

STATE OF CONNECTICUT
FREEDOM OF INFORMATION COMMISSION

In the Matter of a Complaint by

FINAL DECISION

Johanna Fay,

Complainant

against

Docket # FIC 2022-0183

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

Respondents

April 12, 2023

The above-captioned matter was heard as a contested case on October 12, 2022, and March 2, 2023, at which times the complainant and the respondents appeared, stipulated to certain facts, and presented testimony, exhibits and argument on the complaint. For purposes of hearing, this matter was consolidated with Docket # FIC 2022-0182; Johanna Fay v. Chief, Police Department, City of Bridgeport; Police Department, City of Bridgeport; and City of Bridgeport.

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, on March 23, 2022, the complainant requested that the respondents provide her with copies of all records related to the homicide of Keith Kochiss. It is also found that such request was made via the respondents' electronic records request portal.
3. It is found that the respondents acknowledged the request described in paragraph 2, above, via their automatic electronic portal, on the same day, and assigned the matter tracking number W005440032322.
4. By complaint filed April 25, 2022, the complainant appealed to the Commission, alleging that the respondents violated the Freedom of Information ("FOI") Act by failing to provide her with copies of the records described in paragraph 2, above. The complainant alleged that the requested records are public records and that no exemptions apply to such records.
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, videotaped, 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 . . .
(3) 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 records described in paragraph 2, above, are public records within the meaning of §§1-200(5) and 1-210(a), G.S.

9. On September 30, 2022, the Commission consolidated this matter with Docket # 2022-0182; Johanna Fay v. Chief, Police Department, City of Bridgeport; Police Department, City of Bridgeport; and City of Bridgeport.

10. It is found that, on October 7, 2022, the respondents provided the complainant with records responsive to her request described in paragraph 2, above. The respondents also informed the complainant that additional records were being withheld pursuant to §§29-164f, 54-142a, 1-210(b)(1)(2), 1-210(b)(3)(A)(C)(E)(H), G.S., and Galvin v. Freedom of Information Commission, 201 Conn. 448 (1986). The respondents also informed the complainant that they were having technical difficulties in providing further records at such time, but that more records would be forthcoming. It is found that additional records were provided to the complainant on October 11, 2022, the day before the first evidentiary hearing in this matter. It is also found that certain records provided on October 7th and October 11th were redacted.

11. At the October 12, 2022, hearing in this matter, the respondents contended that the complaint in this matter falsely alleges that the respondents did not respond to the request described in paragraph 2, above, because the respondents had acknowledged such request on March 23, 2022. The respondents further contended that the Commission does not have jurisdiction to address the claimed exemptions, since they allege that the complainant did not provide adequate notice to the respondents, either in the complaint, or thereafter, as to the specific exemptions she is contesting.

12. The hearing officer continued the hearing in order to provide an opportunity for the respondents to present evidence regarding application of claimed exemptions for records being redacted or entirely withheld.

13. On October 28, 2022, the respondents submitted to the Commission in camera records. It is found that subsequent to the October 12, 2022, hearing, the parties communicated with each other in order to narrow the issues between them. It is further found that, because of such communications which took place outside the hearing process, the respondents provided additional records, or portions thereof, to the complainant.

14. At the March 2, 2023, hearing, the respondents again made arguments regarding the scope of the Commission's jurisdiction in this matter as described in paragraph 11, above. Nevertheless, the respondents did present testimony with respect to certain claimed exemptions and, on March 8, 2023, provided to the Commission a revised in camera submission. Such records shall be identified as IC-2022-0182/0183-1 through IC-2022-0182/0183-157. It is found that the in camera documents represent the remaining records at issue between the parties in both this matter and in the consolidated matter, Docket #2022-0182. It is further found that such records relate to an investigation of a 1987 murder in Bridgeport, and that the complainant is an attorney working for The Innocence Project in its representation of the individual who was convicted of such murder and who has been incarcerated since such conviction.

15. As described in paragraph 11, above, the respondents contend that the complaint is insufficient in that it alleges that the complainant did not receive a response to her request, and that therefore she was denied access to public records. The respondents contend that since their electronic records request portal provided an acknowledgement to the complainant, the allegation in the complaint is false and the complaint should be dismissed on that basis. Certainly, the automatic acknowledgement issued by the respondents' portal does not release the respondents of their obligation to respond to requests by promptly providing copies of public records. Moreover, the respondents have focused on a turn of phrase in the first paragraph of the complaint in this matter and have ignored the remainder of the pleading.

