

FREEDOM OF INFORMATION COMMISSION  
OF THE STATE OF CONNECTICUT

In the Matter of a Complaint by

FINAL DECISION

Robert Cushman,

Complainant

against

Docket #FIC 2019-0719

Director, Central Communications,  
City of Middletown; Central Communications,  
City of Middletown; and City of Middletown,

Respondents

November 18, 2020

The above-captioned matter was heard as a contested case on October 7, 2020, at which time the complainant and the respondents appeared and presented testimony, exhibits and argument on the complaint. Due to the COVID-19 pandemic and the state's response to it, the hearing was conducted telephonically.<sup>1</sup>

Prior to the start of the testimony, the respondents moved to dismiss the complaint claiming that, because the sole allegation in the complaint is that the respondents improperly destroyed a public record, this Commission lacks jurisdiction over such complaint. After hearing argument from the parties, and reviewing the complaint, the hearing officer denied the motion, based on the fact that the complaint alleges that the complainant had been denied access to certain public records, "prompt or otherwise".

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 November 21, 2019, the complainant requested from the respondents a copy of all records, including incident reports; audio and video recordings; phone logs; phone recordings; and photographs pertaining to the arrest of Juan Cernas by the Hartford Police Department ("Hartford PD") on October 16, 2019.
3. It is found that the respondent director received and was confused by the request, described in paragraph 2, above, because such request pertained to records of an arrest made by the Hartford PD, not the Middletown Police Department ("Middletown PD"). It is found that,

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<sup>1</sup> On March 14, 2020, the Governor issued Executive Order 7B, which suspended the requirement to conduct public meetings in person.

on November 26, 2019, the respondent director contacted the complainant's office and requested further information about the records the complainant was seeking. Specifically, he asked that the complainant provide him with a Middletown PD case number, which case number was provided by the complainant's paralegal.

4. By letter dated December 4, 2019, the complainant appealed to this Commission, alleging that the respondents violated the Freedom of Information ("FOI") Act because he "was denied access to [the] records [described in paragraph 2, above], prompt or otherwise".

5. 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 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 that:

[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 inspect such records promptly during regular office or business hours...or...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]ny 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 requested records are public records within the meaning of §§1-200(5) and 1-210(a), G.S.

9. It is found that the respondent Central Communications is a public agency separate from the Middletown PD, and that it maintains audio records, such as dispatch recordings and 911 calls. It is found that the respondent director conducted a search for responsive audio files maintained by Central Communications, and forwarded the request to Middletown PD, so that a search could be conducted for the remainder of the requested records, such as incident reports and booking video, which would be maintained by Middletown PD, if such records existed.

10. It is found that, by email dated December 5, 2019, the respondents and Middletown PD jointly informed the complainant that they had received his request, and that there were four pages of records, and a CD containing audio recordings, that were responsive to his request. The respondents and Middletown PD further informed the complainant that, because Middletown PD does not use dash cameras or body cameras, there were no dash camera or body camera videos, and that booking videos are maintained only for 30 days, in accordance with the state's retention schedule.

11. At the hearing in this matter, the complainant argued that: the requested records were not provided to him promptly; the respondents failed to conduct a thorough search for the booking video; and that the respondents improperly destroyed the booking video.

12. With respect to the timeliness of the respondents' compliance, the meaning of the word "promptly" is a 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.

13. Some of those factors, according to Advisory Opinion #51, are: the volume of records requested, the amount of personnel time necessary to comply with the request; the time by which the requestor needs the information; the time constraints under which the agency must complete its other work; the importance of the records to the requestor, if ascertainable; and the importance to the public of completing other agency business without the loss of the personnel time involved in complying with the request.

