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SUPERIOR COURT

DOCKET NO. HHB-CV-19-6056393 2020 AUG 6 AM 11 08 SUPERIOR COURT

TOWN OF AVON, ET AL. JUDICIAL DISTRICT OF NEW BRITAIN : JUDICIAL DISTRICT OF NEW BRITAIN
VS. : ADMINISTRATIVE APPEALS SESSION
FREEDOM OF INFORMATION :
COMMISSION, ET AL. : AUGUST 6, 2020

MEMORANDUM OF DECISION

INTRODUCTION:

The Town of Avon, the Avon Police Department and the Avon Chief of Police (collectively, plaintiffs) administratively appeal a final decision of the Freedom of Information Commission (Commission) finding that the plaintiffs violated the Freedom of Information Act (FOIA) and entering certain orders for compliance therewith.

FACTS AND PROCEDURAL HISTORY:

In November of 2018, Mr. Joao Godoy made three FOIA requests of the plaintiffs: (i) for copies of police reports concerning an investigation of unregistered vehicles at 11 Columbus Circle in Avon, (ii) to inspect all documents, including polygraph and test results, regarding Lieutenant Kelly Walsh's application for the position of police officer within the Avon Police Department, and (iii) to inspect all documents regarding "police matters, issues, concerns, anonymous complaints, phone calls, logs . . . related to residents of 3 Columbus Circle, Avon,

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Notice sent to counsel of record,
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Judicial Decisions and Joao Godoy

CT, and/or registered or unregistered automotive vehicles in the immediate vicinity of said address.” *Godoy v. Avon*, Freedom of Information Commission, Docket # FIC 2018-0692, p. 1-2.¹

With respect to the requests concerning 3 and 11 Columbus Circle, the plaintiffs provided the documents requested, except that they temporarily withheld certain police reports because the plaintiffs determined that potential investigations remained open concerning those reports. Once the possibility of investigations closed, the remaining police reports were provided. With respect to the request concerning documents relating to the employment of Lieutenant Kelly Walsh, the plaintiffs provided documents that were redacted to obscure information that plaintiffs believed would be an improper invasion of Lieutenant Walsh’s personal privacy. Further, the plaintiffs have a policy of requiring a signed receipt prior to providing access to documents.

The plaintiffs are aggrieved because they have exhausted their administrative remedies, and appeal a final decision of the Commission finding that they violated FOIA and ordering compliance, including ordering the plaintiffs to take actions that the plaintiffs believe are unwarranted under the applicable law.

¹ Based upon the Commission’s decision and the report of previous decisions therein, it appears that Mr. Godoy is a frequent FOIA requestor of the plaintiffs. See *Godoy v. Avon*, Freedom of Information Commission, Docket # FIC 2018-0692, p. 8.

STANDARD OF REVIEW:

This appeal is brought pursuant to the Uniform Administrative Procedure Act (UAPA), General Statutes § 4-183.² Judicial review of an administrative decision in an appeal under the UAPA is limited. See *Murphy v. Commissioner of Motor Vehicles*, 254 Conn. 333, 343, 757 A.2d 561 (2000). “[R]eview of an administrative agency decision requires a court to determine whether there is substantial evidence in the administrative record to support the agency’s findings of basic fact and whether the conclusions drawn from those facts are reasonable. . . . Neither [the Supreme Court] nor the trial court may retry the case or substitute its own judgment for that of the administrative agency on the weight of the evidence or questions of fact. . . . Our ultimate duty is to determine, in view of all of the evidence, whether the agency, in issuing its order, acted unreasonably, arbitrarily, illegally or in abuse of its discretion.” (Internal quotation marks omitted.) *Id.*, 343.

Although the courts ordinarily afford deference to the construction of a statute applied by the administrative agency empowered by law to carry out the statute’s purposes, “[c]ases that

² Section 4-183 (j) provides in relevant part: “The court shall not substitute its judgment for that of the agency as to the weight of the evidence on questions of fact. The court shall affirm the decision of the agency unless the court finds that substantial rights of the person appealing have been prejudiced because the administrative findings, inferences, conclusions, or decisions are: (1) in violation of constitutional or statutory provisions; (2) in excess of the statutory authority of the agency; (3) made upon unlawful procedure; (4) affected by other error of law; (5) clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record; or (6) arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion. If the court finds such prejudice, it shall sustain the appeal and, if appropriate, may render a judgment under subsection (k) of this section or remand the case for further proceedings.”

present pure questions of law . . . invoke a broader standard of review than is . . . involved in deciding whether, in light of the evidence, the agency has acted unreasonably, arbitrarily, illegally or in abuse of its discretion.” (Internal quotation marks omitted.) *Dept. of Public Safety v. Freedom of Information Commission*, 298 Conn. 703, 716, 6 A.3d 763 (2010).