16. Specifically, the entire first paragraph of the complaint in this matter states:

“This is an appeal under the Connecticut Freedom of Information Act (FOIA). On March 29, 2021, Bridgeport Police Chief Rebeca Garcia, the Bridgeport Police Department, and the Bridgeport City Attorney's Office (collectively, “Respondents”) failed to respond to a FOIA request submitted on March 23, 2021. Respondents' failure to produce the requested records is a violation of Conn. Gen. Stat. §1-210(a).”¹

17. It is clear from that paragraph, and from the entirety of the remainder of the complaint, that the complainant was alleging a violation of the FOI Act for failure to produce the

¹ The Commission notes the complainant's clerical error of using the year 2021, rather than 2022, in this paragraph. However, the remainder of the complaint references the correct year of 2022, and there is no dispute between the parties that the request in this matter was dated March 23, 2022.

requested public records. The complaint in this matter is sufficient in that regard and the complaint shall not be dismissed on the basis of an alleged pleading deficiency.

18. At the hearings in this matter, and on brief, the respondents contended that the Commission lacks jurisdiction to address the issue of exemptions because such issue was not fairly raised in the complaint.

19. Pursuant to §1-210(a), G.S., the complainant had the right to promptly obtain a complete copy of all public records she requested, unless the respondents can prove the applicability of an exemption, or of other federal law or state statute authorizing the withholding of such records. Necessarily implicit in that right is the right to challenge limitations placed on such right. The complainant alleged in her complaint that the respondents violated the FOI Act by failing to provide all responsive records. Furthermore, in this case, the complainant specifically challenged the application of any exemption in the text of her complaint.

20. It is concluded that the Commission has jurisdiction to address the issue of the respondents' claimed exemptions.

21. On brief filed March 21, 2023, the respondents contended for the first time that the complaint in this matter was not filed within thirty days of the denial, and that therefore the Commission lacks subject matter jurisdiction over this matter.

22. Section 1-206, G.S., provides, in relevant part that:

(a) Any denial of the right to inspect or copy records provided for under section 1-210 shall be made to the person requesting such right ... within four business days of such request ... Failure to comply with a request to so inspect or copy such public record within the applicable number of business days shall be deemed to be a denial.

(b)(1) Any person denied the right to inspect or copy records under section 1-210 ... may appeal therefrom to the Freedom of Information Commission, by filing a notice of appeal with said commission. A notice of appeal shall be filed not later than thirty days after such denial.... [Emphasis added.]

23. The respondents contended that calculation of the thirty-day window set forth in §1-206(b)(1), G.S., must start at the date of the last communication between the parties prior to the filing of the complaint, or March 23, 2022.

24. It is found that, on March 23, 2022, the respondents acknowledged the request described in paragraph 2, above, and informed the complainant, in relevant part, that "we are reviewing your request and will contact you in writing when the requested information is available".

25. It is found that the respondents did not deny or comply with the March 23, 2022, request within four business days of such request and that therefore, such request was constructively denied on March 29, 2022, pursuant to §1-206(a), G.S.

26. It is found that, in accordance with the provisions of §§1-206(a) and 1-206(b)(1), G.S., in order for the Commission to have subject matter jurisdiction over this complaint as it relates to the March 23, 2022, request, the complainant was required to file her appeal within 30 days of the date of the denial.

27. It is found that the complainant filed her appeal on April 25, 2022, within 30 days of the March 29, 2022, denial. Consequently, it is concluded that the Commission retains subject matter jurisdiction over this complaint.

28. The parties filed post-hearing briefs on March 21, 2023. On brief, the complainant informed the Commission that she was not contesting the following exemptions claimed by the respondents: medical examiner records withheld under Galvin v. Freedom of Information Commission; records claimed as exempt under §1-210(b)(3)(C), G.S. (signed statements of witnesses); NCIC reports; and erased records withheld under §54-142a, G.S. Accordingly, the following in camera records, or portions thereof that have been withheld, shall not be further addressed herein: IC-2022-0182/0183-5, 6, 8, 9, 16-22, 25, 26-28, 31-32, 47-49, 54-55, 58, 65, 67, 68, 71-73, 75, 80-84, 87-90, 92-93, 97-100, 116-121², 126-130, 131, 142, 145, and 149- 154.

29. The in camera index did not indicate any claimed exemptions for the following records: IC-2022-0182/0183- 3, 51, 64, and 96. Additionally, it is found that such records were disclosed to the complainant in their entirety. Accordingly, such records shall not be further addressed herein.

