Information Act concerning the disclosure of such record shall govern.

10. The complainant contended that, since the records described in paragraphs 2.h and 2.i, above, are neither set forth in §1-215, G.S., nor specifically exempted therein, it follows that such statute cannot operate to excuse such records from mandatory disclosure.

11. The Commission notes that the issue of whether §1-215, G.S., merely sets forth the minimum information that must be disclosed at the time of arrest has been decided to the contrary by the Supreme Court in Commissioner, State of Connecticut, Department of Public Safety v. FOIC, 312 Conn. 513 (2014). The Court concluded that, during a pending criminal prosecution, a law enforcement agency's disclosure obligations under the FOI Act with respect to records related to the arrest are exclusively governed by §1-215, G.S. Accordingly, it is concluded that records not set forth in §1-215, G.S., which might also relate to an arrest, such as the records described in paragraphs 2.h and 2.i, above, are not required to be made available to the public during the limited time of a pending prosecution.

12. It is found that, at all relevant times through the January 10, 2018 Final Decision in this matter, the prosecution related to the arrest at issue was pending. Accordingly, based upon §1-215(e), G.S., it is concluded that the respondents did not violate the FOI Act by failing to provide the complainant with the records described in paragraph 2.h and 2.i, above, while the prosecution was pending, as alleged in the complaint.

13. It is found that, on February 1, 2017, the respondents provided the complainant with records responsive to the request described in paragraph 2.a, 2.b, 2.c, 2.d, 2.e, and 2.f, above. Accordingly, such records are no longer at issue in this matter. It is also found that, on February 1, 2017, the respondents offered to provide the complainant with copies of the three page arrest report (request 2.g) upon payment of $1.50, and a copy of a DVD containing video depicting the apprehension and arrest of the identified individual (request 2.j) upon payment of $15.00.

14. It is found that the complainant paid the fee of $1.50 for the arrest report and received it, but with some redactions. It is further found that the complainant refused to pay the $15.00 fee for the DVD.

15. With respect to the $15.00 copying fee for the DVD, § 1-211(a), G.S., provides:

> 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....

16. In turn, § 1-212(b), G.S., provides:

> (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:
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> (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;
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> (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....

17. It is found that the respondents arrived at the fee of $15.00 by using a portion of the hourly rate of the employee who was charged with searching for, retrieving, and copying the requested video footage onto a DVD. It is found that the respondents failed to prove that such tasks constituted formatting and programming functions within the meaning of §1-212(b)(1), G.S., or that such tasks did not constitute search and retrieval within the meaning of such provision. It is concluded that such a fee is not allowable under §1-212(b)(1), G.S. Accordingly, it is concluded that the respondents violated the FOI Act by conditioning provision of the records requested in paragraph 2.j, above, upon payment of the $15.00 fee.

18. At the November 17, 2017 hearing in this matter, the respondents testified that the file in the arrest at issue had been sealed by a court, although the respondents could not obtain a sealing order to provide to the Commission. The respondents contended that, since the file had been sealed, they could not provide the remaining requested records to the complainant.

19. On December 10, 2017, the complainant filed a "Motion to Append the Record and Add One Exhibit," seeking to add as an exhibit a printout from the Judicial website, indicating that the file in the arrest at issue had been statutorily sealed. Receiving no objection, such request is granted and such one page printout has been marked as complainant's Exhibit G. On January 3, 2018, the respondents also moved to supplement the record by adding as an exhibit a copy of a January 2, 2018 email from the Assistant State's Attorney to the respondents indicating

that the file in the arrest at issue had been sealed and including a reference to §54-56g, G.S. Such request is granted and such one page copy has been marked as respondents' Exhibit 1.

20. It is found that the file related to the arrest was sealed by the court pursuant to §54-56g, G.S.

21. The complainant contended, on brief, that the fact that court records are sealed did not allow the police to withhold their records, and cites to a previous Commission Final Decision, Docket #FIC2005-242; Michelle Tuccitto and the New Haven Register v. Chief. Police Department, City of New Haven; Police Department, City of New Haven; and City of New Haven. In that matter, the Commission construed the statute related to the pre-trial alcohol education system §54-56g, G.S., and concluded that the statutory sealing of court records in that scheme does not render police records related to the underlying arrest exempt or confidential.

22. The decision in Docket #FIC2005-242 was reached well before the amendments to the FOI Act which added the current provisions of §1-215, G.S., which, as described in paragraph 11, above, exclusively govern the disclosure of records related to arrests during the pendency of a prosecution.

23. It is concluded that the respondents failed to prove that the redactions in the arrest report provided to the complainant were allowable under §1-215(b), G.S., at the time of the provision of the record.[2] Accordingly, it is concluded that the respondents violated the FOI Act in that regard.