ANALYSIS:

This appeal challenges, and requires the court to review, the answers to three legal questions provided by the Commission relative to compliance with FOIA:

1. May a police department temporarily withhold the provision of police reports responsive to a FOIA request if the reports concern only infractions that have not yet been complied with by the violator?
2. May a public agency require that a FOIA requestor sign a simple receipt acknowledging receipt of the requested documents prior to providing the requested documents?
3. Is the provision of a police officer’s birth date and watercraft operator number an improper invasion of privacy pursuant to General Statutes § 1-210 (b) (2) under the facts of this matter?

The Commission found that the answer to each of the three foregoing questions was no. The court respectfully disagrees in part.

General Statutes § 1-210 (a) 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 . . . 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.”

General Statutes § 1-212 (a) 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.”
(Emphasis added.)

Thus, FOIA makes all records kept or maintained by any public agency public records subject to inspection or copy by members of the public unless such records are exempt by federal or state law. Accordingly, there is a presumption that all public records are open unless an exemption is found in law. Further, FOIA has a promptness standard requiring that FOIA requests be promptly handled.

A. Records Concerning Infractions and the Exemption to FOIA Disclosure Contained in § 1-210 (b) (3) (D)

One such exception to disclosure is contained in § 1-210 (b) (3) (D) which provides in relevant part:

“Nothing in the Freedom of Information Act shall be construed to require disclosure 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 . . . information to be used in a prospective law enforcement action if prejudicial to such action”
(Emphasis added.)

Here, the records in question were police reports concerning infractions arising out of unregistered vehicles. There is no dispute that these were records of a law enforcement agency not otherwise available to the public. Pursuant to the foregoing statutory exemption from FOIA, the plaintiffs temporarily withheld the reports until the violators had responded and the matters were closed. The plaintiffs took the position that, although these reports concerned only infractions, until the violators responded and resolved the infractions, there remained a possibility that the infractions could turn into misdemeanors and thus were at least temporarily exempt pursuant to § 1-210 (b) (3) (D). Once the infractions were resolved, the plaintiffs provided the documents. The Commission took the position that infractions were not crimes within the meaning of the foregoing statutory exemption and further that the plaintiffs had failed to prove that release of the records would be prejudicial to law enforcement activity.

The court finds that infractions are not crimes within the meaning of § 1-210 (b) (3) (D).³

Exemptions to FOIA are to be narrowly construed. See *Director, Dept. of Information*

³ In this regard, the court accepts the definition of crime contained in the General Statutes § 53a-24, which reasonably defines crime as misdemeanors or felonies. Infractions therefore does not fall within the definition of crime.

Technology v. Freedom of Information Commission, 274 Conn. 179, 187, 874 A.2d 785 (2005).

The party asserting the exception to disclosure bears the burden of establishing that the exception applies. See *Lieberman v. State Board of Labor Relations*, 216 Conn. 253, 266 (1990). The exemption provided in § 1-210 (b) (3) (D) is meant to exempt the disclosure of records compiled for the purpose of ongoing criminal investigations where the disclosure of such exempt information would prejudice an ongoing criminal investigation. Here, it is clear that the requested records concerned only infractions, not crimes. While it is true that irresponsible handling of an infraction by a violator may result in a criminal charge against the violator, it is the subsequent irresponsible handling of the infraction that may result in a new criminal charge, not the infraction itself. Said another way, the infraction always remains an infraction, however subsequent irresponsible handling of the infraction by the violator may result in a separate criminal charge being brought against the violator for the subsequent irresponsible activity. Further, in this matter, no such separate criminal charges were ever brought and the records requested concerned only infractions, not criminal activity. Lastly, the record here contains no substantial evidence indicating that (i) any information in the requested records was actually compiled for the purpose of investigating a crime, or was actually being used by the plaintiffs in

an investigation of a crime, or (ii) that the release of such records would prejudice any ongoing criminal investigation⁴.

In view of the foregoing, the court concludes that the requested records were not compiled in connection with detection or investigation of a crime within the meaning of § 1-210 (b) (3) (D) and therefore were not exempt from FOIA disclosure. Accordingly, the plaintiffs should not have temporarily withheld the requested records pursuant to this exemption. The court further finds that a police department may not temporarily withhold the provision of police reports responsive to a FOIA request if the reports concern only infractions that have not yet been complied with by the violator unless the police department can show that the reports were compiled for the purpose detection or investigation of a crime within the meaning of § 53a-24.

B. May a public agency require that a FOIA requestor sign a simple receipt acknowledging receipt of the requested documents prior to providing the requested documents?