30. The in camera index also did not indicate any claimed exemptions for the following records: IC-2022-0182/0183- 11, 41, 91, 108, 115, 122, and 156. Additionally, it is found that the respondents failed to prove that they provided copies of such records to the complainant. Accordingly, it is concluded that the respondents violated §§1-210(a) and 1-212(a), G.S., by failing to provide copies of such records to the complainant.

31. The respondents claimed on the in camera index that the following records are outside the scope of the request, and that therefore such records need not be disclosed: IC-2022-0182/0183-23, 24, 125, 141, 143, 144, 146, 147 and 148. It is found that the respondents failed to prove that such records are outside the scope of the request in this matter. Accordingly, it is concluded that the respondents violated §§1-210(a) and 1-212(a), G.S., by failing to provide a copy of the following record to the complainant: IC-2022-0182/0183-125. With respect to the remaining records described in this paragraph, the respondents contend that they are exempt from mandatory disclosure pursuant to §1-210(b)(3), G.S. Accordingly, such records shall be further analyzed below.

² The Commission notes that the in camera index contains a clerical error which identifies these records as 161-121. The number 161 should read 116.

32. The respondents contended that the following in camera records, or portions thereof, are exempt from disclosure pursuant to §1-210(b)(1), G.S.: IC-2022-0182/0183- 2, 7, 29, 30, 36, 38, 39, 52, 60, 70, 73, 74, 102, 103, 105, 106, 114, 132, 133, and 140.

33. Section 1-210(b)(1), G.S., provides that “[n]othing in the Freedom of Information Information 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.”

34. The Supreme Court ruled in Shew v. Freedom of Information Commission, that “the concept of preliminary [drafts or notes], as opposed to final [drafts or notes], should not depend upon...whether the actual documents are subject to further alteration...” but rather “[p]reliminary drafts or notes reflect that aspect of the agency’s function that precede formal and informed decision making.... It is records of this preliminary, deliberative and predecisional process that...the exemption was meant to encompass.” Shew v. Freedom of Information Commission, 245 Conn. 149, 165 (1998), citing Wilson v. Freedom of Information Commission, 181 Conn. 324, 332 (1989). In addition, once the underlying document is identified as a preliminary draft or note, “[i]n conducting the balancing test, the agency may not abuse its discretion in making the decision to withhold disclosure. The agency must, therefore, indicate the reasons for its determination to withhold disclosure and those reasons must not be frivolous or patently unfounded.” State of Connecticut, Office of the Attorney General v. Freedom of Information Commission, 2011 WL 522872, *8 (Conn. Super. Ct. Jan. 20, 2011) (citations omitted).

35. The year following Wilson, the Connecticut legislature adopted Public Act 81-431, and added to the FOI Act the language now codified in §1-210(e)(1), G.S. Accordingly, §1-210(b)(1), G.S., must be read in conjunction with §1-210(e)(1), G.S., which provides, in relevant part:

“Notwithstanding the provisions of subdivisions (1) and (16) of subsection (b) of this section, 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 is subject to revision prior to submission to or discussion among the members of such agency....

36. It is found that the respondents conducted the balancing test required by §1-210(b)(1), G.S. However, the first inquiry for the Commission is to determine whether the records described in paragraph 32, above, constitute preliminary drafts or notes.

37. Based upon careful in camera review of the records described in paragraph 32, above, it is found such records consist of handwritten notes of unknown origins in that the authors of such notes are not known. It is also found that many such notes are fragmentary and consist of a series of initials, or letters, or digits, which have no obvious meaning when reviewed

thirty-five years later. Moreover, the testimony regarding the handwritten notes consisted of general assertions and was not specific to the particular records. Given the age of the records, it is found that there is a lack of institutional knowledge in the respondent police department regarding the underlying murder case. Moreover, there is no evidence showing that the handwritten notes described in paragraph 32, above, were used as a memory aid or kept separate by investigators at the time. Rather, the handwritten notes are apparently part of the main or central files of the respondents.

38. It is found that the records described in paragraph 32, above do not constitute “preliminary drafts or notes” within the meaning of §1-210(b)(1), G.S. Accordingly, it is concluded that the respondents violated §§1-210(a) and 1-212(a), G.S., by withholding the following in camera records from the complainant: IC-2022-0182/0183- 2, 30, 70, 73, 106, and 133. The respondents contend that the remaining records described in paragraph 32, above, are also exempt from mandatory disclosure pursuant to other provisions. Accordingly, such records shall be further analyzed below.

39. The respondents contend that the following in camera records, or portions thereof, are exempt from disclosure by virtue of §1-210(b)(2), G.S.: IC-2022-0182/0183- 37, 112, 123, 124, and 134-137.

