

FREEDOM OF INFORMATION COMMISSION
OF THE STATE OF CONNECTICUT

In the Matter of a Complaint by

FINAL DECISION

Marlando Daley,

Complainant

against

Docket #FIC 2019-0516

Chief, Armando Perez, Police Department,
City of Bridgeport; Police Department,
City of Bridgeport;
and City of Bridgeport,

Respondents

November 18, 2020

The above-captioned matter was heard as a contested case on December 6, 2019, and January 21, 2020, at which times the complainant and the respondents appeared and presented testimony, exhibits and argument on the complaint. The complainant, who is incarcerated, appeared via teleconference, pursuant to the January 2004 memorandum of understanding between the Commission and the Department of Correction. See Docket No. CV 03-0826293, Anthony Sinchak v. FOIC, Superior Court, J.D. of Hartford at Hartford, Corrected Order dated January 27, 2004 (Sheldon, J.).

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 August 6, 2019, the complainant requested from the respondents all records pertaining to his criminal case, State of Connecticut v. Marlando Daley, CR 11-0257070-T, including police reports and notes, evidence logs, audio and video recordings, witness statements and transcripts, detective notes, 911 calls, photographs, memos sent to prosecutors, telephone records, forensic reports, chain of custody documentation, crime scene log and photographs, and property reports and receipts.
3. By letter dated August 19, 2019, and received and filed with the Commission on August 20, 2019¹, the complainant appealed to this Commission, alleging that the respondents

¹ On March 25, 2020, the Governor issued Executive Order 7M, thereby suspending the provisions of Conn. Gen. Stat. Sec. 1-206(b)(1), which requires the Freedom of Information Commission to hear and decide an appeal within one year after the filing of such appeal. Executive Order 7M is applicable to any appeal pending with the Commission on the issuance date and to any appeal filed on or after such date, for the duration of the current public health and civil preparedness emergency. Consequently, the Commission retains jurisdiction.

violated the Freedom of Information Act by failing to provide the records responsive to the request, described in paragraph 2, above.

4. It is found that, by letter dated August 19, 2019, the respondents acknowledged receipt of the request, and indicated that they would conduct a search for responsive records. The respondents further informed the complainant that any responsive records would be forwarded to the Department of Correction for review, pursuant to §1-210(c), G.S.

5. It is found that, by letter dated October 3, 2019, the complainant requested that any responsive records be sent to his attorney.

6. It is found that, by letter dated November 13, 2019, the respondents provided some records responsive to the request, described in paragraph 2, above, to the complainant's attorney, and that some of those records were redacted. It is also found that other records were entirely withheld.

7. At the hearing in this matter, the complainant testified that his attorney informed him that certain records were not provided and that the records that were provided were so heavily redacted as to render them useless for purposes of his habeas appeal.

8. Section 1-200(5), G.S., provides:

“[p]ublic 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 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:

[e]xcept 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....

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

11. At the hearing officer's request, the respondents submitted the records at issue to the Commission for in camera inspection on January 21, 2020 ("in camera records"). Such in camera records were submitted in six separate groupings with six separate indexes. For purposes of identifying the records herein, the hearing officer assigned the letters A through F to each grouping. Accordingly, the in camera records will be referred to as IC 2019-0516-A1 through A35, IC 2019-0516-B1 through B44, IC 2019-0516-C1 through C14, IC 2019-0516-D1 through D33, IC 2019-0516-E1 through E24, and IC 2019-0516-F1 through F42. In addition, one video recording was submitted and identified on the index identified as "B".

12. It is found that the respondents' search for responsive records was limited to the files maintained by the detective bureau. The respondents conceded that additional records responsive to the complainant's request might be maintained in other locations within the department, including in the crime scene unit, the property room and the city's telecommunications center, and that they had not conducted a search for responsive records in those locations. Examples of records that may exist in other locations within the department include: evidence logs, receipts, and chain of custody documentation, crime scene photos, and 911 recordings. Accordingly, it is found that the respondents failed to prove that they had provided all non-exempt responsive records to the complainant's attorney.

