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Nicholas Romitti,
Complainant(s)
against

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,
Respondent(s)

Notice of Meeting

Docket #FIC 2015-606

February 22, 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, lst floor, Hartford, Connecticut, at **2 p.m. on Wednesday, March 23, 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 March 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 March 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 March 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: Jeffrey C. Kestenband, Esq.
Assistant Attorney General Stephen Sarnoski

2016-02-22/FIC# 2015-606/Trans/wrbp/CAL//KKR

FREEDOM OF INFORMATION COMMISSION
OF THE STATE OF CONNECTICUT

In the Matter of a Complaint by

Nicholas Romitti,

Complainant

against

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

Report of Hearing Officer

Docket #FIC 2015-606

February 19, 2016

The above-captioned matter was heard as a contested case on December 10, 2015, at which time the complainant and the respondents appeared 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)(A), G.S.

2. It is found that, by letter dated September 4, 2015, counsel for the complainant made a request to the respondents for copies of records "concerning the investigation by the Connecticut State Police of a motor vehicle accident on Route 44 in Eastford on July 5, 2015 in which Nicholas Romitti was an injured party", and more specifically for: a) "(a)ll police reports, including, but not limited to, diagrams and ledgers"; b) "(a)ll photographs in the case, including, but not limited to, the accident scene and physical evidence"; c) "all 911 call recordings"; d) "(t)he identity of any witnesses"; and e) "(a)ccess for the undersigned counsel or a designee to inspect and photograph the physical evidence in the custody of law enforcement" (the "requested records").

3. It is found that, shortly after the request, Ms. Jennifer Koerlin, a paralegal in the Legal Affairs Office of the respondent Department, by telephone orally advised counsel for the complainant that the requested records were part of an ongoing investigation of two fatalities and that the relevant reports would not be released until the investigation was complete.

4. By letter dated and filed with the Commission on September 15, 2015, the complainant appealed to the Commission, alleging that the respondents failed to respond to the complainant's September 4, 2015 request for law enforcement records.

5. It is found that, by "follow-up" letter dated December 1, 2015, the respondents stated that the subject matter of the requested records "remains actively under investigation and is incomplete at this time." Because "disclosure of all or a portion of the draft report would be prejudicial to the integrity of the continuing investigation process", the respondent Department "has determined that the public interest in maintaining confidentiality of the preliminary investigation information and findings outweighs any public interest in disclosure...." Accordingly, pursuant to §§1-210(b)(1), 1-210(b)(3)(C), and 1-210(b)(3)(D), G.S., the respondents declined to provide any requested records.

6. Section 1-200(5), G.S., states:

> "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.

7. Sections 1-210(a), 1-211(a) and 1-212(a), G.S., state, respectively, in relevant parts:

> 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.
>
> ...
>
> Any public agency which maintains public records in a computer storage system shall provide, to any person making a request pursuant to the Freedom of Information Act, a copy of any nonexempt data contained in such records, properly identified, on paper, disk, tape or any other electronic storage device or medium requested by the person, including an electronic copy sent to the electronic mail address of the person making such request, if the agency can reasonably make any such copy or have any such copy made.

> Any person applying in writing shall receive, promptly upon request, a plain, facsimile, electronic or certified copy of any public record.

8. It is concluded that the records requested by the complainant are "public records" within the meaning of §§1-200(5), 1-210(a), and 1-212(a), G.S.

9. Section 1-210, G.S., also states in other relevant parts:

> (b) Nothing in the Freedom of Information Act shall be construed to require disclosure of:
>
> (1) Preliminary drafts or notes provided the public agency has determined that the public interest in withholding such documents clearly outweighs the public interest in disclosure;
>
> (2) Personnel or medical files and similar files the disclosure of which would constitute an invasion of personal privacy;
>
> (3) Records 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 said records would not be in the public interest because it would result in the disclosure of ... (C) signed statements of witnesses, (D) information to be used in a prospective law enforcement action if prejudicial to such action....
>
> ...
>
> (e) Notwithstanding the provisions of subdivision[ ] (1) ... 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;....