40. Section 1-210(b)(2), G.S., provides in relevant part that nothing in the FOI Act shall require disclosure of “. . . personnel or medical files and similar files the disclosure of which would constitute an invasion of personal privacy”

41. The Supreme Court set forth the test for the exemption contained in §1-210(b)(2), G.S., in Perkins v. Freedom of Information Commission, 228 Conn. 158, 175 (1993). The claimant must first establish that the files in question are personnel, medical or similar files. Second, the claimant must show that disclosure of the records would constitute an invasion of personal privacy. In determining whether disclosure would constitute an invasion of personal privacy, the claimant must establish both of two elements: first, that the information sought does not pertain to legitimate matters of public concern, and second, that such information is highly offensive to a reasonable person.

42. Upon careful review of the in camera records described in paragraph 39, above, it is found that the following records do not constitute “personnel or medical files and similar files” within the meaning of §1-210(b)(2), G.S.: IC-2022-0182/0183- 37 and 112.

43. Upon careful review of the in camera records described in paragraph 39, above, it is found that the following records constitute “personnel or medical files and similar files” within the meaning of §1-210(b)(2), G.S.: IC-2022-0182/0183- 123, 124 and 134-137. However, it is further found that the respondents failed to present evidence to show that the subjects of such records have objected to potential disclosure, or that such individuals remain alive. It is found that the respondents failed to prove that disclosure of IC-2022-0182/0183- 123, 124 and 134-137 would constitute an invasion of personal privacy within the meaning of §1-210(b)(2), G.S.

44. It is found that the records described in paragraph 39, above, IC-2022-0182/0183- 37, 112, 123, 124, and 134-137, are not exempt from mandatory disclosure pursuant to §1-210(b)(2), G.S. Accordingly, it is concluded that the respondents violated §§1-210(a) and 1-212(a), G.S., by withholding copies of IC-2022-0182/0183- 123, 124, and 134-137 from the complainant. With respect to IC-2022-0182/0183- 37 and 112, the respondents also contended that another provision of the FOI Act operates to exempt such records. Analysis of that provision follows below.

45. With respect to the records, or portions thereof, claimed to be exempt from disclosure pursuant to §1-210(b)(3), G.S., such statute provides, in relevant part, 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, (B) the identity of minor witnesses, ... (E) investigatory techniques not otherwise known to the general public, ...or (H) uncorroborated allegations subject to destruction pursuant to section 1-216

46. After careful inspection of the in camera records, it is found that the in camera records are law enforcement records not otherwise available to the public which were compiled in connection with the investigation of a crime.

47. The respondents contended that the following in camera records, or portions, thereof, are exempt from disclosure pursuant to §1-210(b)(3)(A), G.S.: IC-2022-0182/0183- 1, 4, 7, 10, 12, 13, 14, 15, 23, 24, 28, 29, 30, 33, 34, 35, 36, 37, 38, 39, 40, 42, 43, 44, 45, 46, 50, 52, 53, 56, 57, 59, 60, 61, 62, 63, 66, 69, 74, 75, 76, 77, 78, 79, 85, 94, 95, 101, 102, 103, 104, 105, 107, 109, 110, 111, 112, 113, 114, 132, 138, 139, 140, 143, 144, 146, 147, 148, 155, and 157.

48. It is found that the respondents conducted some research with respect to individuals named or identified in the records described in paragraph 47, above. However, it is found that, due to the passage of time and the lack of institutional knowledge in the present day respondent police department with respect to the specifics of the underlying murder investigation, the respondents failed to prove that any specific individual named in such records has an identity not otherwise known. Likewise, the respondents failed to prove that any specific individual would be endangered or would be subject to threat or intimidation if their identity became known.

49. It is found that the respondents failed to prove that the records described in paragraph 47, above, are exempt pursuant to §1-210(b)(3)(A), G.S. It is concluded that the respondents

violated §§1-210(a) and 1-212(a), G.S., by withholding the following records from the complainant: IC-2022-0182/0183- 4, 7, 10, 23, 24, 29, 36, 37, 38, 39, 40, 52, 60, 61, 62, 66, 69, 74, 85, 86, 94, 95, 101, 107, 113, 114, 139, 140, 143, 144, 146, 147, 148, 155, and 157. With respect to the remaining records described in paragraph 47, above, the respondents claim other exemptions, which will be analyzed below.

