FREEDOM OF INFORMATION COMMISSION
OF THE STATE OF CONNECTICUT

In the Matter of a Complaint by | FINAL DECISION

James Torlai,

Complainant

against | Docket #FIC 2017-0039

Chief, Police Department,
Town of Darien; and Police
Department, Town of Darien,

Respondents | January 10, 2018

The above-captioned matter was heard as a contested case on November 17, 2017, at which time the complainant and the respondents appeared, stipulated to certain facts and presented testimony, exhibits and argument on the complaint. For purposes of hearing, this matter was consolidated with Docket #FIC2017-0065; James Torlai v. Chief, Police Department, Town of Darien; and Police Department, Town of Darien.

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 December 26, 2016, the complainant requested that the respondents provide him with copies of the following records related to the arrest of Patrick Dowling on or around December 11, 2016:

a – the full name of the person arrested;
b – the address of the person arrested;
c – the race of the person arrested;
d – the date and time of arrest;
e – the place of arrest;
f – a list of all charges;
g – the complete arrest report;
h – records containing any DUI test results such as breath, urine, or blood tests;
i – any records prepared for the Department of Motor Vehicles; and
j – all recordings, including audio, video, and bodycam recordings.

3. It is found that, on January 3, 2017, the respondents provided the complainant with records responsive to the request described in paragraph 2.a, 2.b, 2.c, 2.d, 2.e, and 2.f, above. Accordingly, such records are no longer at issue in this matter. However, it is also found that the respondents did not provide any remaining responsive records at such time, and indicated that the complainant should contact the Office of the State's Attorney for the remainder of the records. Thereafter, the parties exchanged further correspondence regarding the complainant's request, maintaining their positions that the complainant nevertheless sought the records described in paragraph 2.g, 2.h, 2.i and 2.j, while the respondents directed him to the State's Attorney.

4. By letter dated January 18, 2017, and filed January 20, 2017, the complainant appealed to the Commission, alleging that the respondents violated the Freedom of Information ("FOI") Act by failing to provide the records described in paragraph 2.g, 2.h., 2.i, and 2.j, above.

5. 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.

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

> 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.

7. Section 1-212(a), G.S., provides in relevant part that "[a] 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 requested records, to the extent that they are maintained by the respondents, are public records within the meaning of §§1-200(5), 1-210(a), and 1-212(a), G.S.

9. 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. . . .

(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.

. . .

(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. At all other times, the applicable provisions of the Freedom of Information Act concerning the disclosure of such record shall govern.

10. With respect to the records described in paragraph 2.h and 2.i, above, on brief, the complainant contends that §14-227i, G.S., requires that he be given such records by the respondent.

11. Section 14-227, G.S., provides:

(a) Notwithstanding any provision of the General Statutes, the investigating Police department shall maintain any record of a defendant concerning the operation of a motor vehicle by such defendant while under the influence of, or impaired by the consumption of, intoxicating liquor or drugs for a period of not less than two years from the date such defendant was charged with a violation of Section 14-277a.

(b)(1) Notwithstanding any other provision of the general statutes, by making a written request to the investigating police department, a person injured in an accident caused by the alleged violation of Section 14-227a by any such defendant, any party to a civil claim or proceeding arising out of such accident, or the legal representative of any such person or party may review and obtain regular or certified copies of any record concerning the operation of a motor vehicle by such defendant while under the influence of, or impaired by the consumption of, intoxicating liquor or drugs.

(2) The investigating police department shall furnish regular or certified copies of any such record to any person or the legal representative of such person, or to such party, not later than fifteen days following receipt of such request. The investigating police department shall charge a fee for such copies that shall not exceed the cost to such police department for providing such copies, but not more than fifty cents per page in accordance with Section 1-212.

12. First, the complainant appears to be asking the Commission to enforce rights he believes he has under §14-227i(b)(2), G.S. The Commission has no such enforcement power.

13. Second, the Commission cannot agree that §14-227i(b)(2), G.S., provides the complainant with a right of access to the records described in paragraphs 2.h and 2.i, above. That statute provides rights of access to those individuals described in §14-227i(b)(1), G.S.; specifically: persons injured in accidents caused by drivers under the influence of intoxicating liquors or drugs; parties to civil claims or proceedings arising from such accidents; or the legal representatives of such individuals. The language in §14-227i(b)(2), G.S., clearly and specifically relates to the language in §14-227i(b)(1), G.S.

14. On brief, the complainant relies on the legislative history of §14-227i(b)(2), G.S. Such reliance is misplaced. Under the plain meaning rule, extratextual evidence of the meaning of a statute shall not be considered if the meaning of the statute can be ascertained from its text and relationship to other statutes. Section 1-2z, G.S.