10. It is found that in the early afternoon of Sunday, July 5, 2015, the complainant was riding a motorcycle eastbound on Route 44 in Eastford, CT. The complainant collided with two other motorcycles that were traveling westbound. All three

motorcycle operators were transported by Emergency Medical Services to hospitals, one to Hartford Hospital and the other two to the University of Massachusetts Hospital in Worcester. One westbound motorcycle operator died later on the day of the accident and the other westbound motorcycle operator died thirty days later. The complainant survived his injuries.

11. It is found that Trooper William Shemansky was the primary law enforcement officer at the scene of the accident. The on-duty supervisor of Troop D and the barracks Lieutenant were notified of the accident. Trooper Shemansky was soon joined at the scene by two other troopers, and then by members of the Collision Accident Reconstruction Squad ("CARS"), for a total on site state police team of more than six, but not more than twelve individuals. This team was charged with taking photographs, making various measurements and gathering physical evidence. Next of kin were notified and a news release was prepared.

12. It is found that, because there was a motor vehicle accident that caused fatalities, an elaborate, detailed, and carefully organized investigation was launched. Trooper Shemansky became the investigating trooper and was charged with completing an exacting thirteen page, color coded report form (the Connecticut Uniform Police Crash Report). The investigation was conducted pursuant to the relevant portions of the State Police Procedures Manual. This Procedures Manual requires a variety of additional related reports, including: motor vehicle inspections by certified mechanics who, in this case, inspected the three wrecked motorcycles; background checks concerning the time period of twenty-four hours prior to the accident, which, in this case, included two operators from Massachusetts; medical examiners' reports; and the "reconstruction report", which includes both a verbal narrative and a map, from the CARS unit.

13. It is found that, as of the Commission's hearing date, the final accident report had not yet been assembled, because Trooper Shemansky had not yet received the medical examiner's report for one of the deceased operators or the CARS "reconstruction report". Moreover, Sgt. Ericson, the Resident Trooper Supervisor of Troop D, testified that the Police Crash Report was not yet fully completed and was subject to change. He emphasized that a number of activities or steps remained uncompleted.

14. It is found that, when Trooper Shemansky compiles a final accident report, the CARS unit will review the entire report. The CARS "reconstruction report" is only one chapter of this "book", usually a binder six to eight inches thick. The CARS unit tries to ensure that the entire report is internally consistent and without mistakes, and that any conclusions about criminal liability are supported by substantial evidence. If the CARS unit finds error, the report is returned to the investigating trooper for correction. After the CARS review is completed, the report goes up the chain of command for further review, to the master sergeant, then the barracks commander and finally Major Patrick O'Hara. The report might come back to the investigating trooper to correct errors and omissions following any review in the chain of command. When all parties within the State Police are satisfied, the final report is filed with the Reports and Records unit. If criminal charges are recommended, the report must be forwarded to the State's Attorney's Office

within one year of the accident. However, on occasion, when the State's Attorney's Office needs clarification, it will return to the State Police, even after the one year period, for additional consideration or investigation.

15. At the hearing, the respondents renewed their argument that all the requested records were exempt from mandatory public disclosure pursuant to §§1-210(b)(1), 1-210(b)(3)(C), and 1-210(b)(3)(D), G.S. They emphasized that, in exercise of their discretion, they had determined that the public interest in maintaining the confidentiality of the preliminary investigation information and findings outweighs any public interest in disclosure. Specifically, the respondents argued that it would be a disservice to the parties, to the public and to the respondent Department to disclose "piecemeal" information that is not complete and that may contain error. Moreover, respondents argued that partial disclosures, especially to the subject of an investigation, could adversely affect the integrity of the investigation process. Individuals with a direct interest in the outcome of an investigation might alter their testimony if they knew what investigators know. Insurance adjusters and family members might attempt to influence investigations in a manner that had an appearance of impropriety. Family members of the deceased might be needlessly upset. The respondents also pointed out that, in the present case, the complainant would not give a written statement concerning the accident or a release for his medical records to the state police. The complainant is therefore seeking information, but has not been willing to give information. Finally, respondents argued that, in the event of an arrest, all the evidence would be provided to the defendant in most cases.

