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# FREEDOM OF INFORMATION



Connecticut Freedom of Information Commission · 18-20 Trinity Street, Suite 100 · Hartford, CT 06106  
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Robert Cushman,  
Complainant(s)  
against

Notice of Meeting

Docket #FIC 2015-187

Records Supervisor, State of Connecticut, Department of  
Emergency Services and Public Protection, Division of  
Scientific Services; and State of Connecticut, Department  
of Emergency Services and Public Protection, Division of  
Scientific Services,

Respondent(s)

October 7, 2015

### Transmittal of Proposed Final Decision

In accordance with Section 4-179 of the Connecticut General Statutes, the Freedom of Information Commission hereby transmits to you the proposed finding and decision prepared by the hearing officer in the above-captioned matter.

This will notify you that the Commission will consider this matter for disposition at its meeting which will be held in the Freedom of Information Commission Hearing Room, 18-20 Trinity Street, 1st floor, Hartford, Connecticut, at **2 p.m. on Wednesday, October 28, 2015**. At that time and place you will be allowed to offer oral argument concerning this proposed finding and order. Oral argument shall be limited to ten (10) minutes. For good cause shown, however, the Commission may increase the period of time for argument. A request for additional time must be made in writing and should be filed with the Commission **ON OR BEFORE October 16, 2015**. Such request **MUST BE (1) copied to all parties, or if the parties are represented, to such representatives, and (2) include a notation indicating such notice to all parties or their representatives.**

Although a brief or memorandum of law is not required, if you decide to submit such a document, an **original and fourteen (14) copies** must be filed **ON OR BEFORE October 16, 2015**. **PLEASE NOTE: Any correspondence, brief or memorandum directed to the Commissioners by any party or representative of any party MUST BE (1) copied to all parties, or if the parties are represented, to such representatives, (2) include a notation indicating such notice to all parties or their representatives and (3) be limited to argument. NO NEW EVIDENCE MAY BE SUBMITTED.**

If you have already filed a brief or memorandum with the hearing officer and wish to have that document distributed to each member of the Commission, it is requested that **fifteen (15) copies** be filed **ON OR BEFORE October 16, 2015**, and that **notice be given to all parties or if the parties are represented, to their representatives, that such previously filed document is being submitted to the Commissioners for review.**

By Order of the Freedom of  
Information Commission

W. Paradis  
Acting Clerk of the Commission

Notice to: Robert Cushman  
Assistant Attorney General Stephen R. Sarnoski

2015-10-07/FIC# 2015-187/Trans/wrbp/VDH//LFS

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FREEDOM OF INFORMATION COMMISSION  
OF THE STATE OF CONNECTICUT

In the Matter of a Complaint by

Report of Hearing Officer

Robert Cushman,

Complainant

against

Docket #FIC 2015-187

Records Supervisor, State of  
Connecticut, Department of  
Emergency Services and Public  
Protection, Division of Scientific  
Services; and State of Connecticut,  
Department of Emergency Services  
and Public Protection, Division of  
Scientific Services,

Respondents

October 5, 2015

The above-captioned matter was heard as a contested case on August 21, 2015, 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 February 26, 2015, the complainant described for the respondents an incident that took place on January 10, 2015, as follows: "Alcotest 9510: Serial No. ARBD-0091; Police Department: Plainville; Subject Name: [Mr.] C; Case No.: 2015000610; Date of Incident: January 10, 2015; Testing Officer: Officer Greg A. Barrett, Badge No.: 347." In addition, it is found that, in connection with this incident, the complainant requested that the respondents provide him with a copy of the following records:

. . . all records relating to all tests. . . , including but not limited to results of all three (3) tests taken by Mr. C[] and including all Electro Chemical results for all tests, along with copies of the calibration and certification histories of the. . . Alcotest machine.

3. By letter dated March 9, 2015 and filed March 13, 2015, the complainant appealed to this Commission, alleging that the respondents violated the Freedom of Information (“FOI”) Act by failing to provide him with copies of the requested records described in paragraph 2, above.

4. Section 1-200(5), G.S., provides:

“Public 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.

5. Section 1-210(a), G.S., provides in relevant part that:

Except 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 (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.

6. 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.”

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

8. At the contested case hearing, the complainant testified that he did receive the calibration and certification history records that are referred to in paragraph 2, above. However, he further testified that certain test results remained outstanding.

