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FREEDOM OF INFORMATION



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James Torlai,
Complainant(s)
against

Notice of Meeting

Docket #FIC 2013-167

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)

December 3, 2013

Transmittal of Proposed Final Decision

In accordance with Section 4-179 of the Connecticut General Statutes, the Freedom of Information Commission hereby transmits to you the proposed finding and decision prepared by the hearing officer in the above-captioned matter.

This will notify you that the Commission will consider this matter for disposition at its meeting which will be held in the Freedom of Information Commission Hearing Room, 18-20 Trinity Street, 1st floor, Hartford, Connecticut, at **2 p.m. on Wednesday, January 8, 2014**. 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 December 13, 2013**. 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 December 13, 2013**. **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 **fourteen (14) copies** be filed **ON OR BEFORE December 13, 2013**, 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: James Torlai
Terrence M. O'Neill, AAG

12/3/13/FIC# 2013-167/Trans/wrbp/KKR/CAL

An Affirmative Action/Equal Opportunity Employer

FREEDOM OF INFORMATION COMMISSION
OF THE STATE OF CONNECTICUT

In the Matter of a Complaint by

Report of Hearing Officer

James Torlai,

Complainant

against

Docket #FIC 2013-167

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

November 21, 2013

The above-captioned matter was heard as a contested case on October 3, 2013, 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), G.S.
2. It is found that, by letter dated March 1, 2013, the complainant requested “a copy of all records you have related to Officer Bruce LaChance. I am asking for his complete personnel file *and also any other records you have related to him.*” (Emphasis added).
3. It is found that, by letter dated March 12, 2013, the respondents provided records responsive to the request, described in paragraph 2, above, and informed the complainant that a photo of Trooper LaChance, his home address and other “personal information” had been redacted from such records. The respondents further informed the complainant that they had withheld Trooper LaChance’s performance evaluations (service ratings).
4. By letter dated March 13, 2013 and filed March 18, 2013, the complainant appealed to this Commission, alleging that the respondents violated the Freedom of Information (FOI) Act by failing to comply with the requests for 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 . . . (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 records responsive to the request, described in paragraph 2, above, are public records within the meaning of §§1-200(5) and 1-210(a), G.S.

9. It is found that, by letter dated March 17, 2013, the complainant informed the respondents that he believed their response to his request was incomplete because they “only provided 25 pages of records.” Specifically, the complainant questioned the withholding of Trooper LaChance’s service ratings, and further indicated that the respondents had failed to provide him with “all records [they] maintain related to Mr. LaChance.”

10. It is found that, by email dated June 14, 2013, an attorney with the legal affairs unit within the respondent Department of Emergency Services and Public Protection informed the complainant that his request, described in paragraph 2, above, was very broad, and asked him to specify which records, other than the personnel file, he was seeking. It is found that, by letter dated June 17, 2013, the complainant responded, by stating “at this time, I am not willing to limit my request. However, in an effort to resolve this matter quickly, please allow me to list some of the records that would partially satisfy my request.” It is found that the complainant listed four categories of records he was seeking:

- (a) All job performance evaluations or similar records;
- (b) All records or information related to any illegal acts of Mr. LaChance;

- (c) Any records related to Mr. LaChance's driving. This would include any information related to a motor vehicle offense whether or not he was ever charged;
- (d) Any records related to DUI arrests made by Mr. LaChance where a person was arrested and where reliable scientific tests proved the person was not over the per se BAC limit. To satisfy this item, you could just produce copies of the test results with the subjects name redacted if, and only if, records pertaining to the charges have been erased.

11. At the hearing in this matter, the complainant stated that, despite his earlier statement that the foregoing list of records was not exhaustive of the records he was seeking, if the respondents provided him with such records, the request, described in paragraph 2, above, and further described in paragraph 10, above, would be satisfied.