24. However, since the file was subsequently sealed by a court, the particular provisions of §1-215(b), G.S., were applicable to the disclosure of the record described in paragraph 2.g, above, since it is a record of arrest within the meaning of §1-215(a), G.S., during the time that the file was sealed.

25. On brief, the respondents contended that §54-56g, G.S., precluded the disclosure of the remaining requested records.

26. Section §54-56g, G.S., establishes the pretrial alcohol education program, and states in relevant part:

> (a)(1) There shall be a pretrial alcohol education program for persons charged with a violation of Section §14-227a, 14-227g, 15-132a, 15-133, 15-140*l* or 15-140n. Upon application by any such person for participation in such program and payment to the Court of an application fee of one hundred dollars and a nonrefundable evaluation fee of one hundred dollars, the Court shall, but only as to the public, order the Court file sealed....

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[2] At the November 17, 2017 hearing in this matter, the complainant testified that the redactions appear to be a social security number and information received from the Department of Motor Vehicles. The complainant is not contesting the apparent redaction of a social security number; rather, the complainant is only contesting the other redactions.

27. On brief, the respondents contended that since §1-215(b)(3), G.S., covers "any information that a judicial authority has ordered to be sealed from public inspection or disclosure covered by the Court order", then all records related to the case must be exempt. However, it is concluded that §1-215(b)(3), G.S., applies only to the "record of the arrest" as defined in paragraph §1-215(a), G.S. It is found that the record described in paragraph 2.g, above, is such a record. It is concluded that the provisions of §1-215(b)(3), G.S., applied to such record.

28. However, it is found that the record described in paragraph 2.j, above, is not a record of arrest, but rather is a record within the meaning of §1-215(c), G.S.

29. The Commission notes that the Legislature specifically separated the records contemplated in §1-215(c), G.S, from the records of arrest contemplated in §§1-215(a) and (b), G.S., and, additionally, set forth a separate standard for disclosure for such records.

30. It is concluded that the language in §54-56, G.S., by its own terms seals only the court file. Since the record described in paragraph 2.j, above, is a record of the Darien Police Department, it is concluded that §54-56g, G.S., does not provide a basis to withhold it from the complainant.

31. On brief, the respondents also contended that by the application of §54-56g, G.S., the pretrial alcohol education program would lead to an eventual dismissal or erasure in the underlying arrest, and that if such event occurs, the erasure statute, §54-142a, G.S., will control and prohibit the disclosure of the records described in paragraphs 2.g and 2.j, above. The respondents further contended that to order release of records which might eventually be erased will inhibit the pretrial education program.

32. It is found that, at the time the respondents briefed this contention, the records described in paragraphs 2.g and 2.j, above, had not been erased. It is concluded that the erasure statute did not provide a basis to withhold such records at that time.

33. At the April 22, 2019 hearing on remand, and on brief, the respondents contended that, following the November 17, 2017 hearing and January 18, 2018 Notice of Final Decision, the respondents became aware that the court had entered a final judgment of dismissal as against the identified individual, and ordered erasure of all records pertaining to the underlying criminal charge pursuant to §54-142a, G.S. The respondents further contended that the court provided them with a document entitled, "Court Abstract," which set forth, among other categories of information, the name of the identified individual, the court docket number, a disposition date of January 26, 2018 and a judgment of dismissed, and an erasure date of February 15, 2018. The respondents concluded that they were precluded from further disclosing to the complainant the records at issue.

34. At the April 22, 2019 hearing on remand, the complainant contended that the respondents failed to meet their burden to establish that the erasure statute was applicable to the records at issue. The complainant also contended that since the underlying criminal case is no longer pending, §1-215, G.S., is no longer applicable, and the respondents should be ordered to provide the complainant with the records described in paragraph 2.g, 2.h, 2.i, and 2.j, above.

Finally, the complainant contended that, even if the erasure statute is applicable to the records at issue, since the Commission ordered disclosure on January 10, 2018 and the court did not order erasure until February 15, 2018, the respondents were obligated to comply with the Commission's order.

35. Section 54-142a, G.S., provides

> (a) Whenever in any criminal case, on or after October 1, 1969, the accused, by a final judgment, is found not guilty of the charge or the charge is dismissed, all police and court records and records of any state's attorney pertaining to such charge shall be erased upon the expiration of the time to file a writ of error or take an appeal, if an appeal is not taken, or upon final determination of the appeal sustaining a finding of not guilty or a dismissal, if an appeal is taken.
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> . . .
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> (e)(1) The clerk of the court or any person charged with retention and control of such records in the records center of the Judicial Department or any law enforcement agency having information contained in such erased records shall not disclose to anyone, except the subject of the record, upon submission pursuant to guidelines prescribed by the Office of the Chief Court Administrator of satisfactory proof of the subject's identity, information pertaining to any charge erased under any provision of this section and such clerk or person charged with the retention and control of such records shall forward a notice of such erasure to any law enforcement agency to which he knows information concerning the arrest has been disseminated and such disseminated information shall be erased from the records of such law enforcement agency.