9. It is found that, on January 10, 2015, a Plainville police officer administered three Dräger Alcotests (“Alcotest”) on an individual at the Plainville Police Department. It is found that the Alcotest is a hand-held screener used to check an individual’s breath for alcohol content.

10. In general, it is found that when a police officer administers an Alcotest, the result is two-fold: first, the Alcotest produces a test-strip that gives certain information about the

individual's alcohol level known as an "infra-red" result; second, the strip also notes that a separate "electro-chemical" test has been performed. It is found, however, that, unlike the results of the infra-red test, which are actually noted on the strip, the strip does not produce the results of the electro-chemical test; the results of this test must be accessed separately.

11. It is found that the complainant was able to obtain the infra-red test results from test one and test three from the Plainville Police Department and he is not pursuing this part of his request with the Commission. However, it is further found that the complainant did not receive the infra-red test results from test two, nor has he received any of the three electro-chemical test results.

12. It is found that, sometime after the tests were performed by the Plainville Police Department, the records at issue were forwarded to the respondents.

13. It is found that criminal charges were filed against the individual upon whom the Alcotests were performed. Moreover, while it is found that the complainant did not represent this individual with regard to the underlying criminal matter, he is such individual's counsel of record in connection with a related administrative matter.

14. It is found that, by email dated May 28, 2015, the respondents denied the complainant's request, stating that, because the requested records were involved in an underlying criminal matter that was still ongoing, the records were exempt from disclosure pursuant to §1-215, G.S. In addition, at the contested case hearing, the respondents contended that, since the time of their May 28, 2015 denial, the status of the underlying criminal case has changed in that the case has been sealed pursuant to §54-56g(a)(1), G.S. The respondents contended that they do not know if the requested records, which they continue to maintain, are part of the sealed criminal case file.

15. At the time of the request described in paragraph 2, above, through the time of the contested case hearing in this matter, section 1-215, G.S., provided, in relevant part, as follows:

- a. Notwithstanding any provision of the general statutes to the contrary, and except as otherwise provided in this section, any record of the arrest of any person, other than a juvenile, except a record erased pursuant to chapter 961a, 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, except that disclosure of data or information other than that set forth in subdivision (1) of subsection (b) of this section shall be subject to the provisions of subdivision (3) of subsection (b) of section 1-210. . . .
- b. For the purposes of this section, "record of the arrest" means (1) the name 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) at least one of the following, designated by the law enforcement agency: The arrest report, incident report, news release or other similar report of the arrest of a person.<sup>1</sup>

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<sup>1</sup> On July 2, 2015, the legislature enacted Public Act 15-164, thereby amending §1-215, G.S. The amendments, which went into effect on October 1, 2015, include, inter alia, a more expansive definition of "record of arrest" and the requirement that records depicting the arrest or custody of an individual be disclosed during the period in which the prosecution of such person is pending. Section 1-215, G.S., now 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. . . .

(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) 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 (3) any information that a judicial authority has ordered to be sealed from public inspection or disclosure. . . .

(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

16. In Comm’r of Pub. Safety v. FOIC, et al., 312 Conn. 515 (2014) (“Public Safety”), the Supreme Court held that §1-215 provides “the exclusive disclosure obligation under the [FOI] Act for law enforcement agencies, with respect to documents relating to a pending criminal prosecution.” Id. at 525.<sup>2</sup>

17. It is found that the underlying criminal case is still pending.

18. It is found that the records in question do not fall within the definition of “record of arrest,” set forth in §1-215(b), G.S.


19. It is therefore concluded that the requested records are exempt from disclosure pursuant to §1-215, G.S.

20. Because the requested records are exempt pursuant to §1-215, G.S., there is no need to address respondents’ legal argument with respect to §54-56g, G.S.

21. Finally, it is concluded that the respondents did not violate the FOI Act, as alleged in the complaint.

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

1. The complaint is hereby dismissed.

  
Valicia Dee Harmon  
as Hearing Officer

2015-187/HOR/VDH/10/02/2015

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pending against the person who is the subject of such record. At all other times, the applicable provisions of the Freedom of Information Act concerning the disclosure of such record shall govern.

<sup>2</sup> The Commission notes that with the enactment of Public Act 15-164 certain aspects of the Public Safety decision were modified, as §1-215, G.S., now requires broader access to law enforcement records during the pendency of a criminal prosecution. However, even with the more expansive disclosure requirements, the statute does not require the disclosure of the Alcotest results at issue in this case during the pendency of a criminal prosecution.