

FREEDOM OF INFORMATION COMMISSION
OF THE STATE OF CONNECTICUT

In the Matter of a Complaint by

FINAL DECISION

Terrance Burton,

Complainant

against

Docket #FIC 2020-0316

James Rovella, Commissioner,
State of Connecticut, Department
of Emergency Services and Public
Protection, Division of State Police;
and State of Connecticut, Department of
Emergency Services and Public Protection,
Division of State Police,

Respondents

January 12, 2022

The above-captioned matter was heard as a contested case on August 6, 2021 and September 17, 2021, at which times 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). The complainant is incarcerated at a facility of the Connecticut Department of Correction. The case caption has been amended to reflect the correct title of the respondent Commissioner.

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 19, 2019, the complainant requested that the respondents provide him with a copy of a police incident report associated with an investigation concerning identity theft, Case No. 1900577319 ("requested report").
3. It is found that, by "Response to Request for Report" form, dated November 25, 2019, the respondents informed the complainant that a fee in the amount of \$16.00 was required in advance for each report requested.

4. It is found that, by letter dated December 31, 2019, the complainant again requested a copy of the requested report and remitted payment in the amount of \$16.00.

5. It is found that, by “Response to Request for Report” form, dated February 21, 2020, the respondents informed the complainant that “the investigation is not yet available, but your request will be forwarded as soon as possible.”

6. It is found that, by letter dated June 24, 2020, the complainant again requested that the respondents provide him with a copy of the requested report.

7. By letter filed on July 10, 2020,¹ the complainant appealed to the Commission, alleging that the respondents violated the Freedom of Information (“FOI”) Act by failing to provide him with a copy of the requested report. In addition, the complainant requested the imposition of civil penalties.

8. At the time of the request, §1-200(5), G.S., provided:

‘[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.²

9. 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.

10. 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

¹ On March 25, 2020, the Governor issued Executive Order 7M, thereby suspending the provisions of Conn. Gen. Stat. §1-206(b)(1), which required the Freedom of Information Commission to hear and decide an appeal within one year after the filing of such appeal. Executive Order 7M, which was extended by Executive Order 12B, applied to any appeal pending with the Commission on the issuance date and to any appeal filed prior to July 1, 2021. Consequently, the Commission retains subject matter jurisdiction.

² Section 147 of Public Act 21-2 (June Sp. Sess.) amended the definition of “[p]ublic records or files” to also include data or information that is “videotaped”.

of any public record.”

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

12. At the hearing, the complainant maintained that the respondents violated the FOI Act by failing to provide him with the requested report. In addition, he challenged the imposition of the \$16.00 fee. He contended that the respondents treated requests made by inmates differently than requests made by non-inmates, and that, unlike inmates, non-inmates would not be required to pay the \$16.00 search fee to simply be informed of whether or not an investigation was completed and whether a report exists.

13. With respect to the \$16.00 fee, §29-10b, G.S., provides:

[t]he Commissioner of Emergency Services and Public Protection shall charge the following fees for the item or service indicated:

(1) Each search of the record files made pursuant to a request for a copy of an accident or investigative report which results in no document being produced, sixteen dollars.

(2) Each copy of an accident or investigative report, sixteen dollars.

14. In Connecticut Department of Emergency Services v. FOIC, No. CV 11-6012370-3, 2012 WL 3871918, at *4 (Conn Super. Ct. Aug. 10, 2012), the Court found that “§29-10b plainly and unambiguously provides that the charge for a search is permitted when one requests a copy of an accident report.” (Emphasis omitted).

15. It is found that the record maintained by the respondents that is responsive to the complainant’s request is a “report” within the meaning of §29-10b, G.S.

16. The respondents testified, and it is found, that the statutory \$16.00 search fee applies to all requesters. Accordingly, it is found that the complainant was not improperly charged such search fee.

17. With respect to the respondents’ withholding of the requested report, the respondents testified that such record has yet to be provided because the report was not yet completed and the associated investigation was ongoing. The respondents argued that releasing a report “piecemeal” will harm an investigation and relied on the Commission’s final decision in Docket #FIC 2015-606; Nicholas Romitti v. Commissioner, State of Connecticut, Department of Emergency Services and Public Protection, Division of State Police, et. al. (June 28, 2017). The respondents also testified that as soon as the

investigation and report were completed, a copy of the requested report would be provided to the complainant.³

18. In Romitti, the Commission found that an investigatory report concerning a fatal motorcycle accident that had yet to be completed at the time of the records request was a preliminary draft exempt from disclosure pursuant to §§1-210(b)(1) and 1-210(e), G.S.