14. It is found that the complainant did not send the request via electronic mail, but rather, sent it via United States Postal Service, on Thursday, November 21, 2019. The respondents did not offer evidence as to the date the request was received, but argued that, most likely, the request was not received in the office until Monday, November 25, 2019. As previously found in paragraph 3, above, the respondent director contacted the complainant's office on November 26, 2019, seeking clarification of the request, which did not refer to a Middletown PD case, but rather, referenced records pertaining to an arrest by the Hartford PD. The Commission takes administrative notice of the fact that Thursday, November 28, 2019 was a holiday (Thanksgiving). As also previously found in paragraph 9, above, the respondent director forwarded the request at issue to Middletown PD to coordinate a joint response to the request, despite the fact that, because Middletown PD is a separate public agency, he was not required to do so. See Lash v. Freedom of Information Commission, 116 Conn. App. 171, 86-188 (2009).

15. It is found that the respondents and Middletown PD each conducted a search for responsive records, located such records, and notified the complainant on December 5, 2019, that such records were available to be picked up.

16. Based on the findings of fact above, it is further found that the respondents diligently worked to fulfill the request, described in paragraph 2, above, in a timely manner. It is further found that the approximately one-week period between the clarification of the request and the provision of the requested records to the complainant did not constitute “undue delay”.

17. Accordingly, it is concluded that the respondents did not violate the promptness provisions in §§1-210(a) and 1-212(a), G.S.

18. Next, the complainant argued that the respondents did not conduct a thorough search for the booking video he requested. It is found that the booking video, if it had existed, would have been created on October 16, 2019. Lt. Heather Desmond, who is responsible for responding to FOI requests on behalf of Middletown PD, testified that video recordings are automatically overwritten every 30 days, in accordance with the state’s records retention schedule, unless a request to preserve the video is received by the department. It is found that the complainant did not request that the video be preserved. The complainant mailed the request at issue on November 21, 2019, approximately one week after the date on which the video would have been overwritten in accordance with Middletown PD’s policy and the state’s retention schedule. The complainant claimed that because Lt. Desmond did not personally check the recording equipment to see how videos are stored or whether by some chance the particular video he requested was not erased, but rather, relied on the information provided to her by her IT staff that the video would have been overwritten, the respondents failed to conduct a thorough search for the video.

19. However, it is found, based on Lt. Desmond’s knowledge and understanding as to Middletown PD’s policy with regard to retention of this type of record, and the state’s retention schedule, it was reasonable for her to have concluded that the requested booking video, if it ever existed at all, no longer existed. It is therefore found that the respondents conducted a thorough search for the booking video, based on the facts and circumstances of this case.

20. Finally, the complainant argued that the respondents violated the FOI Act by improperly destroying the booking video he requested.

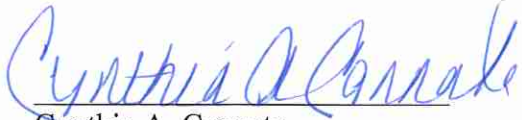
21. The complainant was unable to cite to the specific provision of the FOI Act he claimed the respondents violated. The Commission notes that §1-240(a), G.S., provides that “any person who willfully, knowingly and with intent to do so, destroys, mutilates or otherwise disposes of any public record without the approval [of the head of the political subdivision and the Public Records Administrator] shall be guilty of a class A misdemeanor....”

22. However, matters regarding the retention and destruction of public records are within the purview of the State’s Public Records Administrator, pursuant to §11-8a, G.S.; moreover, criminal enforcement powers under §1-240, G.S., reside with the appropriate State’s Attorney. See e.g., Sally Roberts v. Planning and Zoning Commission, City of Middletown, Docket #FIC 2010-541 (June 8, 2011); Steven Edelman v. Donald Schultz, Building Official, Building Department, Town of Windham, Docket #FIC 2001-295 (May 22, 2002).

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.

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:

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

**DIRECTOR, CENTRAL COMMUNICATIONS, CITY OF MIDDLETOWN;  
CENTRAL COMMUNICATIONS, CITY OF MIDDLETOWN; AND CITY OF  
MIDDLETOWN**, c/o Attorney Brig Smith, General Counsel, 245 deKoven Drive, Middletown, CT 06457



Cynthia A. Cannata  
Acting Clerk of the Commission