13. After careful inspection of the in camera records, it is found that they are law enforcement records not otherwise available to the public compiled in connection with a murder investigation. The respondents claimed that the in camera records, or portions thereof, are exempt from disclosure pursuant to §§1-210(b)(3)(A), 1-210(b)(3)(C), 1-210(b)(3)(D), 1-210(b)(27), 29-164f, 42-471 (and the "Privacy Act"), 52-142a, 54-102j, G.S., and 18 USC §1039.

14. Throughout the in camera records, the respondents redacted the names, addresses, dates of birth, phone numbers and photographs of witnesses and "potential witnesses," claiming such information is exempt from disclosure pursuant to §1-210(b)(3)(A), G.S.

15. Section 1-210(b)(3)(A), G.S., provides that disclosure is not required of:

[r]ecords of law enforcement agencies not otherwise available to the public which records were compiled in connection with the detection or investigation of crime, if the disclosure of such records would not be in the public interest because it would result in the disclosure of (A) the identity of informants not otherwise known or the identity of witnesses not otherwise known whose safety would be endangered or who would be subject to threat or intimidation if their identity was made known....

16. The respondents' witness, a detective with the department, testified that, generally, the department strives to keep the names of witnesses confidential for their protection and so that witnesses will come forward. It is found that the respondents failed to prove that the identity of the witnesses whose names and other information they redacted are not otherwise known; and

further failed to prove that the safety of these specific witnesses would be endangered, or that they would be subject to threat or intimidation if their identities were disclosed.

17. It is therefore found that the names and other identifying information and photographs included throughout the in camera records, as indicated on the indexes, are not exempt from disclosure under §1-210(b)(3)(A), G.S.

18. The respondents also claimed that the following in camera records are exempt from disclosure pursuant to 1-210(b)(3)(C), G.S.: IC 2019-0516-A3, IC 2019-0516-A31, IC 2019-0516-C1, IC 2019-0516-C4, IC 2019-0516-E24, IC 2019-0516-F6, IC 2019-0516-F26, IC 2019-0516-F36, IC 2019-0516-F39.

19. Section 1-210(b)(3)(C), G.S., provides that disclosure is not required of:

[r]ecords of law enforcement agencies not otherwise available to the public which records were compiled in connection with the detection or investigation of crime, if the disclosure of such records would not be in the public interest because it would result in the disclosure of...
(C) signed statements of witnesses....

20. After careful inspection of the in camera records identified in paragraph 18, above, it is found that IC 2019-0516-A3 and IC 2019-0561-F6 are signed statements of witnesses, and therefore exempt from disclosure pursuant to §1-210(b)(3)(C), G.S.

21. However, it is found that IC 2019-0516-A31, IC 2019-0516-C1, IC 2019-0516-C4, IC 2019-0516-E24, IC 2019-0516-F26, IC 2019-0516-F36, IC 2019-0516-F39 are not signed witness statements, and therefore are not exempt from disclosure pursuant to 1-210(b)(3)(C), G.S.

22. The respondents claimed that the in camera record consisting of a video recording of a witness interview (listed on the index identified as B) is exempt from disclosure pursuant to 1-210(b)(3)(D), G.S. That provision states that disclosure is not required of:

[r]ecords of law enforcement agencies not otherwise available to the public which records were compiled in connection with the detection or investigation of crime, if the disclosure of such records would not be in the public interest because it would result in the disclosure of
...(D) information to be used in a prospective law enforcement action if prejudicial to such action....

23. It is found that the complainant was convicted of murder in 2011 after a jury trial. It is found that the respondents offered no evidence and therefore failed to prove that the recording is to be used in a prospective law enforcement action and that disclosure of the recording would be prejudicial to such action. Accordingly, it is found that the respondents failed to prove that the recording is exempt from disclosure pursuant to §1-210(b)(3)(D), G.S.

24. The respondents claimed that IC 2019-0516-C14, described on the index as an “autopsy report” is exempt from disclosure pursuant to §1-210(b)(27), G.S.² After careful in camera inspection of that record, it is found that it is an autopsy report. In Galvin v. FOI Commission, 201 Conn. 448 (1986), the Supreme Court ruled that, pursuant to §19a-411, G.S., “autopsy reports are not records accessible to the general public pursuant to [the FOI Act],” but rather, may only be obtained from the Office of the Chief Medical Examiner. *Id.* at 459, 462. Because the Court’s decision in Galvin controls, it is not necessary to analyze whether the exemption raised by the respondents applies to the autopsy report. Accordingly, it is found that IC 2019-0516-C14 may not be disclosed by the respondents.