12. With regard to the records described in paragraph 10(b), above, at the hearing in this matter, the respondents' witness testified, and it is found, that a criminal history search was conducted, and such search revealed no records pertaining to Trooper LaChance. The respondents indicated, however, at the hearing in this matter, that they maintain one record arguably responsive to the request described in paragraph 10(b), above, consisting of a pre-employment background investigation report ("report") regarding Trooper LaChance. According to the respondents, such report consists of approximately 500 pages, and generally, such reports contain a broad range of information, such as criminal history (including acts committed as a juvenile), medical and mental health history, sexual conduct, financial history, and the results of polygraph tests. The respondents argued, at the hearing in this matter, that the entire report is exempt from disclosure pursuant to §§1-210(b), (10) and (19), G.S., 1-217, G.S., and Article 9, Section 3 of the NP-1 collective bargaining agreement.

13. Based upon the testimony described in paragraph 12, above, the complainant stated, at the hearing in this matter, that the only portion of the report he was seeking was that portion pertaining to criminal history, and further, that he was not interested in records of any criminal acts or indiscretions that Trooper LaChance may have committed while he was a juvenile.

14. With regard to the records described in paragraph 10(c), the respondents' witness testified that that the respondents do not maintain records relating to Trooper LaChance's driving history.

15. Based upon the testimony, described in paragraphs 12 and 14, above, on October 7, 2013, the hearing officer issued an order to the respondents to submit to the Commission either (1) that portion of the report pertaining to Trooper LaChance's criminal history, or (2) the entire report with a completed index indicating which portions of the report are responsive to the request and any exemptions claimed.

16. By letter dated October 8, 2013, the complainant withdrew that portion of the complaint pertaining to his request for Trooper LaChance's performance evaluations. See paragraph 10(a), above. Accordingly, the Commission shall not further consider herein the allegations pertaining to such records.

17. On October 24, 2013, the respondents submitted two pages of the 500 page report, described in paragraph 12, above, for in camera inspection. Such pages shall be referred to herein as the "in camera records." On the index, the respondents claimed the information contained in the in camera records was "not criminal," "nonresponsive," or that it pertained to a "youthful indiscretion." Additionally, the respondents claimed that all such information is exempt from disclosure pursuant to §1-210(b)(2), G.S.

18. After careful review of the in camera records at Page 1, lines 28 - 28, and Page 2, lines 15 through 23, it is found that such information is responsive to the request described in paragraph 10(c), above.

19. With regard to the claim that the portion of the in camera records, described in paragraph 18, above, is exempt from disclosure pursuant to §1-210(b)(2), G.S., that statute permits the nondisclosure of personnel, medical or similar files the disclosure of which would constitute an invasion of personal privacy.

20. The Supreme Court set forth the test for the §1-210(b)(2), G.S., exemption in Perkins v. Freedom of Information Commission, 228 Conn. 158, 175 (1993), which test has been the standard for disclosure of records pursuant to that exemption since 1993.

21. Specifically, under the Perkins test, 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.

22. It is found that the in camera records constitute a "personnel file" within the meaning of §1-210(b)(2), G.S. the in camera records.

23. Section 1-214(c), G.S., provides in relevant part that:

"[a] public agency which has provided notice under subsection (b) of this section shall disclose the records requested unless it receives a written objection from the employee concerned or the employee's collective bargaining representative, if any, within seven business days from the receipt by the employee or such collective bargaining ... Upon the filing of an objection as provided in this subsection, the agency shall not disclose the

requested records unless ordered to do so by the Freedom of Information Commission pursuant to section 1-206....”

24. Section 1-214(b), G.S., in relevant part states:

“[w]henver a public agency receives a request to inspect or copy records contained in any of its employees' personnel or medical files and similar files and the agency reasonably believes that the disclosure of such records would legally constitute an invasion of privacy, the agency shall immediately notify in writing (1) each employee concerned, provided such notice shall not be required to be in writing where impractical due to the large number of employees concerned and (2) the collective bargaining representative, if any, of each employee concerned....”

25. It is found that both Trooper LaChance and his union representative were notified of the complainant's request for the entire report and that both timely filed an objection to its disclosure, within the meaning of §1-214, G.S.