36. Following the April 22, 2019 hearing, the hearing officer issued an amended order[3], directing the respondents to file with the Commission a redacted copy of the Court Abstract referred to by the respondents' witness during testimony. The Court Abstract has been marked as respondents' after-filed exhibit 3.

37. Based upon careful consideration of the evidence in the record, it is found that on January 29, 2018, the court dismissed the criminal charge pertaining to the arrest of the identified individual that occurred on or about December 20, 2016, and ordered erasure effective February 15, 2018.

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[3] The hearing officer first issued an order to the respondents to produce a copy of the Court Abstract. The respondents then filed a motion seeking an amended order, contending that the Court Abstract is subject to the erasure statute. The complainant filed an objection. After consideration of the issues and arguments raised by the parties, the hearing officer ordered the respondents to produce a redacted copy of the Court Abstract.

38. It is found that the erasure provisions supersede the disclosure requirements of the FOI Act and that any of the requested records subject to the erasure statute are not required to be disclosed at this time. See Docket No. FIC 2012-520, Robert Cushman v. Chief, Police Department, City of New London, and Police Department, City of New London (April 24, 2013), and Docket No. FIC 1999-353, Michele Graham v. Police Department, City of Stratford (February 23, 2000).

39. The Superior Court recently issued a Memorandum of Decision in Commissioner, State of Connecticut Department of Emergency Services and Public Protection v. Freedom of Information Commission and Thomas J. McDonnell, No. HHBCV146027085S, 2019 WL 4201551 (Conn. Super. Ct. Aug. 20, 2019), analyzing the meaning of "pertaining to such charge" in §54-142a, G.S, and the scope of records to which it applies. The court concluded that the erasure statute "encompasses 'descriptive information' that discloses 'when or where a person was arrested, the nature of or circumstances surrounding the crime charged or the names of witnesses from whom further information may be obtained'," as set forth in State v. West, 192 Conn. 488, 496 (1984), and "specifically include[s] police reports within the scope of records covered by §54-142a[, G.S.]"

40. It is found that the arrest report identified in paragraph 2.g, above, is erased pursuant to §54-142a, G.S. Since the arrest report is statutorily erased, the Commission declines to order disclosure of any of the redacted information contained in the arrest report, as described in paragraph 23, above.

41. It is found that the DVD containing video depicting the apprehension and arrest of the identified individual, identified in paragraph 2.j, above, is erased pursuant to §54-142a, G.S. Since the footage is statutorily erased, the Commission declines to order disclosure of the DVD at this time.

42. During the April 22, 2019 hearing on remand, the complainant contended that, because prosecution is no longer pending, he is now entitled to records responsive to his requests identified in paragraphs 2.h and 2.i, above. However, as set forth in paragraph 12, above, the respondents did not violate the FOI Act by failing to provide records responsive to those requests. Furthermore, there is nothing in the FOI Act that requires the respondents to belatedly provide records after prosecution is no longer pending.

43. The complainant also contended during the April 22, 2019 hearing on remand that, since the Commission ordered disclosure on January 10, 2018 and the court did not enter a judgment of dismissal until January 26 and erasure until February 15, 2018, the respondents were obligated to comply with the Commission's order. However, the complainant failed to file an appeal with the Commission alleging noncompliance with the Commission's order prior to the respondents' appeal. Additionally, as set forth in paragraphs 37 and 38, above, the Commission declines to order disclosure of records that are statutorily erased.

On the basis of the entirety of the record concerning the above-captioned complaint, no order by the Commission is hereby recommended.

Approved by Order of the Freedom of Information Commission at its regular meeting of December 11, 2019.

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:

JAMES TORLAI, 127 Barton Street, Torrington, CT 06790

CHIEF, POLICE DEPARTMENT, TOWN OF DARIEN POLICE DEPARTMENT, TOWN OF DARIEN; AND TOWN OF DARIEN, c/o Attorney Patricia M. Gaug, Curtis Brinckerhoff & Barrett, PC, 666 Summer Street, Stamford, CT 06902

Cynthia A. Cannata
Acting Clerk of the Commission

FIC 2017-0065/FD/CAC/12/11/2019