

Since 1975



# FREEDOM OF INFORMATION



Connecticut Freedom of Information Commission • 18-20 Trinity Street, Suite 100 • Hartford, CT 06106  
Toll free (CT only): (866)374-3617 Tel: (860)566-5682 Fax: (860)566-6474 • www.state.ct.us/foi/ • email: foi@po.state.ct.us

John Vivo,  
Complainant(s)  
against

Notice of Meeting

Docket #FIC 2015-192

Commissioner, State of Connecticut, Department of  
Correction; and State of Connecticut, Department of  
Correction,

Respondent(s)

February 3, 2016

### 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, February 24, 2016**. 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 February 11, 2016**. 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 February 11, 2016**. **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 February 11, 2016**, 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: John Vivo  
James Neil, Esq.  
cc: Craig Washington

2016-02-03/FIC# 2015-192/Trans/wrbp/VB/VDH

FREEDOM OF INFORMATION COMMISSION  
OF THE STATE OF CONNECTICUT

In the Matter of a Complaint by

Report of Hearing Officer

John Vivo,

Complainant

against

Docket #FIC 2015-192

Commissioner, State of Connecticut,  
Department of Correction; and State of  
Connecticut, Department of Correction,

Respondents

February 3, 2016

The above-captioned matter was heard as a contested case on December 17, 2015, at which time the complainant and the respondents appeared, stipulated to certain facts, and presented testimony, exhibits and argument on the complaint.

The complainant, who is incarcerated, appeared via teleconference, pursuant to the January 2004 memorandum of understanding between the Commission and the Department of Correction. See Anthony Sinchak v. FOIC et al, Superior Court, Judicial District of Hartford, Docket No. CV 03-0826293 (corrected order dated January 27, 2004, *Sheldon, J.*).

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 January 8, 2015, the complainant made a written request to the respondents for certain records related to a September 26, 2014 Restrictive Housing Unit Status Order.
3. It found that, on February 23, 2015, the complainant inquired about the status of his January 8, 2014 records request.
4. It is found that, on March 2, 2015, the respondents notified the complainant that he had been provided with responsive records and that certain other responsive records could not be disclosed due to an "investigation."
5. By letter of complaint dated March 6, 2015 and filed on March 16, 2015, the complainant appealed to the Commission, alleging that the respondents failed to provide copies

of certain records described in paragraph 2, above, in violation of the Freedom of Information Act. Among other relief, the complainant requested that a civil penalty be imposed.

6. Section 1-200(5), G.S., defines “public records or files” as:

[A]ny 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.

7. 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 . . . (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 found that, to the extent that the records identified in paragraph 2, above, exist and are maintained by the respondents, such records are public records within the meaning of §§1-200(5) and 1-210(a), G.S., and must be disclosed in accordance with §§1-210(a) and 1-212(a), G.S., unless they are exempt from disclosure.

10. Following the complainant’s filing of this complaint, it is found that, by letter dated August 12, 2015, the respondents informed the complainant that they had forwarded his records request to the appropriate department for processing.

11. It is found that, on September 18, 2015, the respondents informed the complainant that responsive records were ready for distribution pending payment of \$2.50 to cover the cost of copies and that they were withholding certain information in reliance on the exemption contained in §1-210(b)(18), G.S.

12. It is further found that, on November 10, 2015, and on or around December 10, 2015, certain responsive records were made available to the complainant.<sup>1</sup>

---

<sup>1</sup>It is found that the complainant declined to accept the records offered to him on or around December 10, 2015, but at the hearing in this matter indicated that he would now accept those records. The respondents agreed to provide those records to the complainant.

13. At the hearing in this matter, the complainant conceded that certain records were provided to him by the respondents but asserted that the respondents' response was incomplete. Specifically, the complainant claimed that the following records were improperly withheld and/or redacted:

- (a) Records associated with an incident report dated September 26, 2014 (hereinafter referred to as the "Incident Report"), which report precipitated the issuance of a September 26, 2014 Restrictive Housing Unit Status Order, including certain notes and pages of the Incident Report; and
- (b) State Master Movement Card reflecting time served at Cheshire Correctional Facility (hereinafter referred to as "Movement Card").