26. After careful review of Page 1, lines 28 – 29 and Page 2, line 20, of the in camera records, it is found that the information contained therein pertains to a legitimate matter of public concern and that disclosure of such information would not be offensive to a reasonable person.

27. It is found, based upon the foregoing, that disclosure of Page 1, lines 28 – 29 and Page 2, line 20, of the in camera records would not constitute an invasion of personal privacy.

28. With regard to Page 2, lines 15 – 19, and lines 21 – 23, of the in camera records, it is well established that the respondents bear the burden of proving the applicability of an exemption. See Wilson v. Freedom of Information Commission, 181 Conn. 324, 341 (1980). It is found that the respondents offered no evidence, at the hearing in this matter, from which the Commission could base a determination that such information does not pertain to a legitimate matter of public concern and that disclosure of such information would be offensive to a reasonable person.

29. Accordingly, it is found that the respondents failed to prove that disclosure of Page 2, lines 15 – 19, and lines 21 – 23, of the in camera records, would constitute an invasion of personal privacy.

30. With regard to the remainder of the in camera records, the respondents claim, on the index, that the following information is nonresponsive: Page 1, lines 2 – 19, and 21 – 31; Page 2, lines 1 through 5, line 9, lines 11 – 14, and lines 24 – 29.¹ After careful review of the information contained in these portions of the in camera records, it is found that such information is nonresponsive, and need not be disclosed to the complainant in connection with this matter.

¹ Page 2, lines 15 – 23 are addressed in paragraph 29, above.

31. With regard to the remainder of the in camera records, claimed on the index to be exempt from disclosure pursuant to §1-210(b)(2), G.S., (i.e., Page 1, line 1; Page 2, lines 6 – 8, and 10), it is found, after careful review, that such information pertains to youthful indiscretions. As noted in paragraph 13, above, the complainant withdrew his complaint as it pertains to such information, and accordingly it shall not be further considered herein.

32. With regard to the request described in paragraph 10(d), above, it is found that, as of the date of the hearing in this matter, the respondents had completed their search for such records, but had not yet had the opportunity to verify the status of the criminal charges. Under the facts and circumstances of this case, including the large volume of records initially requested by the complainant in connection with this matter, the large number of FOI requests and complaints filed by the complainant against these respondents, and the respondents' positive efforts to respond to such requests and complaints, it is found that the respondents' did not violate the promptness provisions of the FOI Act with regard to this portion of the request.

33. At the hearing in this matter, the respondents argued that it is their policy to withhold the entire report, and that no portion of the report, including information that is not subject to any exemption from disclosure, may be disclosed. According to the respondents, the reason behind this policy is their belief that state police troopers would be intimidated from making arrests if their background investigation reports could then be requested by the subject of the arrest and disclosed. In support of this claim, the respondents cite §§1-210(b), (10) and (19), G.S., 1-217, G.S., and Article 9, Section 3 of the NP-1 collective bargaining agreement. While each of these statutes or provisions may support a claim that some portion of the report is exempt from disclosure, the respondents cite no authority for their position that any of these statutes or provisions exempt the entire report from disclosure. In fact, the Commission has previously concluded that background investigation reports must be disclosed, subject to any applicable exemptions for any portion of such reports, upon request by any person. See Joao Godoy v. Chief, Police Department, Town of Avon, et al., Docket #FIC 2009-437 (June 9, 2010).

34. Accordingly, it is found that the respondents violated the FOI Act by failing to disclose the portions of the report described in paragraphs 27, and 29, above.

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 a copy of the in camera records to the complainant, free of charge.
2. In complying with the order, described in paragraph 1, above, the respondents may redact those portions of the report described in paragraphs 30 and 31, above.
3. The respondents are urged to provide to the complainant a copy of any nonexempt records responsive to the request described in paragraph 10(d), above, as soon as is practicable.

A handwritten signature in black ink, appearing to read 'Kathleen K. Ross', written over a horizontal line.

Kathleen K. Ross
as Hearing Officer

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