15. Next, the complainant contends that, since the records described in paragraphs 2.h and 2.i, above, are neither set forth in §1-215, G.S., nor specifically exempted therein, it follows that such statute cannot operate to excuse such records from mandatory disclosure.

16. The Commission notes that the issue of whether §1-215, G.S., merely sets forth the minimum information that must be disclosed at the time of arrest has been decided to the contrary by the Supreme Court in Commissioner, State of Connecticut, Department of Public Safety v. FOIC, 312 Conn. 513 (2014). The Court concluded that, during a pending criminal prosecution, a law enforcement agency's disclosure obligations under the FOI Act with respect to records related to the arrest are exclusively governed by §1-215, G.S. Accordingly, it is concluded that records not set forth in §1-215, G.S., which might also relate to an arrest, such as the records described in paragraphs 2.h and 2.i, above, are not required to be made available to the public during the limited time of a pending prosecution.

17. It is found that, at all times relevant to this matter, the prosecution related to the arrest at issue was and is pending. It is found that the next court date related to such arrest is currently scheduled for February, 2018. Accordingly, based upon §1-215(e), G.S., it is concluded that the respondents did not violate the FOI Act by failing to provide the complainant with the records described in paragraphs 2.h and 2.i, above.

18. With respect to the remaining records, described in paragraphs 2.g (arrest report) and 2.j (recordings), above, it is found that, on January 31, 2017, the respondents further contacted the complainant and offered to provide him with copies of the three page arrest report upon payment of $1.50, and a copy of a DVD containing the recordings upon payment of $15.00. Thus, the complainant could have received copies of the remaining records at such time. However, it is found that the complainant refused to pay the $15.00 fee for the DVD, and refused to pay the $1.50 fee for the arrest report prior to receiving such report.

19. With respect to the issue of the $1.50 arrest report, §1-212(a)(B), G.S., provides: "Any person applying in writing shall receive, promptly upon request, a plain, facsimile, electronic or certified copy of any public record...The fee for any copy provided in accordance with the Freedom of Information Act:...shall not exceed fifty cents per page...." Section 1-212(c), G.S., provides: "A public agency may require the prepayment of any fee required or permitted under the Freedom of Information Act if such fee is estimated to be ten dollars or more....."

20. The complainant contended at the hearing and on brief that, since the $1.50 fee was under $10.00, as set forth in §1-212(c), G.S., the respondents were required to mail him the arrest report, and bill him for the record. The Commission cannot agree. A public agency need not provide requested copies if payment is not made at point of receipt. Thus, if the complainant had arrived at the respondents' offices, and demanded a copy of the three page report, the respondents would have every right to demand payment at the time records were provided. It is only because the transaction here was conducted through the mail that this issue has arisen. It should also be noted that nowhere in the FOI Act is it required that public agencies provide requested copies by mail, although that is normally done as a courtesy. Under the facts and circumstances of this case, it is concluded that the respondents did not violate the FOI Act by

informing the complainant that they would send him the requested arrest report upon payment of the statutory fee of $1.50.

21. With respect to the $15.00 copying fee for the DVD, §1-211(a), G.S., provides:

> 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. Except as otherwise provided by state statute, the cost for providing a copy of such data shall be in accordance with the provisions of section 1-212….

22. In turn, §1-212(b), G.S., provides:

> (b) The fee for any copy provided in accordance with subsection (a) of section 1-211 shall not exceed the cost thereof to the public agency. In determining such costs for a copy, other than for a printout which exists at the time that the agency responds to the request for such copy, an agency may include only:
>
> (1) An amount equal to the hourly salary attributed to all agency employees engaged in providing the requested computer-stored public record, including their time performing the formatting or programming functions necessary to provide the copy as requested, but not including search or retrieval costs except as provided in subdivision (4) of this subsection;
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> (2) An amount equal to the cost to the agency of engaging an outside professional electronic copying service to provide such copying services, if such service is necessary to provide the copying as requested;
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> (3) The actual cost of the storage devices or media provided to the person making the request in complying with such request; and
>
> (4) The computer time charges incurred by the agency in providing the requested computer-stored public record where another agency or contractor provides the agency with computer storage and retrieval services….

23. It is found that the respondents arrived at the fee of $15.00 by using a portion of the hourly rate of the employee who was charged with searching for, retrieving, and copying the requested recordings onto a DVD. It is found that the respondents failed to prove that such tasks constituted formatting and programming functions within the meaning of §1-212(b)(1), G.S., or that such tasks did not constitute search and retrieval within the meaning of such provision. Accordingly, it is concluded that the respondents violated the FOI Act by conditioning provision of the records requested in paragraph 2.j, above, upon payment of the $15.00 fee.

24. At the hearing in this matter, the respondents testified that the file in the arrest at issue has been sealed by a court, although the respondents could not obtain a sealing order to provide to the Commission. The respondents contended that, because the file has been sealed, they now cannot provide the records described in paragraph 2.g and 2.j, above, to the complainant.