19. Section 1-210(b)(1), G.S., provides, in relevant part, that nothing in the FOI Act shall be construed to require disclosure of:

[p]reliminary drafts or notes provided the public agency has determined that the public interest in withholding such documents clearly outweighs the public interest in disclosure....

20. In 1980, the Connecticut Supreme Court interpreted the phrase “preliminary drafts and notes” in the FOI Act. See Wilson v. FOIC, 181 Conn. 324 (1980) (“Wilson”). The Wilson Court ruled that “preliminary drafts or notes reflect that aspect of an agency’s function that precedes formal and informal decision making. . . . It is records of this preliminary, deliberative and predecisional process that . . . the exemption was meant to encompass.” Wilson, 181 Conn. at 332. In addition, the Wilson Court interpreted the phrase “preliminary drafts and notes” in the FOI Act as identical to the deliberative process privilege found in 5 U.S.C. §552(b)(5) of the federal Freedom of Information Act, with the exception that, under Connecticut’s FOI Act, the public agency carried the additional burden to show that “the public interest in withholding such document clearly outweighs the public interest in disclosure.” See Wilson, 181 Conn. at 333-340.

21. The year following Wilson, the Connecticut legislature adopted Public Act 81-431, which added to the FOI Act the language now codified in §1-210(e)(1). See ¶ 24, below.

22. Accordingly, §1-210(b)(1), G.S., must be read in conjunction with §1-210(e)(1), G.S., which provides as follows:

Notwithstanding the provisions of [§1-210(b)(1), G.S.], disclosure shall be required of:

(1) Interagency or intra-agency memoranda or letters, advisory opinions, recommendations or any report comprising part of the process by which governmental decisions and policies are formulated, except disclosure shall not be required of a preliminary draft of a memorandum, prepared by a member of the staff of a public agency, which

³ The Commission notes that counsel for the respondents did not bring a witness to the hearing, but asked to be sworn and then testified.

is subject to revision prior to submission to or discussion among the members of such agency.

23. The general rule under the FOI Act is disclosure: exceptions to this rule must be narrowly construed; and the burden of establishing the applicability of an exemption clearly rests upon the party claiming the exemption. New Haven v. FOI Comm'n, 205 Conn. 767, 775 (1988); Ottochian v. FOI Comm'n, 221 Conn. 393, 398 (1992). By design, that burden is difficult to meet. "This burden requires the claimant of the exemption to provide more than conclusory language, generalized allegations or mere arguments of counsel. Rather, a sufficiently detailed record must reflect the reasons why an exemption applies to the materials requested." Director, Retirement & Benefits Service v. FOI Commission, 256 Conn. 764, 773 (2001), citing New Haven, supra.

24. It is found that the respondents did not claim a specific statutory exemption to the disclosure of the requested report. Nevertheless, to the extent that the Commission can infer that the respondents intended to claim that the requested report was exempt from disclosure pursuant to §1-210(b)(1), G.S., it is found that the respondents did not present evidence at the hearings regarding the applicability of such exemption to the record at issue in the instant matter.

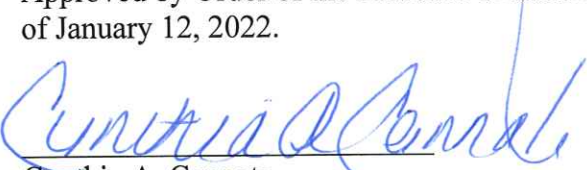
25. It is found that the respondents failed to prove that the requested report is exempt from disclosure. Accordingly, it is concluded that, under the facts and circumstances of this case, the respondents violated the FOI Act by withholding such record from the complainant.

26. Notwithstanding the conclusion reached in paragraph 25, above, the Commission in its discretion declines to impose a civil penalty in this matter.

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

1. The respondents shall forthwith provide a copy of the requested record to the complainant, free of charge.
2. Henceforth, the respondents shall strictly comply with the disclosure provisions in §§1-210(a) and 1-212(a), G.S.

Approved by Order of the Freedom of Information Commission at its regular meeting of January 12, 2022.

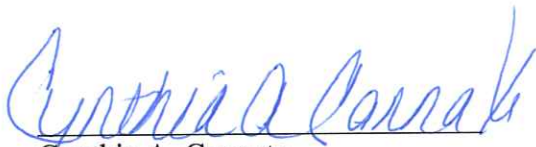

Cynthia A. Cannata
Acting Clerk of the Commission

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:

TERRANCE BURTON, #244193, Cheshire Correctional Institution, 900 Highland Avenue, Cheshire, CT 06410

JAMES ROVELLA, CHIEF, 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 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