25. The respondents claimed that the following in camera records, or portions thereof, are exempt from disclosure pursuant to §29-164f, G.S., because they are “NCIC” records: IC 2019-0516-A5 through A18, IC 2019-0516-C12 (number only), IC 2019-0516-D2 through D19 and IC 2019-0516-D27 through D33. “NCIC” stands for National Crime Information Center. After careful in camera inspection, it is found that such records are “NCIC” records.

26. It is found that in Commissioner of Public Safety v. FOI Commission, 144 Conn. App. 821, 827 (2013), the Appellate Court clarified that “the NCIC database is to be used for limited purposes authorized by law, such as background checks, and that NCIC records may only be used for official purposes.” The Court concluded that §29-164f, G.S., provides a statutory exemption to the disclosure provisions of §1-210(a), G.S. *Id.* at 831.

27. Accordingly, it is found that the records, or portions thereof, identified in paragraph 25, above, are exempt from disclosure.

28. Throughout the in camera records, the respondents redacted dates of birth, and a photograph of a driver’s license that includes the driver’s name, address, and photograph, claiming such information is exempt from disclosure pursuant to §42-471, G.S., and the “Privacy Act.”

29. Section 42-471, G.S., provides, in relevant part:

[a]ny person in possession of personal information of another person shall safeguard the data, computer files and documents containing the information from misuse by third parties, and shall destroy, erase or make unreadable such data, computer files and documents prior to disposal.

(b) Any person who collects Social Security numbers in the course of business shall create a privacy protection policy

² Section 1-210(b)(27), G.S., provides that disclosure is not required of “any record created by a law enforcement agency or other federal, state, or municipal governmental agency consisting of a photograph, film, video or digital or other visual image depicting the victim of a homicide, to the extent that such record could reasonably be expected to constitute an unwarranted invasion of the personal privacy of the victim or the victim’s surviving family members.”

which shall be published or publicly displayed. For purposes of this subsection, “publicly displayed” includes, but is not limited to, posting on an Internet web page. Such policy shall: (1) Protect the confidentiality of Social Security numbers, (2) prohibit unlawful disclosure of Social Security numbers, and (3) limit access to Social Security numbers.

(c) As used in this section, (1) “personal information” means information capable of being associated with a particular individual through one or more identifiers, including, but not limited to, a Social Security number, a driver's license number, a state identification card number, an account number, a credit or debit card number, a passport number, an alien registration number, a health insurance identification number or any military identification information, and does not include publicly available information that is lawfully made available to the general public from federal, state or local government records or widely distributed media (e) Any person or entity that violates the provisions of this section shall be subject to a civil penalty of five hundred dollars for each violation, provided such civil penalty shall not exceed five hundred thousand dollars for any single event. It shall not be a violation of this section if such violation was unintentional...

(f) The provisions of this section shall not apply to any agency or political subdivision of the state. (Emphasis added).

30. It is found, based on the plain language of §42-471, G.S., that it does not apply to the respondent department, a unit of a political subdivision of the state. Accordingly, it is found that the information described in paragraph 28, above, is not exempt from disclosure pursuant to §42-471, G.S.

31. Although the respondents’ reference on the indexes to the “Privacy Act” is not clear, it is assumed that the respondents intended to reference the federal Privacy Act of 1974, 5 USC §552a.

32. As previously found by this Commission in Randy Dixon v. Armando Perez, Chief, Police Department, City of Bridgeport, et al., Docket #FIC 2016-0427 (April 12, 2017), however, the Privacy Act “binds only federal agencies and covers only records under the control of federal agencies.” See also, <https://www.hhs.gov/foia/privacy/index.html>

33. Because the respondent department is not a federal agency, it is found that the nondisclosure provisions of the Privacy Act are not applicable to the department’s records.

