

FREEDOM OF INFORMATION COMMISSION
OF THE STATE OF CONNECTICUT

In the Matter of a Complaint by

FINAL DECISION

John Hernandez,

Complainant

against

Docket # FIC 2021-0058

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

Respondents

November 17, 2021

The above-captioned matter was heard as a contested case on August 20, 2021, at which time the complainant and the respondents appeared, stipulated to certain facts, 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 through the use of electronic equipment (remotely) pursuant to §149 of Public Act 21-2 (June Special Session).

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 email dated September 21, 2020, the complainant requested that the respondents provide him with copies of "my polygraph examinations conducted during the following Troops [sic] hiring processes: CSP 127th Training Troop; CSP 129th Training Troop; CSP 130th Training Troop."
3. It is found that the respondents acknowledged receipt of the complainant's request on September 21, 2020.
4. It is found that, on October 21, 2020, and November 24, 2020, the complainant contacted the respondents to inquire about the status of his request. It is found that on January 4, 2021, the complainant submitted a second request for the same records as identified in paragraph 2, above.

5. By letter of complaint filed February 8, 2021¹, the complainant appealed to the Commission, alleging that the respondents violated the Freedom of Information (“FOI”) Act by denying his request for certain public records.

6. 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, videotaped, printed, photostated, photographed or recorded by any other method.

7. 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 . . . (3) receive a copy of such records in accordance with section 1-212.

8. 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.”

9. It is found that the records described in paragraph 2, above, are public records within the meaning of §§1-200(5), 1-210(a) and 1-212(a), G.S.

10. It is found that on August 5, 2021, the respondents disclosed to the complainant summaries of the requested polygraph examinations as described in paragraph 2, above.

11. At the hearing, the complainant challenged the promptness and the completeness of the respondents’ August 5, 2021, disclosure.

12. It is found that the respondents withheld from disclosure the questions asked of the complainant and the answers provided by the complainant during each polygraph examination.

¹On March 25, 2020, the Governor issued Executive Order 7M, thereby suspending the provisions of Conn. Gen. Stat. Sec. 1-206(b)(1), which requires any appeal of the denial of rights under the Freedom of Information Act to be filed not later than thirty days after such denial. Executive Order 7M was applicable to any appeal filed between March 25, 2020 and April 19, 2021. Consequently, the complainant’s appeal is timely, and the Commission retains jurisdiction.

13. It is found that the polygraph examinations sought in this matter were administered as part of the examination for employment as a Connecticut state trooper trainee. The respondents contended that the withheld records were exempt from disclosure pursuant to §1-210(b)(6), G.S.

14. Section 1-210(b)(6), G.S., provides that nothing in the FOI Act shall be construed to require the disclosure of “[t]est questions, scoring keys and other examination data used to administer ... [an] examination for employment”

15. At the hearing, the respondents provided a written, sworn affidavit prepared by Sgt. Douglas Sauve. Sgt. Sauve was assigned to coordinate the respondents’ reply to the complainant’s request. Sgt. Sauve was not available to testify at the time of the hearing. The complainant objected to the admission of the affidavit as evidence. Such objection was overruled by the hearing officer and the affidavit was admitted as evidence.

16. The respondents also offered as evidence the Commission’s final decision in Docket #FIC 2017-0244, David Eldridge v. Commissioner, State of Connecticut, Department of Emergency Services and Public Protection, et. al. (April 11, 2018), in which the Commission found that portions of the summaries of two polygraph examinations administered to an applicant during the employment testing process for the Milford and Shelton Police Departments, contained the applicant’s answers to questions asked of the applicant, and that the applicant’s answers revealed the questions the applicant was asked. Such records were found to be permissively exempt from disclosure as “test questions” within the meaning of §1-210(b)(6), G.S. The Commission takes administrative notice of such decision.

17. It is found that each polygraph examination sought was part of a test for employment and therefore permissively exempt from disclosure as contended by the respondents. Further, it is found that the responses given to the polygraph questions, if disclosed, would reveal the questions asked during the examination for employment and therefore such responses are also exempt from disclosure pursuant to §1-210(b)(6), G.S. Accordingly, it is concluded that the respondents did not violate the Act as alleged by the complainant when they withheld the questions asked and the answers provided by the complainant for each polygraph examination.

18. Additionally, the complainant contended that the respondents’ disclosure of responsive records was not prompt. The Commission has held that the meaning of the word “promptly” is a particularly fact-based question. 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 opined that the word “promptly,” as used in the Act, means quickly and without undue delay, taking into consideration all of the factors presented by a particular request. Some of the factors that should be considered by an agency include 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 contained in the records; the time constraints under which the agency must complete its other work; the importance of the records to the requester, if ascertainable; and the importance to the public of completing the other agency business without the loss of the personnel time involved in complying with the request.

19. A number of Superior Court decisions have found the Commission's interpretation of the promptness standard reasonable. See Commissioner, Department of Emergency Services and Public Protection v. Freedom of Information Commission, Superior Court, judicial district of New Britain, Docket No. CV-18-6047741-S (July 2, 2020, Cordani, J) (An agency's FOIA duty is a statutory duty or command. As such, it is not second class to any other statutory duty or command); Torlai v. Freedom of Information Commission, Superior Court, judicial district of New Britain, Docket No. CV-16-5017450-S (November 27, 2017, Huddleston, J.); and Smith v. Freedom of Information Commission, Superior Court, judicial district of New Britain, Docket No. CV-12-5015684-S (June 7, 2013, Cohn, J.)

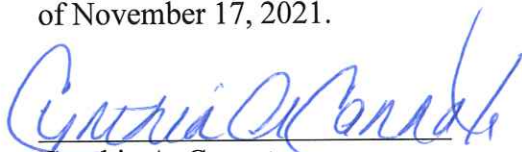
20. With regard to the issue of promptness, the respondents contended that due to the sensitive content of the requested records, there was "significant internal review and deliberation and it was difficult to obtain the requested records from the [polygraph] unit." The respondents further contended that the delay in disclosing the requested records was the result of high caseloads in the legal affairs unit, the departure of two staff attorneys and the transfer of Sgt. Sauve from the legal affairs unit to the labor relations unit.

21. It is found that the respondents' reasons for delay set forth in paragraph 20, above, failed to justify the nearly eleven months that elapsed prior to the disclosure of the requested records. Accordingly, it is concluded that the respondents' disclosure of records was not prompt and therefore violated the promptness provisions of §1-212(a), G.S.

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

1. Henceforth, the respondents shall strictly comply with the promptness requirements set forth in §1-212(a), G.S.

Approved by Order of the Freedom of Information Commission at its regular meeting of November 17, 2021.



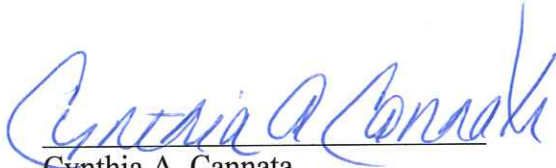
Cynthia A. Cannata
Acting Clerk of the Commission

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:

JOHN HERNANDEZ, 94 Gunpowder Rd., Artesia, NM. 88210

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 Janet K. Ainsworth, State of Connecticut Department of Emergency Services and Public Protection, 1111 Country Club Road, Middletown, CT 06457



Cynthia A. Cannata
Acting Clerk of the Commission