FREEDOM OF INFORMATION COMMISSION
OF THE STATE OF CONNECTICUT

In the Matter of a Complaint by | FINAL DECISION

James Torlai,

Complainant

against | Docket #FIC 2016-0134

Commissioner, State of Connecticut, Department of Emergency Services and Public Protection; and State of Connecticut, Department of Emergency Services and Public Protection,

Respondents | November 16, 2016

The above-captioned matter was heard as a contested case on June 28, 2016, at which time the complainant and the respondents appeared, stipulated to certain facts and presented testimony, exhibits and argument on the complaint.

After consideration of the entire record, the following facts are found and conclusions of law are reached:

1. The respondents are public agencies within the meaning of §1-200(1), G.S.

2. It is found that, by letter dated January 22, 2016, the complainant requested that the respondents provide him with copies of the following records:

> . . . all DUI arrests made or processed by L-Troop during December of 2015. For each arrest, I am requesting the following:
>
> a. The complete name and address of the person arrested;
> b. The race of every person arrested;
> c. The date, time and location of the arrest;
> d. A list of the charges;
> e. Any arrest warrant application and any related documents, such as affidavits;
> f. The official arrest, incident or similar report;
> g. A copy of any and all test results related to the arrests;
> h. Any reports your agency maintains that document or depict the arrest or custody of the persons arrested;

i. Any video and audio recording of the arrest and detention of the persons arrested; and
j. Any other records your agency maintains that document or depict the arrest or custody of the person arrested.

3. It is found that, by letter dated January 28, 2016, the respondents acknowledged the complainant's request, indicating that they would process the request and notify the complainant as soon as possible about the status of responsive records. It is further found that the respondents informed the complainant that he might be charged a fee in connection with the records he was requesting.

4. By letter dated February 14, 2016 and filed February 17, 2016, the complainant appealed to this Commission, alleging that the respondents violated the Freedom of Information ("FOI") Act by failing to provide him with copies of the requested records described in paragraph 2, above.

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 that:

> Except as otherwise provided by any federal law or state statute, all records maintained or kept on file by any public agency, whether or not such records are required by any law or by any rule or regulation, shall be public records and every person shall have the right to (1) inspect such records promptly during regular office or business hours, (2) copy such records in accordance with subsection (g) of section 1-212, or (3) receive a copy of such records in accordance with section 1-212.

7. 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."

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

9. The complainant contends that the respondents have failed to provide him with all of the records in their possession, in accordance with the provisions of §1-215, G.S.

10. 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. "Record of the arrest" does not include . . . a record erased pursuant to chapter 961a or any investigative file of a law enforcement agency compiled in connection with the investigation of a crime resulting in an arrest.
>
> (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 section. 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. Any personal possessions or effects found on a person at the time of such person's arrest shall not be disclosed unless such possessions or effects are relevant to the crime for which such person was arrested.
>
> (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.
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> (d) Any law enforcement agency receiving a request for a record described in subsection (c) of this section shall promptly provide written notice of such request to the office of the state's attorney for the appropriate judicial district where the arrest occurred. The state's attorney for such district shall be afforded the opportunity to intervene in any proceeding before the Freedom of Information Commission concerning such request.
>
> (e) The provisions of this section shall only be applicable to any record described in this section during the period in which a prosecution is 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.

11. It is found that Troop L made and/or processed thirteen DUI arrests in December 2015.

12. It is found that, on March 7, 2016, the respondents provided the complainant with a first installment of responsive records. It is found that the records disclosed concerned ten of the DUI arrests made and/or processed by Troop L in December 2015. It is also found that the respondents informed the complainant that they would be providing him with arrest warrants and affidavits if such records were used in connection with the arrests identified in the request. It found that the respondents further informed the complainant that the arrest report, the tests strips, and the 911 call pertaining to one of the arrests were part of the investigative file and not subject to disclosure at this time, as the prosecution against the subject of the record was still pending. In addition, it is found that the respondents informed the complainant that there were no video records for four of the arrests. Finally, it is found that, with regard to arrests in which the prosecutions were still pending and in accordance with the provisions of §1-215(d), G.S., the respondents informed the complainant that they had notified the State's Attorney of the request as it pertained to audio and video records.

13. It is found that the complainant corresponded with the respondents on March 24, 2016, stating that the records that he received in connection with one of the arrests did "not seem to provide all of the Section 1-215 information," that the audio of a DVD record pertaining to another arrest was missing (the "missing audio"), and that he believed that not every person arrested or processed by Troop L for DUI during December 2015 had been identified.