16. At the hearing, the complainant emphasized his request for unchangeable information, in other words, police reports that document historical information that cannot be changed. Complainant's counsel specifically excluded from his request witness statements, draft reports and other records that could be supplanted. As examples of records that do not change, complainant's counsel discussed photographs, measurements taken by the CARS unit at the accident scene, and 911 call transcripts, if any. He further argued that in many other cases the state police do release information about pending investigations in order to seek the public's assistance. Moreover, if the complainant received the relevant information and could have his own experts perform his own accident reconstruction, a better, more fair report might result. In similar fashion, insurance adjusters might make some helpful, good points for consideration by the CARS unit. Because the CARS unit could reject suggestions, any influence on the final report would only further a legitimate purpose and not cause an improper result. He argued that potential defendants should be able to mount a defense before they experience the embarrassment and expense of arrest. Finally, the complainant argued that targets of investigations often decline to give statements and that the identity of witnesses should be disclosed.

17. It is found that, in the present investigation, a principal question is: on which side of the highway dividing line was the point of impact where the accident occurred? Obviously, no collision of motorcycles travelling in opposite directions would have occurred if all parties had been driving in their proper lanes of a two-way highway.

18. The General Assembly has recently expanded access to arrest records. P.A. 15-164. Prior to P.A. 15-164, the disclosure of arrest records would have been limited by the terms of §1-215(b), G.S. (2015), as interpreted by the Supreme Court in Commissioner of Public Safety v. Freedom of Information Commission, 312 Conn. 513 (2014). But, briefly summarized, pursuant to P.A. 15-164, warrant applications, affidavits in support of warrants, arrest and incident reports or the portions thereof that have not been sealed by a court are now subject to disclosure, except for the identity of witnesses and specific information that a law enforcement agency reasonably believes may prejudice a pending prosecution or a prospective law enforcement action. While there has been no arrest in the present case, and P.A. 15-164 is by its own terms not directly applicable [subsection (e)], it is relevant to this case that the General Assembly has recently expressed a public policy in favor of greater disclosure of law enforcement records. The Commission believes that the public policy expressed in P.A. 15-164 ought to likewise guide its decision making in this case, involving an extended prearrest, investigation period.

19. On January 8 and 11, 2016, the respondents submitted 209 pages of records and a compact disc for in camera inspection. Such records are hereby identified as IC-2015-606-1 through IC-2015-606-209, and IC-2015-606-CD. On the index to the in camera records, the respondents claimed the exemptions at §§1-210(b)(1) and 1-210(b)(3)(D), G.S., for all of the submitted records including IC-2015-606-CD. In addition, the respondents claimed the exemption at §1-210(b)(2), G.S., for IC-2015-606-81 through IC-2015-606-126 (described on the index as "Medical Records, Hartford Hospital"); the exemption at §1-210(b)(3)(C), G.S., for IC-2015-606-30, IC-2015-606-32 and 33, and IC-2015-606-71 through IC-2015-606-80 (described three times on the index as a "Signed Witness Statement"); and finally, the exemption at §19a-411(b), G.S., for IC-2015-606-37 through IC-2015-606-42 and IC-2015-606-45 through IC-2015-606-53 (described twice on the index as a "Medical Examiner's Report").

20. Section 19a-411(b), G.S., provides, in relevant part:

> (b) The report of examinations conducted by the Chief Medical Examiner, Deputy Chief Medical Examiner, an associate medical examiner or an authorized assistant medical examiner, and of the autopsy and other scientific findings may be made available to the public only through the Office of the Chief Medical Examiner and in accordance with this section, section 1-210 and the regulations of the commission [Commission on Medicolegal Investigations]. Any person may obtain copies of such records upon such conditions and payment of such fees as may be prescribed by the commission, except that no person with a legitimate interest in the records shall be denied access to such records.... (emphasis added)

21. It is found that IC-2015-606-45 through IC-2015-606-53 is a report of an examination by the Office of the Chief Medical Examiner of the State of Connecticut. These records are the report of an examination and of an autopsy by an authorized

medical examiner, within the meaning of §19a-411(b), G.S. Accordingly, it is concluded that such records are exempt from mandatory public disclosure.

