

FREEDOM OF INFORMATION COMMISSION
OF THE STATE OF CONNECTICUT

In the Matter of a Complaint by

FINAL DECISION

Robert Cushman,

Complainant

against

Docket #FIC 2023-0204

Jason Thody, Chief, Police Department,
City of Hartford; Police Department,
City of Hartford; and City of Hartford,

Respondents

April 10, 2024

The above-captioned matter was heard as a contested case on December 12, 2023, at which time the complainant and the respondents appeared, stipulated to certain facts and presented testimony, exhibits and argument on the complaint.

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 April 11, 2023, the complainant requested that the respondents provide him with a copy of the following records related to the arrest of Kelvin Robinson and his co-defendant Gregory Pena in criminal case number 22-030509:

records, reports, not including investigative and accident reports, audio, video, digital recordings, body-cam videos, photographs (including but not limited to black and white and color), documentation, tapes, transmissions, transcriptions, broadcasts, notes, statements, and recordings for [Mr. Robinson and his co-defendant Mr. Pena] in this matter....

3. It is found that, by emails dated April 11, 2023 and April 14, 2023, the respondents acknowledged the complainant's request. It is found that the respondents further indicated that they would make a concerted effort to provide the requested records to the complainant within a reasonable time frame, but that they processed requests in the order in which they are received.

4. It is found that, by email dated April 20, 2023, the respondents informed the complainant that they had consulted the judicial branch website with regard to the two individuals identified in paragraph 2, above, and noticed that the superior court had statutorily sealed the criminal file regarding Mr. Robinson. It is further found that the respondents informed the complainant that, due to the court's sealing of the file, the requested records concerning Mr. Robinson were exempt from disclosure pursuant to §1-215(b)(4), G.S.

5. By email dated April 18, 2023 and filed April 27, 2023, the complainant appealed to this Commission, alleging that the respondents violated the Freedom of Information ("FOI") Act by failing to provide him with a copy of the requested records. In addition, the complainant requested that the Commission impose civil penalties against the respondents.

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 concluded that the records requested by the complainant are public records within the meaning of §§1-210(a) and 1-212(a), G.S.

10. It is found that, by email dated September 7, 2023, the respondents informed the complainant that, after again consulting the judicial branch website, they noticed that the superior court had unsealed the criminal file concerning Mr. Robinson. It is further found that the respondents informed the complainant that his request for records pertaining to Mr. Robinson had been placed back in the respondents' FOI queue for processing.

11. The complainant contended that the respondents had no basis upon which to claim that the "record of arrest" concerning Mr. Robinson was exempt from the mandatory disclosure provisions of §1-215(b)(4), G.S. See ¶ 13, below. The complainant further contended that the respondents violated the promptness requirements of the FOI Act.

12. The respondents contended that when the judicial branch website indicated that the court file with regard to Mr. Robinson was sealed, they were not required to provide the complainant with any records concerning Mr. Robinson. The respondents further contended that, even though they informed the complainant that the records concerning Mr. Robinson were exempt from disclosure, they never stopped processing the complainant's request for records concerning Mr. Pena. The respondents further contended that, once they realized that the court had unsealed its file with regard to Mr. Robinson, they placed the complainant's request for records concerning Mr. Robinson back in their FOI queue in the same position as the complainant's request concerning Mr. Pena. Finally, the respondents contended that the reason the complainant had not received any records with regard to either Mr. Robinson or Mr. Pena was because they process FOI requests in the order in which they are received, and, by the time of the contested case hearing, the respondents had not reached the complainant's request in the FOI queue.

13. Section 1-215, G.S., provides, in relevant part, as follows:

(a) For the purposes of this section, "record of the arrest" means

(1) the name, race and address of the person arrested, the date, time and place of the arrest and the offense for which the person was arrested, and

(2) in addition, in a case in which (A) the arrest has been by warrant, the arrest warrant application, including any affidavit in support of such warrant, or (B) the arrest has been made without a warrant, the official arrest, incident or similar report, provided if a judicial authority has ordered any such affidavit or report sealed from public inspection or disclosure, in whole or in part, the portion of the affidavit or report that has not been sealed, if applicable, as well as a report setting forth a summary of the circumstances that led to the arrest of the person in a manner that does not violate such order. "Record of the arrest" does not include any record of arrest of a juvenile, a record erased pursuant to chapter 961a or any investigative file of a law enforcement agency compiled in connection with the investigation of a crime resulting in an arrest.

