

FREEDOM OF INFORMATION COMMISSION  
OF THE STATE OF CONNECTICUT

In the Matter of a Complaint by

FINAL DECISION

Robert Cushman,

Complainant

against

Docket #FIC 2019-0357

Commissioner, State of Connecticut,  
Department of Emergency Services and  
Public Protection; and State of Connecticut,  
Department of Emergency Services and  
Public Protection,

Respondents

August 26, 2020

The above-captioned matter was heard as a contested case on August 15, 2019, at which time the complainant and the respondents appeared 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 by letter dated May 31, 2019, the complainant made a Freedom of Information (“FOI”) request to the respondents for, among other records no longer at issue, officer field notes and “digital recordings of or in the barracks, garage, sally port, booking room and processing room” in connection with a May 19, 2019 arrest under Case No. 19-00239047.
3. By letter of complaint filed June 13, 2019, the complainant appealed to the Commission, alleging that the respondents violated the FOI Act by denying his request for certain public records.
4. Section 1-200(5), G.S., defines “public records or files” as follows:

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.

5. 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.

6. 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."

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

8. At the hearing, the complainant contended that he filed the June 13, 2019 appeal to the Commission because the respondents had not produced any records responsive to his May 31, 2019 FOI request. However, subsequent to the filing of the appeal, the respondents produced some records, but did not produce officer field notes or video/digital recordings as set forth in paragraph 2, above, and his appeal was therefore limited to the respondents' failure to provide records responsive to these elements of his May 31, 2019 request.

9. After some evidence was taken at the hearing, the complainant withdrew the issue of the respondents' failure to provide officer field notes. Consequently, such issue will not be further addressed herein.

10. The respondents contended that they do not maintain any additional responsive digital recordings. The complainant disputes the respondents' contention on the following grounds: that he notified the respondents just days prior to his FOI Act request (on May 28, 2019) that the Superior Court granted a motion to preserve evidence in connection with the May 19, 2019 arrest identified in paragraph 2, above; that the complainant requested that the respondents preserve all evidence pursuant to such motion; and the complainant served upon the respondents a Subpoena Duces Tecum, dated June 25, 2019, compelling the respondents to produce all records pertaining to the arrest identified in paragraph 2, above. The complainant contends, therefore, that the respondents should have taken steps to preserve and maintain all digital recordings. The complainant also noted that the FOI Act provides for civil and criminal penalties for willful destruction of records.

11. It is found that on or about June 6, 2019, the respondents assigned the May 31, 2019 FOI request to a Legal Affairs Unit paralegal. It is found that the respondents did not

acknowledge receipt of the complainant's May 31, 2019 FOI request. The respondents also failed to offer any evidence that they notified Troop A, the troop responding to the arrest identified in paragraph 2, above, of the May 31, 2019 FOI request.

12. However, it is found that on or about May 29, 2019 the respondents acknowledged receipt of the complainant's *request for preservation*, identified in paragraph 10, above, and subsequently notified Troop A that it was obligated to preserve "any and all evidence, video recordings, documents, correspondence, notes, electronic or hard copy, and anything else pertaining to or related to CFS 19-00239047."

13. It is also found that on or about June 6, 2019, in response to the preservation request identified in paragraph 10, above, Troop A Evidence Officer Nicholas Ierarci conducted a search for video that was seized as evidence and concluded that no video was seized at that time.

14. It is found that later, on June 26, 2019, after receipt of the Subpoena Duces Tecum identified in paragraph 10, above, Trooper Ierarci attempted to retrieve booking room surveillance video. It is found that such video was not retrievable or viewable due to a software issue. It is also found that Trooper Ierarci contacted "DESPP IT" with a request to repair the software. However, by the time the software was repaired, the booking room surveillance video was automatically overwritten and not retrievable. It is found that by email dated June 26, 2019 the respondents notified the complainant that such video was no longer available as it was "past the retention period." Consequently, it is found that the respondents do not maintain any booking room surveillance video responsive to the complainant's request as set forth in paragraph 2, above.

15. The Commission understands the complainant's concern with respect to the retention of the booking room surveillance video requested. However, jurisdiction over the retention and destruction of public records does not rest with this Commission, but rather with the State's Public Records Administrator and the applicable State's Attorney, as provided by statute.

16. However, it is found that the respondents did not offer any evidence that a search was conducted for digital recordings of or in the barracks, garage, and sally port in relation to the May 19, 2019 arrest identified in paragraph 2, above. Consequently, the respondents failed to prove that they do not maintain records responsive to this element of the complainant's May 31, 2019 request for such records. Therefore, it is found that the respondents violated the FOI Act as alleged by the complainant.

17. With regard to a civil penalty, it is found that such was not fairly raised in the complaint, and therefore, the Commission declines to consider the request for a civil penalty.

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

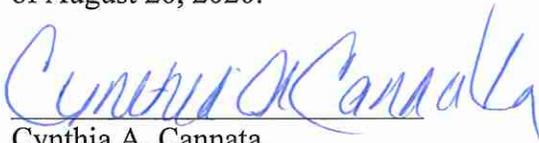
1. The respondents shall, within ten (10) days of the date of the issuance of a final decision in this matter, conduct a search for records responsive to the complainant's May 31, 2019 FOI request for digital recordings of or in the barracks, garage, and sally port in connection

with Case No. 19-00239047, the May 19, 2019 arrest identified in paragraph 2, above. The respondents shall, within fifteen (15) days of the issuance of a final decision in this matter, send copies of any responsive records to the complainant, free of charge.

2. The respondents shall, within fifteen (15) days of the issuance of a final decision in this matter, cause to be executed an affidavit by an individual responsible for the search for the requested digital recordings of or in the barracks, garage, and sally port as set forth in paragraph 1 of this order. The affidavit shall set forth the steps taken to search for responsive records, including the name and title of any person conducting the search, a description of the location(s) searched, a description of the search method used, and the results of the search. The affidavit shall also set forth the reason any records responsive to the request do not exist or are no longer maintained.

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

Approved by Order of the Freedom of Information Commission at its regular meeting of August 26, 2020.



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:

**ROBERT CUSHMAN**, c/o Attorney Robert A. Cushman, Law Offices of Robert A. Cushman, LLC, 21 New Britain Avenue, Suite 218, Rocky Hill, CT 06067

**COMMISSIONER, STATE OF CONNECTICUT, DEPARTMENT OF EMERGENCY SERVICES AND PUBLIC PROTECTION; AND STATE OF CONNECTICUT, DEPARTMENT OF EMERGENCY SERVICES AND PUBLIC PROTECTION**, c/o Attorney Douglas Sauve, Dept. of Emergency Services and Public Protection, 1111 Country Club Road, Middletown, CT 06457



Cynthia A. Cannata  
Acting Clerk of the Commission