34. Accordingly, it is found that the dates of birth contained throughout the in camera records and the photograph of the driver's license are not exempt from disclosure pursuant to the Privacy Act.

35. The respondents claimed that IC 2019-0516-A2, IC 2019-0516-C3, and IC 2019-0516-D24, described on the indexes as "depiction of subject of erased/nollied record," are exempt from disclosure pursuant to §52-142a, G.S.³

36. Section 52-142a, G.S., known as the "erasure statute," generally requires nondisclosure of all police, court, and prosecutorial records pertaining to a criminal charge whenever the person charged is acquitted or pardoned, or the charge is dismissed or nolle.

37. In the present case, it is found that the respondents offered no evidence that the charges against the individual(s) depicted in the in camera records identified in paragraph 35, above, were dismissed or nolle, or that such individual was acquitted or pardoned.

38. Moreover, even if the respondents had demonstrated that the charges were dismissed or nolle, or that the individual was acquitted or pardoned, it is found that the Supreme Court, in State v. West, 192 Conn. 488, 496 (1984), concluded that photographs do not pertain to any specific criminal charge, because they do not disclose "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." *Id.* at 496. Accordingly, the Court held that photographs are not subject to erasure pursuant to §52-142a, G.S.

39. Therefore, it is found that the in camera records identified in paragraph 35, above, are not exempt from disclosure pursuant to §52-142a, G.S.

40. The respondents claimed that IC 2019-0516-D20 through D22, described on the index as "State of CT Department of Public Safety DNA Search Report," are exempt from disclosure pursuant to §54-102j, G.S.

41. Section 54-102g, G.S., requires that blood or other biological samples be taken for deoxyribonucleic acid (DNA) analysis from certain individuals who have been arrested or convicted, and further requires that the Division of Scientific Services within the Department of Emergency Services and Public Protection store and maintain the "identification characteristics of the profile resulting from the analysis" in a DNA data bank which "shall be made available only as provided in section 54-102j."

42. Section 54-102j, G.S., requires the division "to receive blood or other biological samples and to analyze, classify and file the results of DNA identification characteristics profiles of blood or other biological samples submitted...and to make such information available as provided in this section."

³ On the indexes, the respondents claimed that IC 2019-0516-C3 and IC 2019-0516-D24 are exempt from disclosure pursuant to §54-142a, G.S. The Commission assumes the reference to this statute was a typographical error, and that the respondents intended to claim §52-142a, G.S.

43. Section 54-102j, G.S., further provides that “the results of an analysis and comparison of the identification characteristics from two or more blood or other biological samples shall be made available directly to federal, state and local law enforcement officers upon request made in furtherance of an official investigation of any criminal offense.” In addition, any person from whom a blood or other biological sample has been taken may, upon request, obtain a copy of his or her DNA profile, and a person who has been identified and charged with an offense as a result of a search of information in the data bank, may, upon request, obtain a copy of the search request.

44. Section 54-102i, G.S., provides that, other than as provided in §54-102j, G.S., “the results of the analysis shall be stored securely and shall remain confidential.”

45. It is found that the records identified as IC 2019-0516-D20 through D22 do not pertain to the complainant. Based upon the foregoing state statutes, it is found that IC 2019-0516-D20 through D22 are exempt from disclosure.

46. Finally, the respondents claimed that IC 2019-0516-B8 through B17 and IC 2019-0516-B24 through B44, described on the index as “phone records,” are exempt from disclosure pursuant to §16-247u, G.S., and 18 USC §1039.

47. Section 16-247u, G.S., entitled “Unauthorized procurement and sale of telephone records. Definitions. Exclusions. Telephone company protection of records. Penalties. Unfair Trade Practice,” imposes certain duties and obligations on telephone companies to protect telephone records. Section 16-247u(b), G.S., prohibits the procurement, sale and receipt of a “telephone record” of any resident of the state without the authorization of the customer to whom the record pertains, or by fraudulent, deceptive or false means.

48. Section 16-247u(a)(1), G.S., defines “telephone record” as “information retained by a telephone company that relates to a telephone number dialed by a customer or another person using the customer’s telephone with such customer’s permission, or the incoming number of a call directed to a customer or another person using the customer’s telephone with such customer’s permission, or other data related to such call typically contained on a customer’s telephone bill.....” (Emphasis added).