14. It is found that, on April 12, 2016, the respondents replied to the complainant, providing him with following information: first, with regard to the missing audio, the

respondents provided the complainant with a new DVD, which had been reviewed on their computer to ensure functionality (the respondents apologized for the problematic DVD that they had initially disclosed); second, the respondents informed the complainant that they had become aware that there were two additional arrests in Troop L during December 2015, and that, once they received the criminal information summaries and/or the arrest warrants pertaining to the arrests, they would forward the same to the complainant; and third, the respondents informed the complainant that they had requested the audio for all arrests out of Troop L for December 2015, and that, once they received these records, they would disclose them in accordance with the FOI Act.

15. It is found that, under cover letter dated May 24, 2016, the respondents provided the complainant with a second installment of responsive records, as follows: 1) a copy of an arrest warrant application pertaining to one arrest; 2) copies of audio pertaining to two arrests; 3) a copy of the accident information summary pertaining to one arrest; and 4) a copy of the criminal information summary pertaining to one arrest. In addition, in connection with an arrest which resulted in connection with a fatal motor vehicle collision and in which the prosecution was ongoing, it is found that the respondents informed the complainant that there was an audio record that would be disclosed to him after certain redactions were made.

16. At the contested case hearing, the complainant clarified his contentions as follows: first, with regard to his contention that certain §1-215, G.S., information was missing, what the complainant meant was that one of the arresting officers who filled out a criminal information summary failed to fill in the "race" box contained on the form, and that another arresting officer, in completing his accident information summary, also failed to include the arrestee's race; second, with regard to his contention that the respondents failed to identify every arrest by Troop L during December 2015, the complainant contended that he believed that the records pertaining to two arrests had not yet been provided to him; third, the complainant contended that a court record, which he was able to obtain, revealed that one of the arrestees had been arrested on two charges, but the records disclosed to him by the respondents only revealed one of the charges; fourth, the complainant contended that the respondents had failed to provide certain responsive audio and video records to him promptly, as such records were at the respondents' audio center waiting for redaction; and, fifth, the complainant challenged the respondents' contention that, in a case in which a DUI arrestee had entered a diversionary program, the audio and video records pertaining to the underlying arrest were exempt from disclosure. The Commission will address these contentions in order.

17. First, with regard to the contention that the respondents failed to provide the complainant with the race of two of the arrestees, it is found that the respondents disclosed the information in their possession, which in this case was a criminal information summary pertaining to one arrest and an accident information summary pertaining to another arrest. It is found that both of the officers who filled out these documents failed to include the arrestee's race. It is found, however, that in neither case was a record or part of a record withheld from the complainant; rather, it is found that both of the officers failed to complete the forms. It is found that the records were disclosed to the complainant in the manner in which they were retained by the respondents. This Commission cannot require the respondents to create new records with the "race" information included. See Talbert-Slagle

v. Superintendent of Schools, Hartford Public Schools, et al., Docket #FIC 2015-313 (Jan. 13, 2016) ("The Freedom of Information Act imposes no obligation on a public agency to modify a responsive record.")

18. Second, it is found that the respondents did provide the complainant with the records pertaining to two additional arrests. The Commission's finding in this regard is based on the complainant's testimony: in fact, while the complainant initially testified several times that the respondents had failed to give him these records, later in his presentation and in response to questions by the hearing officer, the complainant testified as follows: "if you want I will testify that they did not give them to me, and then they gave them to me later." The complainant is cautioned that he should be forthright when testifying under oath about what records have and have not been disclosed to him.

19. Third, in response to the contention that a court record that revealed that one of the arrestees was arrested on two charges, the respondents testified that their records on this particular arrestee revealed only one charge, and that it was possible that the other charge had been dropped. Based on the respondents' testimony, it is found that the respondents did not withhold these records from the complainant; rather, they provided the records that they maintained in the form in which they maintained them to the complainant. This Commission can require nothing more. See ¶ 17, above.

20. Fourth, with regard to the complainant's contention that the respondents had failed to provide him with audio and video records promptly, it is found that, at the time of the contested case hearing, two responsive audio records and one responsive video record were at the respondents' audio center in a queue to be redacted,[1] but the respondents' technician has not yet been able to complete the redactions. The respondents have represented that, when these three records have been redacted, they will be forwarded to the complainant. Based on the breadth of the instant request, and the extreme efforts that the respondents have undertaken thus far to provide all of the responsive records to the complainant, it is found that the fact that three electronic records are in a queue at the respondents' audio center waiting for redaction does not constitute a violation of the FOI Act. If, when the complainant receives these records, he is dissatisfied with any of them, he may make a request for an unredacted version of the record(s), and file a new complaint with this Commission. The Commission can take up these matters at such later date, if necessary.