The complainant also asserted that the respondents were not prompt in complying with his records request.

14. The respondents contended that they have provided the complainant with certain records that they maintain, which are responsive to the requests described in paragraph 2, above, but claim that certain additional responsive records identified in paragraph 13(a), above, were withheld and/or redacted because such records are exempt from mandatory disclosure pursuant to the exemption contained in §1-210(b)(18), G.S.

15. Section 1-210(b)(18), G.S., provides, in relevant part, that:

Nothing in the Freedom of Information Act shall be construed to require disclosure of . . . [r]ecords, the disclosure of which the Commissioner of Correction . . . has reasonable grounds to believe may result in a safety risk, including the risk of harm to any person or the risk of an escape from, or a disorder in, a correctional institution or facility under the supervision of the Department of Correction.

16. In State of Connecticut, Department of Correction v. Freedom of Information Commission and Richard Quint, et al, Superior Court, Judicial District of New Britain, Docket No. CV06-4012025S, (July 3, 2007, *Levine, J.*), the court held that:

The statutory phrases 'reasonable grounds to believe' and 'may result' establish a standard which has an inherently subjective component. That is, whether reasonable grounds exist to believe that something may happen cannot be scientifically established. That test can only be established only by opinion evidence. An opinion, not representing certainty, necessarily has an element of speculation. Accordingly, requiring evidence which is devoid of

speculation in order to establish a subjective matter requires a type of evidence which cannot exist.

See also State v. Martin, 77 Conn. App. 778, 803, *cert. denied*, 266 Conn. 906 (2003) (“we should accord heightened deference to prison officials’ policies designed to address the urgent problems involved in administering a modern day prison”). Lastly, as cautioned by the Quint court, “[b]ecause our statutes and case law expressly recognize that the administration of prisons requires expertise not possessed by lay people, second-guessing prison administrators on matters concerning prison security can be undertaken only with great care and delicacy.” Id.

17. It is found that the unredacted records concerning the Incident Report that were provided to the complainant, which records were entered into evidence, detail an incident that occurred on September 26, 2014 in which an investigation was conducted into a suspected plan to injure a fellow inmate with the assistance of other inmates who had a suspected gang affiliation.

18. Upon order by the hearing officer, the respondents submitted the withheld records and unredacted copies of the records identified in paragraph 13(a), above, for an in camera inspection. Such records have been identified as IC-2015-192-1 through IC-2015-192-46. The Index to Records Submitted for In Camera Inspection (“Index”), incorporated herein by reference, identifies the exemptions that the respondents claim for each record.<sup>2</sup>

19. After a careful review, it is found that IC-2015-192-1 through IC-2015-192-12; IC-2015-192-16 through IC-2015-192-27 and IC-2015-192-29 through IC-2015-192-46 provide additional details regarding the Incident Report, including identifying information of other inmates involved in the investigation of that report. The Index indicates that those identified records were either withheld and/or redacted because such records are exempt from mandatory disclosure pursuant to the exemption contained in §1-210(b)(18), G.S.

20. It is further found that the respondents’ Freedom of Information liaison, who has specific training with “Security Risk Groups,”<sup>3</sup> reviewed the withheld and redacted records, as the respondents’ delegate. It is found that his opinion, based on his years of experience with the respondents’ correctional institutions, is that due to the general nature of the circumstances detailed in the Incident Report, disclosure of the withheld and redacted portions of the responsive records would result in a safety and security risk, including the risk of harm to other individuals and the correctional facility.