22. The Supreme Court set forth the test for the invasion of privacy exemption at §1-210(b)(2), G.S., in Perkins v. Freedom of Information Commission, 228 Conn. 158, 175 (1993). This test has been the standard for disclosure of records pursuant to that exemption since 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 disclosure of such information is highly offensive to a reasonable person.

23. It is found that IC-2015-606-37 through IC-2015-606-42 is the report of an examination by the Office of the Chief Medical Examiner of the Commonwealth of Massachusetts, that these records are medical records, that information in these records does not pertain to legitimate matters of public concern and that disclosure of such information is highly offensive to a reasonable person. It is therefore concluded that disclosure of IC-2015-606-37 through IC-2015-606-42 would constitute an invasion of personal privacy and that such records are exempt from mandatory public disclosure pursuant to §1-210(b)(2), G.S. See Freedom of Information Officer, Department of Mental Health and Addiction Services v. FOIC, 318 Conn. 769 (2015) ("Mental Health and Addiction Services").

24. It is found that IC-2015-606-81 through IC-2015-606-126 (described on the index as "Medical Records, Hartford Hospital") are medical records, that information in these records does not pertain to legitimate matters of public concern and that disclosure of such information is highly offensive to a reasonable person. It is therefore concluded that disclosure of IC-2015-606-81 through IC-2015-606-126 would constitute an invasion of personal privacy and that such records are exempt from mandatory public disclosure pursuant to §1-210(b)(2), G.S. See Mental Health and Addiction Services.

25. Based on the review of the in camera records, it is also found that all of the requested records are the records of a law enforcement agency, that they are not otherwise available to the public, and that they were compiled in connection with the investigation of crime.

26. It is further found that IC-2015-606-30, IC-2015-606-32 and IC-2015-606-33, and IC-2015-606-71 through IC-2015-606-80 are signed statements of witnesses. It is therefore concluded that such records are exempt from mandatory public disclosure pursuant to §1-210(b)(3)(C), G.S.

27. It is also found that disclosure of the following IC-2015-606 records would be prejudicial to a prospective law enforcement action: 1 and 2, 14 through 27, 31, 34 through 36, 43 and 44, 59 through 70, 127 through 146, 163, 174 and on IC-2015-606-

CD, the second 911 call (call 631474; 7/5/2015, 12:21:04 p.m.; duration: 3 minutes and 40 seconds). It is therefore concluded that these specific IC-2015-606 records are exempt from mandatory public disclosure pursuant to §1-210(b)(3)(D), G.S.

28. It is further found that disclosure of the following IC-2015-606 records would not be prejudicial to a prospective law enforcement action: 3 through 13, 28 and 29, 54 through 58, 147 through 159, 160 through 162, 164 through 169, 170 through 173, 175 through 183, and 184 through 209. Concerning IC-2015-606-CD, it is found that the first 911 call (call 631473; 7/5/2015, 12:20:59 p.m.; duration: 59 seconds) would not be prejudicial to a prospective law enforcement action. It is also found any records that may exist as referred to on IC-2015-606-136, but not discussed at the hearing, would not be prejudicial to a prospective law enforcement action. It is therefore concluded that these specific IC-2015-606 records are not exempt from mandatory public disclosure pursuant to §1-210(b)(3)(D), G.S. Department of Public Safety, Division of State Police v. FOIC, 51 Conn. App. 100 (1998) ("The statute, however, does not require that an investigation be closed before disclosure is required." Id. at 105.)