(b) Notwithstanding any provision of the general statutes, and except as otherwise provided in this section, any record

of the arrest of any person shall be a public record from the time of such arrest and shall be disclosed in accordance with the provisions of section 1-212 and subsection (a) of section 1-210. No law enforcement agency shall redact any record of the arrest of any person, except for (1) the identity of witnesses, (2) the name, address or other identifying information of any victim of sexual assault under section 53a-70, 53a-70a, 53a-71, 53a-72a, 53a-72b or 53a-73a, voyeurism under section 53a-189a, injury or risk of injury, or impairing of morals under section 53-21 or family violence, as defined in section 46b-38a, or of an attempt thereof, (3) specific information about the commission of a crime, the disclosure of which the law enforcement agency reasonably believes may prejudice a pending prosecution or a prospective law enforcement action, or (4) any information that a judicial authority has ordered to be sealed from public inspection or disclosure. Any personal possessions or effects found on a person at the time of such person's arrest shall not be disclosed unless such possessions or effects are relevant to the crime for which such person was arrested.

(c) In addition, any other public record of a law enforcement agency that documents or depicts the arrest or custody of a person during the period in which the prosecution of such person is pending shall be disclosed in accordance with the provisions of subsection (a) of section 1-210 and section 1-212, unless such record is subject to any applicable exemption from disclosure contained in any provision of the general statutes.

(d) Any law enforcement agency receiving a request for a record described in subsection (c) of this section shall promptly provide written notice of such request to the office of the state's attorney for the appropriate judicial district where the arrest occurred. The state's attorney for such district shall be afforded the opportunity to intervene in any proceeding before the Freedom of Information Commission concerning such request.

(e) The provisions of this section shall only be applicable to any record described in this section during the period in which a prosecution is pending against the person who is the subject of such record....

(Emphasis supplied).

14. Section 1-215, G.S., exclusively governs law enforcement agencies' disclosure obligations under the FOI Act while a criminal prosecution is pending. In Commissioner of Public Safety v. Freedom of Information Commission, et al., 312 Conn. 513 (July 15, 2014) ("Public Safety"), the Supreme Court interpreted §1-215, G.S., and ruled that during the pendency of a criminal prosecution, a law enforcement agency must disclose no more than basic police blotter information and one other piece of information, designated by the law enforcement agency: either a press release, the arrest or incident report, or other similar report of the arrest of a person. In response to Public Safety, the General Assembly enacted Public Act 15-164, *An Act Concerning the Disclosure of Arrest Records During a Pending Prosecution under the Freedom of Information Act*, which amended §1-215, G.S., by increasing law enforcement agencies' disclosure obligations under §1-215, G.S.

15. It is found that all of the records identified in paragraph 2, above, relate to the arrest of Mr. Robinson and the arrest of Mr. Pena, and that, at all relevant times, the criminal prosecutions related to such arrests were pending. Accordingly, the respondents were only required to disclose to the complainant the "record of arrest," within the meaning of §1-215(a), G.S., and "any other public record...that documents or depicts the arrest or custody" of Mr. Robinson or Mr. Pena within the meaning of §1-215(c), G.S.

16. Sgt. Gary Benway appeared at the contested case hearing and testified on behalf of the respondents. Based upon Sgt. Benway's testimony, it is found that the superior court file related to the criminal matter pending against Mr. Robinson was, for a period of time, statutorily sealed.

17. It is found, however, that the respondents failed to prove which statute authorized the court to seal the court file pertaining to Mr. Robinson. It is further found that the respondents failed to provide any evidence with regard to the scope of the actual sealing order, or any evidence that would tend to show that a written sealing order actually existed.

18. Without evidence of the nature and scope of the sealing order, the respondents failed to prove that the "record of arrest" that they maintained with regard to Mr. Robinson had been sealed for purposes of §1-215(b)(4), G.S. See, e.g. State v. Dionne, 38 Conn. Supp. 675 (1983) (the court's sealing of its own file upon the defendant's application to participate in the pretrial alcohol education diversion program did not operate to seal other public agency's records regarding the defendant, as "there is nothing in the statute creating the pretrial alcohol education system indicating that the system itself or the records of the people participating in it are shielded from public view."); see also Off. of Chief Disciplinary Couns. v. Kohn, No. FST-CV-206046380S, 2023 WL 2769695, at *1 (Conn. Super. Ct. Mar. 27, 2023) ("Diversionary programs in criminal matters generally are intended to lead to a dismissal so as to preclude prosecution and allow erasure of the existence of the prosecution."); Cushman v. Chief, Police Dep't, City of New Britain, et al., Docket #FIC 2022-0551 (Nov. 15, 2023) (concluding that, to the extent the provisions of §54-56e, G.S., allow the court to seal its file upon a defendant's application to participate in the accelerated pretrial rehabilitation, such language, by its own terms, applies only to the court's file).