As noted above, FOIA at § 1-210 (a) provides that a member of the public may inspect records. In addition, FOIA at § 1-212 (a) provides that a member of the public may receive copies of records if the request complies with § 1-212, which involves a written request and

⁴ Typically, irresponsible handling of an infraction may result in a charge of failure to pay or plea, or of failure to appear. These charges typically originate in the court proceedings concerning the infraction, and are rarely if ever "investigated" by the police agency that issued the infraction other than potentially to arrest the person on the new charges.

which may involve payment of a reasonable copying fee. Thus, there are two possibilities under FOIA. First, the requestor may be allowed to inspect records. Second, the requestor may receive copies of records. The receipt of copies of records requires a written request for such copies and potentially the payment of a reasonable copy fee. Here, Mr. Godoy requested copies of the records concerning 11 Columbus Circle but only to inspect the records concerning Lieutenant Walsh and 3 Columbus Circle. See *Godoy v. Avon*, Freedom of Information Commission, Docket # FIC 2018-0692, p. 1-2.

The plaintiffs here required Mr. Godoy to sign a receipt both for the inspection of records and for the receipt of copies thereof. The plaintiffs testified that it is “a fairly standard practice of the Department” to require requesters to sign a form “simply to acknowledge receipt or opportunity to inspect” records. *Godoy v. Avon*, Freedom of Information of the State of Connecticut, Docket # FIC 2018-0692, p. 3. The Commission entered the following blanket order concerning the issue of signing a receipt: “Henceforth, the respondents shall not require requesters to sign a form as a condition precedent to the receipt of public records.” *Godoy v. Avon*, Freedom of Information Commission, Docket # FIC 2018-0692, p. 12, as amended by October 10, 2019, meeting minutes.

It is clear that FOIA contains no provision that authorizes, nor one that explicitly prohibits, public agencies requiring a receipt prior to the provision of records. The purpose of FOIA is, however, to foster open government, and to provide a convenient and easy means for the public

to obtain access to public records. As such, public agencies should not adopt policies that inhibit rightful public access to public records. That being said, it is also important for public agencies to maintain the public records for the agencies' use and for access by all members of the public.

If the requester is receiving copies of records pursuant to § 1-212, then there is no risk to the maintenance of the original public records since the agency is making and providing copies. The plaintiffs' explanation for the requirement of a signed receipt from the requester is solely directed to create a record that the copies have been provided. The court finds that the public agency's imposition of an impediment to receipt of the copies by requiring a signed receipt is not justified by the foregoing purpose. As such, requiring a signed receipt as a precondition to receiving copies of public records is an unreasonable impediment to the public's right to public records under FOIA⁵.

If, however, the requester is asking to inspect public records and the agency intends to allow the inspection of original public records, then the agency, and the public, must be concerned with the overall maintenance of the public records and the prevention of destruction, loss or theft of the records being inspected. This legitimate concern for the proper maintenance of public records

⁵ However, in order to receive copies, the statute requires that the requestor make the request in writing. Thus, in order to receive copies of a public record a written request is required but the further signing of a written receipt is not.

is consistent with the purpose of FOIA which has embedded within it the purpose of maintaining the public records for access by all of the public. Thus, an agency may institute reasonable procedures to ensure the proper maintenance of public records being inspected and to avoid their destruction, loss or theft. The court finds that such reasonable procedures may include creating a record of who is inspecting which public records at what time by requiring a requester to sign a simple receipt prior to the allowance of the inspection of original public records. The court finds that such procedures do not unreasonably inhibit the public's access to public records while at the same time properly safeguarding the public records for future access by the public.

In view of the foregoing, the court finds that the Commission's order as it applies to prohibiting the signing of a receipt as a precondition to receiving copies is appropriate, however to the extent that the Commission's order prohibits the signing of a receipt as a precondition to the inspection of original public records, the court finds that the order was clear error.

C. Is the provision of a police officer's birth date and watercraft operator number an improper invasion of privacy pursuant to § 1-210 (b) (2) under the facts of this matter?

With regard to the provision of public records concerning Lieutenant Walsh, the plaintiff provided redacted documents. The documents provided were redacted to remove information that the plaintiffs believed the provision of which would have resulted in an improper invasion of Lieutenant Walsh's personal privacy. The Commission allowed certain redactions, however, the Commission's orders require no redaction of Lieutenant Walsh's birthdate and watercraft

operator number. The plaintiffs in this appeal challenge the provision of her birthdate and watercraft operator number.