25. On December 10, 2017, the complainant filed a "Motion to Append the Record and Add One Exhibit." The complainant seeks to add as an exhibit a printout from the Judicial website, indicating that the file in the arrest at issue has been statutorily sealed. Receiving no objection, such request is granted and such one page printout has been marked as Complainant's Exhibit J. On January 3, 2018, the respondents also moved to supplement the record by adding as an exhibit a copy of January 2, 2018 email from the Assistant State's Attorney to the respondents indicating that the file in the arrest at issue has been sealed and including a reference to §54-56g, G.S. Such request is granted and such one page copy has been marked as Respondents' Exhibit 1.

26. It is found that the file related to the arrest at issue has been sealed by the court pursuant to §54-56g, G.S.

27. The complainant contended, on brief, that the fact that court records are sealed does not allow the police to withhold their records, and cites to a previous Commission Final Decision, Docket #FIC2005-242; Michelle Tuccitto and the New Haven Register v. Chief, Police Department, City of New Haven; Police Department, City of New Haven; and City of New Haven. In that matter, the Commission construed the statute related to the pre-trial alcohol education system §54-56g, G.S., and concluded that the statutory sealing of court records in that scheme does not render police records related to the underlying arrest exempt or confidential.

28. The decision in Docket #FIC 2005-242 was reached well before the amendments to the FOI Act which added the current provisions of §1-215, G.S., which, as described in paragraph 16, above, exclusively govern the disclosure of records related to arrest during the pendency of a prosecution, as it is at issue in this matter.

29. Under §1-215, G.S., the sealing of the file by the court affects the disclosure of the record of arrest only; that is, the arrest report described in paragraph 2.g, above. As concluded in paragraph 20, above, the respondents did not violate the FOI Act with respect to the record described in paragraph 2.g, above.

30. On brief, the respondents contended that §54-56g, G.S., precludes the disclosure of the requested records. Since the Commission has not ordered the disclosure of the records described in paragraphs 2.g, 2.h, or 2.i, the only remaining record at issue is the DVD, described in paragraph 2.j, above.

31. Section 54-56g, G.S., establishes the pretrial alcohol education program, and states in relevant part;

> (a)(1) There shall be a pretrial alcohol education program for persons charged with a violation of Section 14-227a, 14-227g, 15-132a, 15-133, 15-140l or 15-140n. Upon application by any such person for participation in such program and payment to the Court of an application fee of one hundred dollars and a nonrefundable evaluation fee of one hundred dollars the Court shall, but only as to the public, order the Court filed sealed....

32. On brief, the respondents contended that since §1-215(b)(3), G.S., covers "any information that a judicial authority has ordered to be sealed from public inspection or disclosure covered by the court order", then all records related to the case must be exempt. However, §1-215(b)(3), G.S., applies only to the "record of the arrest" as defined in paragraph §1-215(a), G.S. It is found that the remaining record, described in paragraph 2.j, above, is not a record of arrest, but rather is a record within the meaning of §1-215(c), G.S.

33. The Commission notes that the Legislature specifically separated the records contemplated in §1-215(c), G.S., from the records of arrest contemplated in §§1-215(a) and (b), G.S., and, additionally, set forth a separate standard for disclosure for such records.

34. It is concluded that the language in §54-56g, G.S., by its own terms seals the court file. Since the respondents' record is a record of the Darien Police Department, it is concluded that §54-56g, G.S., does not provide a basis to withhold the record described in paragraph 2.j, above, from the complainant.

35. On brief, the respondents' also contended that by the application of §54-56G, G.S., the pretrial alcohol education program may well lead to an eventual dismissal or erasure in the underlying arrest, and that if such event occurs, the erasure statute, §54-142a, G.S., will control and prohibit the disclosure of the record described in paragraph 2.j, above. The respondents' further contended that to order release of records which might eventually be erased will inhibit the pretrial education program.

36. It is found that the record described in paragraph 2.j., above, has not been erased. It is concluded that the erasure statute does not provide a basis to withhold such record at this time.

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

1. Forthwith, the respondents shall provide the complainant with a copy of the DVD described in paragraph 2.j of the findings, above, free of charge.

Approved by Order of the Freedom of Information Commission at its regular meeting of January 10, 2018.

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:

TO COMPLAINANT(S)
JAMES TORLAI, 127 Barton Street, Torrington, CT 06790

TO RESPONDENT(S)
CHIEF, POLICE DEPARTMENT, TOWN OF DARIEN; AND POLICE DEPARTMENT, TOWN OF DARIEN, c/o Attorneys John Wayne Fox and Patricia M. Gaug, Curtis Brinckerhoff & Barrett, PC, 666 Summer Street, Stamford, CT 06902

Cynthia A. Cannata
Acting Clerk of the Commission