19. Notwithstanding the fact that the respondents failed to prove that “record of arrest” regarding Mr. Robinson was not subject to the mandatory disclosure provisions of §1-215(a), G.S., on April 20, 2024 (see ¶ 4, above), by the time of the contested case hearing, the respondents had not provided the complainant with any responsive record with regard to either Mr. Robinson or Mr. Pena. In this regard, the complainant contended that the respondents violated his right to access public records promptly.

20. With regard to whether the respondents have acted promptly in responding to the instant request, this Commission has previously opined that the word “promptly” in §1-210, G.S., means “quickly and without undue delay, taking into account all of the factors presented by a particular request . . . [including] the volume of records requested; the amount of personnel time necessary to comply with the request; the time by which the requester 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 loss of the personnel time involved in complying with the request.” See FOI Commission Advisory Opinion #51 (Jan. 11, 1982). The Commission also recommended in Advisory Opinion #51 that, if immediate compliance is not possible, the agency should explain the circumstances to the requester.

21. Based upon the testimony of Sgt. Benway, it is found that the respondents process FOI requests in the order in which they are received. It is further found that, when the respondents received the request set forth in paragraph 2, above, they had a back log of FOI requests. Accordingly, it is found that the respondents placed the complainant’s request at the end of their FOI queue. It is found that, in or around June 2023, the complainant’s request was number 125 in the respondents’ FOI queue for processing. It is further found that, in June 2023, the respondents had one individual processing FOI requests on a full-time basis, along with two other individuals who were processing FOI requests on a part-time basis.

22. By the time of contested case hearing, it is found that, while 245 days had elapsed since the respondents had received the complainant’s request, the respondents still had not processed the request. At the hearing, the respondents estimated that they still required several additional weeks to get to the complainant’s request in the queue and to process the request.¹ It is found that processing the request included gathering the “record of arrests” for both Mr. Robinson and Mr. Pena, gathering approximately 20 body worn camera videos depicting the arrest and custody of both individuals, and reviewing the records for exemptions to disclosure. It is further found that, by the time of the contested case hearing, the respondents had enlisted three criminal analysts from another division to assist with processing of body worn camera videos.

23. Under the facts and circumstances of this case, even taking the respondents’ reasons for the delay into consideration, it is found that the respondents failed to provide the requested records to the complainant promptly. However, the Commission recognizes that the respondents have taken steps to mitigate the delays in processing FOI requests, especially with regard to

¹ In their post-hearing brief, the respondents represented that, on January 3, 2024, they had fully processed the complainant’s request. However, because the complainant has not withdrawn his appeal, the Commission still maintains jurisdiction over this matter.

processing requests for body worn camera video.

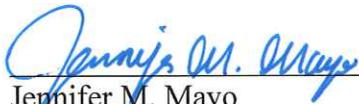
24. Accordingly, it is concluded that the respondents violated the promptness provisions of §§1-210(a) and 1-212(a), G.S.

25. Based on the specific facts and circumstances of this case, the Commission declines to consider the imposition of civil penalties.

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 provisions of §§1-210(a) and 1-212(a), G.S.

Approved by Order of the Freedom of Information Commission at its regular meeting of April 10, 2024.



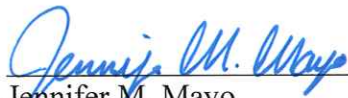
Jennifer M. Mayo
Acting Clerk of the Commission

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:

ROBERT CUSHMAN, 21 New Britain Avenue, Suite 218, Rocky Hill, CT 06067

JASON THODY, CHIEF, POLICE DEPARTMENT, CITY OF HARTFORD; POLICE DEPARTMENT, CITY OF HARTFORD; AND CITY OF HARTFORD, c/o Attorney Nathalie Feola-Guerrieri, Office of the Corporation Counsel, 550 Main Street, Hartford, CT 06103



Jennifer M. Mayo
Acting Clerk of the Commission