FREEDOM OF INFORMATION COMMISSION
OF THE STATE OF CONNECTICUT

In the Matter of a Complaint by FINAL DECISION

Nicholas Romitti,

Complainant

against Docket #FIC 2015-606

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 June 28, 2017

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.

A proposed final decision was prepared by the hearing officer and was mailed to the parties on February 22, 2016. At a full Commission meeting on March 23, 2016, after hearing arguments from the parties, the Commission unanimously adopted the proposed final decision. Notice of the final decision was mailed to the parties on March 24, 2016.

On April 15, 2016, the respondents appealed the Commission's final decision to the Superior Court. The Commission filed a motion with the Superior Court, requesting that the case be remanded so that the Commission could reconsider its final decision. On October 19, 2016, the Superior Court granted the motion and remanded the case back to the Commission.

On April 18, 2017, the Commission held a post-remand evidentiary hearing, at which time the complainant and the respondents appeared and presented additional 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 the following :

> a) All police reports, including, but not limited to, diagrams and ledgers;
> b) All photographs in the case, including, but not limited to, the accident scene and physical evidence;
> c) All 911 call recordings;
> d) The identity of any witnesses; and
> e) Access 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 requested records 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.
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> ...
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> 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.
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> 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. 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, Connecticut. 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.

10. 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.

11. 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 that the investigatory report include several focused sections (or sub-reports), including the following: 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.

12. It is found that, as of the December 10, 2015 contested case hearing, 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." It is further found that the final narrative report had not been completed, as the final narrative report can only be completed once all of the necessary sub-reports have been submitted. Accordingly, the respondents' final conclusions about fault and criminal liability had not been drawn and such section remained blank within the report.

13. 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, the report can be returned to the State Police, even after the one year period, for additional consideration or investigation.

14. At the December 10, 2015 contested case hearing, the respondents claimed that the requested records were exempt from disclosure pursuant to §1-210(b)(1), G.S., (preliminary drafts and notes), §1-210(b)(2), G.S., (invasion of personal privacy), and §§1-210(b)(3)(C) (signed statements of witnesses) and (D) (information to be used in a prospective law enforcement action).

15. Section 1-210(b)(1), G.S., provides, in relevant part, that nothing in the FOI Act shall be construed to require disclosure of:

> 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....

16. In 1980, the Connecticut Supreme Court interpreted the phrase "preliminary drafts and notes" in the FOI Act. See Wilson v. FOIC, 181 Conn. 324 (1980) ("Wilson"). The Wilson Court ruled that "preliminary drafts or notes reflect that aspect of an agency's function that precedes formal and informal decision making. . . . It is records of this preliminary, deliberative and predecisional process that . . . the exemption was meant to encompass." Wilson, 181 Conn. at 332. In addition, the Wilson Court interpreted the phrase "preliminary drafts and notes" in the FOI Act as identical to the deliberative process privilege found in 5 U.S.C. §552(b)(5) of the federal Freedom of Information Act, with the exception that, under Connecticut's FOI Act, the public agency carried the additional burden to show that "the public interest in withholding such document clearly outweighs the public interest in disclosure." See Wilson, 181 Conn. at 333-340.

17. The year following Wilson, the Connecticut legislature adopted Public Act 81-431, which added to the FOI Act the language now codified in §1-210(e)(1). See ¶ 24, below.

18. Accordingly, §1-210(b)(1), G.S., must be read in conjunction with §1-210(e)(1), G.S., which provides as follows:

> Notwithstanding the provisions of [§1-210(b)(1), G.S.], 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.

19. At the December 10, 2015 contested case hearing, the respondents 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 outweighed 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

errors. 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.

20. In response, the complainant emphasized that his request was 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.[1]

21. It is found that, by the time of the April 18, 2017 post-remand evidentiary hearing, the complainant had been arrested and convicted for two counts of negligent homicide with a motor vehicle for matters arising out of the July 5, 2015 motorcycle accident. It is further found that, prior to the complainant's arrest, which occurred on April 18, 2016, he was provided with copies of all of the records at issue in this case. Nonetheless, at the April 18, 2017 post-remand evidentiary hearing, the complainant expressed his continued interest in having the Commission rule on the disclosbility of the requested records at the time they were originally requested from the respondents.