50. The respondents contended that the following in camera records, or portions, thereof, are exempt from disclosure pursuant to §1-210(b)(3)(B), G.S.: IC-2022-0182/0183-78³, 79, 110, 111. Upon in camera review, it is found that such in camera records reveal the identity of a minor witness, within the meaning of §1-210(b)(3), G.S. Accordingly, it is concluded that the respondents did not violate the FOI Act by withholding portions of the in camera records that identify the minor witness.

51. The respondents contended that the following in camera records, or portions, thereof, are exempt from disclosure pursuant to §1-210(b)(3)(E), G.S.: IC-2022-0182/0183-1, 12, 13, 14, 15, 33, 34, 35, 42, 43, 44, 45, 46, 50, 53, 56, 57, 59, 63, 76, 77, 78, 102, 103, 104, 105, 109, 132, and 138. With respect to the respondents' claim that certain records, or information contained therein, are exempt from disclosure pursuant to §1-210(b)(3)(E), G.S., it is found that the respondents presented no evidence to explain how any of the specific information claimed to be exempt from disclosure pursuant to §1-210(b)(3)(E), G.S., constitutes an investigatory technique that is also not otherwise known to the public. After careful in camera inspection, it is found that the respondents failed to prove that such information is exempt from disclosure pursuant to §1-210(b)(3)(E), G.S.

52. Therefore, it is concluded that the respondents violated §§1-210(a) and 1-212(a), G.S., by withholding the records described in paragraph 51, above. However, the Commission notes that the following in camera records also indicate that portions thereof constitute erased records: IC-2022-0182/0183-1, 12, 13, 44, 53, 56, 57, 59, 63, 76, 77, 102, 104, 132, and 138. In keeping with the complainant's statement described in paragraph 28, above, such portions of the in camera records described in this paragraph need not be disclosed.

53. The respondents contended that IC-2022-0182/0183-141 is exempt from disclosure by virtue of §1-210(b)(3)(H), G.S., because it constitutes uncorroborated allegations of criminal activity. Section 1-216, G.S., which must be considered under this exemption, provides:

Except for records the retention of which is otherwise controlled by law or regulation, records of law enforcement agencies consisting of uncorroborated allegations that an individual has engaged in criminal activity shall be reviewed by the law enforcement agency one year after the creation of such records. If the existence of the alleged criminal activity cannot be corroborated within ninety days of the commencement of such review, the law enforcement agency shall destroy such records.

³ The Commission notes that the in camera index incorrectly cites §1-210(b)(2), G.S., rather than §1-210(b)(3)(B), G.S.

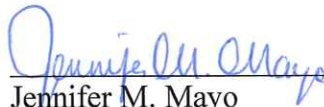
54. The Commission interprets the term “corroborate” as “to strengthen, to add weight or credibility to a thing by additional and confirming facts or evidence,” “to state facts tending to produce confidence in the truth of a statement made by another,” and “to give increased support to; make more sure or evidence.” Rachel Gottlieb and The Hartford Courant v. State of Connecticut, Department of Public Safety, Division of State Police, Docket #FIC 1994-291.

55. Other than the record itself, the respondents presented no evidence in this matter to show that IC-2022-0182/0183-141, which dates from the time of the 1987 murder investigation in this matter, contains uncorroborated allegations. It is concluded that the respondents failed to prove that such record is exempt from mandatory disclosure by virtue of §1-210(b)(3)(H), G.S. Accordingly, it is concluded that the respondents violated §§1-210(a) and 1-212(a), G.S., by withholding such record from the complainant.

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 provide to the complainant, free of charge, a copy of all requested records in this matter.
2. In complying with the order in paragraph 1, the respondents may withhold portions of IC-2022-0182/0183-78, 79, 110, and 111, which identify a minor witness, as described in paragraph 50 of the findings, above. In complying with the order in paragraph 1, the respondents may also withhold portions of IC-2022-0182/0183-1, 12, 13, 44, 53, 56, 57, 59, 63, 76, 77, 102, 104, 132, and 138, which constitute erased records, as described in paragraph 52 of the findings, above.
3. Henceforth, the respondents shall strictly comply with the disclosure requirements of §§1-210 and 1-212 G.S.

Approved by Order of the Freedom of Information Commission at its regular meeting of April 12, 2023.



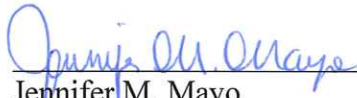
Jennifer M. Mayo
Acting Clerk of the Commission

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:

JOHANNA FAY, Brown Rudnick LLP, One Financial Center, Boston, MA 02111

CHIEF, 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



Jennifer M. Mayo
Acting Clerk of the Commission