21. Based on a careful review of the in camera records, coupled with the credible testimony proffered by the respondents’ Freedom of Information liaison at the hearing and mindful of the Quint court’s cautionary guidance, it is found that the respondent Commissioner had reasonable grounds to believe that disclosure of IC-2015-192-1 through IC-2015-192-12; IC-

---

<sup>2</sup>The Commission notes that the Index contains a duplicate record reference for No. 14, which should be listed as No. 15 and is referred to as IC-2015-192-15. In addition, although record reference No. 28 was included in the in camera records, it is not listed on the Index and was provided to the complainant unredacted. For purposes of record reference numbers, it will be referred to as IC-2015-192-28, but will not be considered as part of the in camera inspection.

<sup>3</sup>“Security Risk Groups” is a classification for those inmates suspected of having an affiliation with certain gangs.

2015-192-16 through IC-2015-192-27 and IC-2015-192-29 through IC-2015-192-46 may result in a safety and security risk, including the risk of harm to any person and/or the risk of a disorder in a correctional institution or facility under the supervision of the Department of Correction within the meaning of §1-210(b)(18), G.S.

22. It is therefore concluded that the respondents did not violate the Freedom of Information Act when they withheld certain responsive records and redacted certain information from records that were disclosed to the complainant as identified as IC-2015-192-1 through IC-2015-192-12; IC-2015-192-16 through IC-2015-192-27 and IC-2015-192-29 through IC-2015-192-46.<sup>4</sup>

23. With respect to IC-2015-192-13, IC-2015-192-14 and IC-2015-192-15, which according to the Index contain other inmates' "medical information," the respondents claim an exemption to mandatory disclosure in reliance on the Health Insurance Portability and Accountability Act (hereinafter referred to as "HIPPA").

24. HIPAA prohibits a "covered entity" from using or disclosing protected health information. 45 C.F.R. §164.502(a). Covered entities include a "health plan," a "health care clearinghouse," and a "health care provider who transmits any health information in electronic form in connection with a transaction" that HIPAA covers. 45 C.F.R. §164.104(a). It is found that the respondents do not fit within any of those categories. Moreover, even if the respondents were considered to be a covered entity for purposes of HIPAA, this Commission has consistently held that the confidentiality requirements of HIPAA, alone, do not bar disclosure of medical records where state law does not prohibit such disclosure. See Robin Elliot v. Commissioner, State of Connecticut, Department of Correction, Docket #FIC 2008-507 (July 22, 2009), Kathryn Ladd and Catherine Oemcke v. Administrator, State of Connecticut, Teachers' Retirement Board; and State of Connecticut, Teachers' Retirement Board, Docket # FIC 2015-061 (October 28, 2015).

25. It is therefore found that the respondents relied in error on the HIPPA confidentiality requirements when they withheld IC-2015-192-13, IC-2015-192-14 and IC-2015-192-15. Nevertheless, based on the identifying information of other inmates contained in those records, the circumstances detailed in the Incident Report and the testimony provided by the respondents' Freedom of Information liaison in support of the exemption contained in §1-210(b)(18),G.S., the Commission declines to order the disclosure of IC-2015-192-13, IC-2015-192-14 and IC-2015-192-15, as it is unclear whether the respondents were relying on the HIPPA exemption in addition to the exemption contained in §1-210(b)(18),G.S.<sup>5</sup> Because of that lack of clarity, the complainant is not precluded from making a new request for IC-2015-192-13, IC-2015-192-14 and IC-2015-192-15.

---

<sup>4</sup>The Commission notes that the complainant asserts that certain page numbers were redacted, which pages were not redacted on the copies provided by the respondents during the hearing in this matter. However, the complainant contended that he was able to read those page numbers despite the attempted redactions, and therefore, the Commission declines to consider those page numbers as redactions.

<sup>5</sup>The Commission notes that despite the respondents stating on the Index that the exemption relied on for IC-2015-192-13, IC-2015-192-14 and IC-2015-192-15 was the HIPPA confidentiality provision, at the hearing in this matter, the respondents asserted only the exemption contained in §1-210(b)(18),G.S., for all withheld records and redacted information.