22. Following the December 10, 2015 contested case hearing, 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.

23. Based upon a careful review of all of the in camera records except for IC-2015-606-CD (which is the CD containing two 911 calls and which was also carefully reviewed and will be addressed separately below), as well as on the evidence presented at both the contested case hearing and the post-remand evidentiary hearing, it found that the in camera records comprise one investigatory report concerning the fatal motorcycle accident that occurred on July 5, 2015.

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[1] In fact, at the March 23, 2016 Commission meeting during which the hearing officer's proposed final decision was considered, the complainant emphasized that he never requested that the respondents disclose draft records: "While we would certainly welcome draft reports from the respondents if they were inclined to give them to us, we've never asked for them." See Transcript of March 23, 2016 Commission meeting, at pg. 342.

24. It is further found that, at the time of the December 10, 2015 contested case hearing, the investigatory report was not completed and that the records submitted for in camera inspection were all part of one incomplete, preliminary draft, within the meaning of §1-210(b)(1), G.S. It is further found that the respondents determined that the public interest in withholding the draft report clearly outweighed the public interest in disclosure. Finally, it is found that, at the time of the initial request in this matter, the draft report was a report, within the meaning of §1-210(e)(1), G.S.; however, it was also subject to revision prior to submission to or discussion among the members of the respondent department, within the meaning of such provision. Therefore, the report was exempt from disclosure at such time, pursuant to §§1-210(b)(1) and (e)(1), G.S.

25. While the complainant points to unchangeable information or completed sub-reports within the draft investigatory report and requests that the Commission selectively order disclosure of such records, the Connecticut Supreme Court has stated that such an approach is not appropriate. See Shew v. FOIC, et al., 245 Conn. 149, 164-66 (1998). In Shew, a town manager hired two attorneys to evaluate and provide legal advice with regard to the police chief's continued employment. One attorney reviewed transcripts from a civil tort case, while the other interviewed town employees and other persons to determine whether there might be evidence outside of the court records revealing that the chief may have abused his authority. The attorney conducting the interviews prepared summaries of the interviews and affidavits and forwarded these documents to the other attorney, who in turn prepared a draft report for the town manager. Before the report was final, a citizen requested copies of the interview summaries. The Supreme Court determined that such completed subparts of an overall incomplete investigatory report were preliminary drafts within the meaning of §1-210(b)(1), G.S., because such records, "although final in form, also are preliminary because they were created solely to serve as supporting documentation for [the overall] unfinished report." The same is true in this case. It is found that, while several of the sub-reports were complete at the time the request was made, the overall investigatory report had not yet been completed. It is further found that the completed sub-reports were created solely as part of and in support of the overall investigatory report.

26. Accordingly, based on the law set forth Shew, it is concluded that the respondents did not violate the FOI Act when they declined to disclose such records to the complainant.

27. With regard to the CD containing the two 911 calls, it is found that these records did not precede the creation of a larger document, nor were they preliminary to any other document or report. Rather, it is found that the 911 calls were final and complete calls by citizens to the police requesting help for the motorcyclists. It is concluded that these records are not preliminary drafts or notes, within the meaning of §1-210(b)(1), G.S., and that the respondents violated the FOI Act when they declined to disclose the CD when it was requested by the complainant.

28. The only other exemption claimed with regard to the CD is §1-210(b)(3)(D), G.S., which provides, in relevant part, that nothing in the FOI Act shall be construed to require disclosure of:

> 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 tin the disclosure of. . . (d) information to be used in a prospective law enforcement action if prejudicial to such action. . . .

29. It is found that the two 911 calls were not "compiled" in connection with the "detection of investigation of crime;" rather, these calls were received by law enforcement from concerned citizens who had witnessed an accident and were requesting assistance for the individuals involved in such accident.

30. Accordingly, it is concluded that the CD containing the 911 calls is not exempt from disclosure pursuant to of §1-210(b)(3)(D), G.S., and that the respondents violated the FOI Act when they declined to disclose the CD when it was requested by the complainant.

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

1. If the respondents have not already done so, they shall forthwith provide the complainant, free of charge, with a copy of the CD containing the two 911 calls.

Approved by Order of the Freedom of Information Commission at its regular meeting of June 28, 2017.

Cynthia A. Cannata
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:

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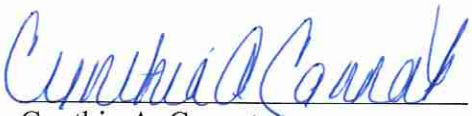

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