49. Section 16-247u(a)(2), G.S., defines “telephone company” as “any person that provides commercial telephone services to a customer, irrespective of the communications technology used to provide such service....”

50. Section 16-247u(a)(5), G.S., defines “person” as “any individual, partnership, corporation, limited liability company, trust, estate, cooperative association or other entity.”

51. It is found, under the plain language of §16-247u, G.S., that the in camera records identified in paragraph 46, above, which are maintained by the respondents and not by a “telephone company,” are not “telephone records,” as defined in that statute. Accordingly, it is found that such records are not exempt from disclosure pursuant to §16-247u, G.S.

52. The respondents also argued that the phone records, identified in paragraph 46, above, are exempt from disclosure pursuant to 18 USC §1039, entitled "Fraud and related activity in connection with obtaining confidential phone records information of a covered entity."

53. 18 USC §1039 makes it a criminal offense to knowingly and intentionally obtain, transfer, sell, purchase, or receive confidential "phone records information" of a "covered entity" by making false statements to an employee of a covered entity or a customer of a covered entity, knowingly providing a false document to a covered entity, or accessing customer accounts of a covered entity via the internet [or other means] without the customer's authorization.

54. "Phone records information" is defined in 18 USC §1039(h)(1), as "information that (A) relates to the quantity, technical configuration, type, destination, location, or amount of use of a service offered by a covered entity, subscribed to by any customer of that covered entity, and kept by or on behalf of that covered entity solely by virtue of the relationship between that covered entity and the customer; (B) is made available to a covered entity by a customer solely by virtue of the relationship between that covered entity and the customer; or (C) is contained in any bill, itemization or account statement provided to a customer by or on behalf of a covered entity solely by virtue of the relationship between that covered entity and the customer."

55. "Covered entity" is defined in 18 USC §1039(h)(2) as "any provider of telecommunications services." See 47 USC §153, Sec. 3.

56. Even assuming the in camera records described in paragraph 46, above, constitute "phone records information," within the meaning of 18 USC §1039, it is found that this provision is a federal criminal statute, not a federal law that provides for non-disclosure under §1-210(a), G.S. It is further found that, in the instant matter, the respondents failed to prove that any person attempted to obtain the records through fraud or unauthorized accessing of a customer's account. Accordingly, it is found that the in camera records, described in paragraph 46, above, are not exempt from disclosure pursuant to 18 USC §1039.

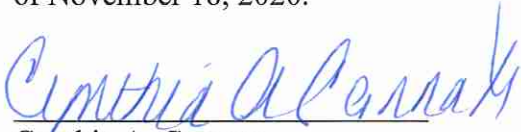
57. Based upon the foregoing, it is concluded that the respondents violated §§1-210(a) and 1-212(a), G.S., by failing to conduct a thorough search for records responsive to the request at issue in this case, and therefore failing to prove that they provided all responsive records to the complainant. It is further concluded that the respondents violated §§1-210(a) and 1-212(a), G.S., by redacting the information described in paragraphs 14 and 28, and by withholding the records described in paragraphs 21, 22, 35 and 46, above.

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 conduct an additional search for all records responsive to the request, described in paragraph 2, above, and, if additional records are located, provide such records to the complainant's attorney, free of charge. In addition, except for the in camera records found to be exempt from disclosure in paragraphs 20, 24, 25 and 40, the respondents shall forthwith provide an unredacted copy of the in camera records to the complainant's attorney, free of charge.

2. 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 November 18, 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:

MARLANDO DALEY, #383160, Corrigan/Radgowski Correctional Center, 986 Norwich-New London Turnpike, Uncasville, CT 06382

CHIEF, ARMANDO PEREZ, POLICE DEPARTMENT, CITY OF BRIDGEPORT; POLICE DEPARTMENT, CITY OF BRIDGEPORT; AND CITY OF BRIDGEPORT, c/o Attorney Dina A. Scalo, Office of the City Attorney, 999 Broad Street, 2nd Floor, Bridgeport, CT 06604



Cynthia A. Cannata
Acting Clerk of the Commission