29. It is also found that the IC-2015-606 records specifically enumerated in paragraph 28, above, including any records that may exist as referred to on IC-2015-606-136, are interagency memoranda or reports comprising part of the process by which governmental decisions are formulated, and that such records were not subject to revision. These records are final in themselves and not deliberative. Nor do they contain information not required or germane to their ultimate purpose. Therefore, it is further found that the reasons given by the respondents for withholding these records are, for these particular records only, "patently unfounded". The respondents abused their discretion when they determined that 'that the public interest in withholding such documents clearly outweighs the public interest in disclosure." Wilson v. FOIC, 181 Conn. 324, 339 (1980).

30. Based on the findings in paragraph 29, above, it is concluded that the IC-2015-606 records specifically enumerated in paragraph 28, above, including any records that may exist as referred to on IC-2015-606-136, are not preliminary drafts or notes within the meaning of §1-210(b)(1), G.S., and are not exempt from mandatory public disclosure pursuant to §1-210(b)(1), G.S., or §1-210(e), G.S. Van Norstrand v. FOIC, 211 Conn 339, 343 (1989); Strillacci v. FOIC, CV 084018120S, Superior Court, Judicial District of New Britain at New Britain (2009); University of Connecticut Health Center v. FOIC, CV116008847, Superior Court, Judicial District of New Britain at New Britain (2012).

31. As a result of the conclusions at paragraphs 21, 24, 26 and 27, above, it is unnecessary to address the applicability of the other exemptions that were also claimed for the IC-2015-606 records addressed in those four paragraphs.

32. It is concluded, with reference to the complainant's request described at paragraph 2.e), above, that there is no right conferred by the Freedom of Information Act

("FOIA") to inspect or photograph physical evidence if such physical evidence is not itself a public record within the meaning of §1-200(5), G.S.

33. Based upon the foregoing, it is concluded that the respondents violated §§1-210(a) and 1-212(a), G.S., when they failed to provide to the complainant the following IC-2015-606 records: 3 through 13, 28 and 29, 54 through 58, 147 through 159, 160 through 162, 164 through 169, 170 through 173, 175 through 183, 184 through 209, and on IC-2015-606-CD, the first 911 call (call 631473; 7/5/2015, 12:20:59 p.m.; duration: 59 seconds). It is also concluded that if records exist as referred to on IC-2015-606-136, but not discussed at the hearing, and a copy of such records could be reasonably made pursuant to §1-211(a), G.S., the respondents have violated §§1-210(a) and 1-212(a), G.S., by failing to provide a copy to the complainant.

34. Disclosure of the records enumerated in paragraph 33 will cause important basic information concerning the accident to be made public. This information includes the measurements taken by the CARS unit at the accident scene, photographs of the vehicles and accident scene (which do not include any photographs of the accident victims), and one of two 911 calls. It does not include the identity of witnesses, accounts of their statements or, of course, the actual witness statements.

35. As set forth in the FOIA, the respondents must be protected against disclosures that would prejudice a prospective law enforcement action or disclose records that are subject to further internal check and possible revision prior to disclosure. But nonetheless, just because there has been no arrest, it is also not acceptable to have no information concerning a serious accident available to the public or interested parties for as long as a year. (See paragraph 14, above, concerning the one year deadline for the State Police to refer matters to the State's Attorney's Office.)

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

1. The respondents shall provide the following IC-2015-606 records to the complainant forthwith and without charge: 3 through 13, 28 and 29, 54 through 58, 147 through 159, 160 through 162, 164 through 169, 170 through 173, 175 through 183, 184 through 209, and on IC-2015-606-CD, the first 911 call (call 631473; 7/5/2015, 12:20:59 p.m.; duration: 59 seconds).

2. If records exist as referred to on IC-2015-606-136, but not discussed at the hearing, and a copy of such records could be reasonably made pursuant to §1-211(a), G.S., the respondents shall provide such records to the complainant. If no records exist as referred to on IC-2015-606-136, or a copy of such records cannot reasonably be made, the respondents shall provide an affidavit to the Commission, with a copy to the complainant, stating that the records do not exist or explaining why a copy cannot reasonably be made.

Clifton A. Leonhardt
as Hearing Officer

FIC2015-606/HOR/CAL/02192016