26. The final responsive record in conjunction with the records request described in paragraph 13(a), above is page No. 2 of the Incident Report. The respondents neither provided that record to the complainant nor included it in its initial in camera submission. Upon order by the hearing officer to provide such record for in camera inspection, the respondents reported to the Commission that although initially unable to locate that record, it was subsequently located and provided to the complainant.

27. With respect to the request described in paragraph 13(b), above, the respondents do not claim any exemption but contended that they were unable to locate the Movement Card, and so provided the complainant with portions of a Location/Housing History Card that contained information similar to that contained in the missing Movement Card.

28. Although the respondents' Freedom of Information liaison testified that the respondents conducted a search for the Movement Card, it is found that there was no evidence presented to indicate that a diligent search for that record had been conducted. While it is found that the Location/Housing History that was provided to the complainant provides similar information as that contained in the Movement Card, it is further found that the portions of the Location/Housing History Card provided to the complainant do not cover the entire period in which the complainant was incarcerated at the Cheshire Correctional Facility, and therefore, the respondents' disclosure fell short of the complainant's request.<sup>6</sup>

29. Accordingly, it is concluded that the respondents violated the Freedom of Information Act by failing to disclose the requested portions of the Movement Card to the complainant.

30. With respect to the complainant's assertion of a "promptness" violation, it is found that: (a) it took over six (6) months to provide records that were responsive to the complainant's records request as described in paragraph 17, above, that were associated with the Incident Report; (b) page No. 2 of the Incident Report was not provided to the complainant until after the hearing in this matter, which was over a year after the complainant made his records request and (c) the requested portions of the Movement Card have not been provided to the complainant.

31. The 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 statements requested; the amount of personnel time necessary to comply with the request; the time by which the requester needs the information contained in the statements; 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.

---

<sup>6</sup>The portion of the Movement Card that was provided to the complainant contains history from November 13, 2001 through June 14, 2010. The Location/Housing History Card provides history from February 6, 2012 through September 30, 2014, which leaves a period of time that is not accounted for on either the Movement Card or the Location/Housing History Card.

32. Taking into consideration all of the facts and circumstances of this matter, and in the absence of any evidence as to any justification for the delay in providing those records to the complainant, it is concluded that the requested records were not provided promptly, and that the respondents consequently violated the promptness provision of §1-212(a), G.S.

33. Notwithstanding the conclusions reached in paragraphs 29 and 32, above, the Commission in its discretion declines to impose a civil penalty in this matter.

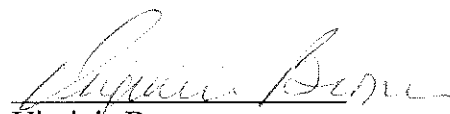
The following order by the Commission is hereby recommended on the basis of the record concerning the above-captioned complaint:

1. If not already provided, the respondents shall forthwith provide the complainant with a copy of the records that were previously offered to the complainant on December 10, 2015, which records he had previously declined, free of charge.

2. The respondents shall forthwith conduct a diligent search for the Movement Card. Within two (2) weeks of the date of the Notice of Final Decision in this matter, the respondents shall provide an affidavit to the complainant stating the steps undertaken to conduct a diligent search for such record and whether the record was located. If located, the record shall be provided to the complainant, free of charge.<sup>7</sup>

3. The complainant is not precluded from making a new request to the respondents for IC-2015-192-13, IC-2015-192-14 and IC-2015-192-15, consistent with the Commission's decision not to order immediate disclosure, as stated in paragraph 25, above.

4. Henceforth, the respondents shall strictly adhere to the disclosure and promptness requirements of §§1-210(a) and 1-212(a), G.S.

  
Virginia Brown  
as Hearing Officer

FIC2015-192/HOR/VB/02032016

---

<sup>7</sup>At the hearing in this matter, the complainant agreed to accept either the Movement Card or the Location/Housing History Card. As the Location/Housing History Card was neither included in the complainant's records request nor in his appeal to this Commission, the Commission declines to include such an agreement in its order.