21. Fifth, with regard to the argument concerning the disclosability of public records upon a DUI arrestee's entrance into a diversionary program, it is found that eight of the thirteen DUI arrestees have been permitted by the criminal justice system to enter into a pretrial alcohol education program pursuant to §54-56g, G.S. While the respondents have disclosed all the required §1-215(a), G.S., "record of arrest" information to the complainant, they contend that, with regard to the audio and video records for five (out of the eight) of the arrestees, they have been instructed by the relevant state's attorney that the files are exempt

[1] It is found that, when the respondents determine that a particular audio record requires redaction, which record in most instances consists of police radio traffic, the entire electronic record has to be sent to the respondents' audio center, the relevant information that needs to be redacted must be isolated and excised from the record, and the record must be re-recorded and burned to a CD for the requester.

from disclosure. Specifically, in their May 24, 2016 correspondence to the complainant, the respondents state, in relevant part, as follows:

> Both the Bantam and the Waterbury State's Attorney's Offices have taken the position that in cases where the accused has entered a diversionary program, the files are sealed and are not releasable. With regard to this Freedom of Information Request, this applies to the arrests of [five named individuals].

22. Section 54-56g, G.S., provides, in relevant part, as follows:

> (a)(1) There shall be a pretrial alcohol education system for persons charged with a violation of section 14-227a, 14-227g, 15-133 or 15-140n. Upon application by any such person for participation in such system 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 file sealed....
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> . . .
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> (b) The court, after consideration of the recommendation of the state's attorney, assistant state's attorney or deputy assistant state's attorney in charge of the case, may, in its discretion, grant such application. If the court grants such application, it shall refer such person to the Court Support Services Division for assessment and confirmation of the eligibility of the applicant and to the Department of Mental Health and Addiction Services for evaluation. . . . Upon confirmation of eligibility and receipt of the evaluation report, the defendant shall be referred to the Department of Mental Health and Addiction Services by the Court Support Services Division for placement in an appropriate alcohol intervention program for one year. . . .

23. It is found that, at the time of the contested case hearing, the court had sealed the five files referred to in paragraph 21, above.

24. However, this Commission notes that the superior court has already considered the effect of the court's sealing of a record pursuant to §54-56g, G.S., with respect to the requirements of public agencies under the FOI Act. Specifically, in State v. Dionne, 38 Conn. Supp. 675, 679 (1983), the court determined that there is nothing in the act enabling §54-56g, G.S., which indicates that the records of the pretrial alcohol education system, or the records of the people participating in it, are shielded from public view. The court further pointed out that the records of the public agency charged with overseeing the state's alcohol education program (currently the Department of Mental Health and Addiction Services, and

formerly its predecessor, the Connecticut Alcohol and Drug Abuse Commission) are not exempt from the FOI Act, as follows:

> There is nothing in the statute creating the pretrial alcohol education system indicating that the system itself or the records of the people participating in it are shielded from public view. Moreover, records of the Connecticut Alcohol and Drug Abuse Commission, the agency charged with overseeing the alcohol education program, are not exempt from public disclosure under the Freedom of Information Act. . . .

25. It is further found that the respondents offered no evidence that the audio or video records at issue in this case are records contained within the "court file," within the meaning of §54-56g (a)(1), G.S. See ¶ 22, above. Moreover, the sealing provision referenced in §1-215(b)(3), G.S., is a provision that permits certain redactions to the "record of arrest," as such phrase is defined in §1-215(a), G.S. However, it is found that said sealing provision does not apply to the audio or video records at issue in this case, as such records do not fall within the definition of "record of arrest." See ¶ 10.a, above.

26. Finally, it is found that plain language of §1-215(d), G.S., affords the relevant state's attorney objecting to the disclosure of record that "documents or depicts the arrest or custody of a person during the time in which the prosecution of such person is pending" the "opportunity to intervene in any proceeding before the Freedom of Information Commission." It is found that, in this case, the relevant state's attorneys were promptly provided with written notice of this request. See ¶¶ 12, 21, above. However, it is found that no state's attorney chose to intervene in any of this Commission's proceedings.

27. It is concluded that the audio and video records referred to in paragraph 21, above, are not exempt pursuant to the provisions of §54-56g, G.S. It is further concluded that the respondents violated the FOI Act by declining to disclose such records to the complainant.

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

1. The respondents shall promptly provide the complainant with the audio and video records referred to in paragraph 21 of the findings, above, free of charge.

Approved by Order of the Freedom of Information Commission at its regular meeting of November 16, 2016.

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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Commissioner, State of Connecticut, Department of Emergency Services and Public Protection; and State of Connecticut, Department of Emergency Services and Public Protection
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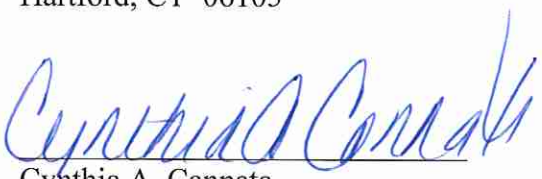

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