Section 1-210 (b) (2) provides in relevant part an exemption from the disclosure requirements of FOIA for “[p]ersonnel or medical files and similar files the disclosure of which would constitute an invasion of personal privacy.”⁶ Our Supreme Court in *Perkins v. Freedom of Information Commission*, 228 Conn. 158, 635 A.2d 783 (1993), set forth a two part test for determining whether the disclosure of particular information would constitute an invasion of personal privacy within the meaning of the foregoing statutory exemption. In *Perkins*, the Court held that disclosure of information constitutes an invasion of personal privacy if (i) the information sought does not pertain to legitimate matters of public concern, and (ii) the disclosure of such information would be highly offensive to a reasonable person. *Id.*, 175. As with most exemptions from FOIA disclosure, the burden of establishing the exemption rests on the person or entity resisting disclosure. *Id.*, 167.

The Commission found, and there is no real dispute, that the records requested regarding Lieutenant Walsh consist of “personnel or medical and similar files” within the meaning of § 1-210 (b) (2). The court finds that this conclusion is supported by the record, is reasonable and is

⁶ The federal Freedom of Information Act contains a similar exemption. See 5 U.S.C. § 552(b)(6).

apparent based upon the description in the request. As such, the requested records fall within the province of § 1-210 (b) (2) and information contained within the records, the provision of which would constitute an invasion of personal privacy, may be withheld by redaction or otherwise.

The information being challenged is Lieutenant Walsh's birth date and watercraft operator number. Lieutenant Walsh objected to the provision of the foregoing information. The record contains no evidence that Lieutenant Walsh's birthdate or watercraft operator number constitute a legitimate matter of public concern. The requestor provided no substantial reason for his need of the foregoing information. In the court's view, absent very unusual circumstances, that are not present here, there can be no legitimate need for the public to obtain Lieutenant Walsh's date of birth and watercraft operator number. Further, the provision of a person's date of birth and watercraft operator number would be highly offensive to a reasonable person. It was offensive to Lieutenant Walsh and she objected. It would be offensive to the court, and the court has little doubt that the Commission members would object to the publication of their birth dates absent some substantial justification. Specific identity information such as a birth date, a watercraft operator number or a driver license number can be used to facilitate the crime of identity theft. As such, the court concludes that the provision of the requested specific identity information from a personnel file in this matter would be highly offensive to a reasonable person. In view of the foregoing, the court finds that the provision of Lieutenant Walsh's birth date and watercraft operator number from her personnel file would be an inappropriate invasion of her personal

privacy and is therefore exempt from disclosure under § 1-210 (b) (2). The Commission's finding otherwise was clear error.

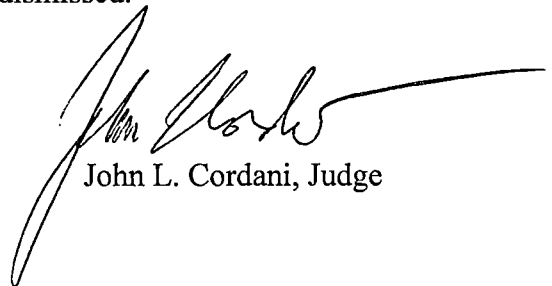
The court's finding in this regard is supported by previous action of the Commission and by courts. The court finds no principled distinction between the provision of a birth date or watercraft operator number from a personnel file and similar provision of a social security number, driver license number or employee identification number, all of which the Commission has previously found an invasion of personal privacy. Similarly, the United States Supreme Court has held in *Dept. of State v. Washington Post Co.*, 456 U.S. 595, 600, 102 S.Ct. 1957, 72 L.Ed.2d 358 (1982), that under the federal freedom of information act the provision of a person's birth date from a personnel file was exempt from disclosure as an unwarranted invasion of personal privacy. Correspondingly, the Connecticut Judicial Branch requires that personal identifying information, such as dates of birth and government issued personal identification numbers, be redacted from public court filings. See Practice Book § 4-7. Lastly, the court's finding in this regard is supported by the public policy behind General Statute § 42-471. All of the foregoing compel a conclusion that the provision of a date of birth and/or a watercraft operator number from a personnel file, absent some unusual substantial need which is not present here, would be an improper invasion of personal privacy, and thus exempt from FOIA disclosure.

D. CONCLUSION

In view of the foregoing, the court concludes that (i) the Commission's order to the extent that it prohibits requiring the signing of a receipt as a precondition to the inspection of original public records was clear error, and (ii) the Commission's order requiring the provision of Lieutenant Walsh's date of birth and watercraft operator number from her personnel file was clear error. The appeal is sustained as to the foregoing. In all other respects the appeal is dismissed.

ORDER:

The Commission's order to the extent that it prohibits requiring the signing of a receipt as a precondition to the inspection of original public records was clear error and is reversed. The Commission's order requiring the provision of Lieutenant Walsh's date of birth and watercraft operator number from her personnel file was clear error and is reversed. The appeal is sustained as to the foregoing. In all other respects the appeal is dismissed.



John L. Cordani, Judge