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# FREEDOM OF INFORMATION



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Peter Bowman,  
Complainant(s)  
against

Notice of Meeting

Docket #FIC 2013-191

Chief, Police Department, City of Waterbury;  
and Police Department, City of Waterbury,  
Respondent(s)

January 6, 2014

### 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 Tuesday, February 11, 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 January 30, 2014**. 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 January 30, 2014**. **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 January 30, 2014**, 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: Peter Bowman  
Kevin J. Daly, Esq.

2014-01-06/FIC# 2013-191/Trans/wrbp/LFS//TAH

FREEDOM OF INFORMATION COMMISSION  
OF THE STATE OF CONNECTICUT

In the Matter of a Complaint by

Report of Hearing Officer

Peter Bowman,

Complainant

against

Docket #FIC 2013-191

Chief, Police Department, City of  
Waterbury; and Police Department, City of  
Waterbury,

Respondents

January 3, 2014

The above-captioned matter was heard as a contested case on November 6, 2013, at which time the complainant and 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 on October 9, 2012, the complainant requested a copy of records and materials in the respondents' possession concerning Kriola's Café.
3. It is found that on November 26, 2012, the respondents provided 251 pages, at the statutory fee of \$125.50. It is found that the respondents withheld all records concerning a criminal matter that was pending at the time of the complainant's request and remained pending as of the date of the respondents' compliance.
4. It is found that the respondents claimed that the records were exempt from disclosure until the conclusion of the pending criminal matter.
5. It is found that on March 18, 2013, the complainant informed the respondents by letter that because the criminal matter resolved in January, 2013, the complainant was renewing his request for records that had been withheld when the respondents responded to the complainant's October 9, 2012 request.
6. It is found that the pending criminal matter relating to Kriola's Café concerned a homicide that occurred on the premises. It is found that the matter was resolved when the defendant was acquitted of the crime.

7. By letter of complaint filed April 2, 2013, the complainant appealed to the Commission, alleging that the respondents violated the FOI Act by failing to provide him with copies of the records he requested.

8. Section 1-200(5), G.S., defines "public records" as follows:

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, ... whether such data or information be handwritten, typed, tape-recorded, printed, photostated, photographed or recorded by any other method.

9. 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 ... receive a copy of such records in accordance with the provisions of section 1-212.

10. Section 1-212(a), G.S., provides in relevant part: "Any person applying in writing shall receive, promptly upon request, a plain, facsimile, electronic or certified copy of any public record."

11. 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.

12. The respondents claim that §54-142a, G.S., prohibits them from disclosing any of the records requested by the complainant.

13. Section 54-142a, G.S., provides, in relevant part:

(a) Whenever in any criminal case, on or after October 1, 1969, the accused, by a final judgment, is found not guilty of the charge..., all police and court records and records of any state's attorney pertaining to such charge shall be erased upon the expiration of the time to file a writ of error or take an appeal, if an appeal is not taken, or upon final determination of the appeal sustaining a finding of not guilty or a dismissal, if an appeal is taken.

(e) (1) ...[A]ny law enforcement agency having information contained in such erased records shall not disclose to anyone, except the subject of the record, ... information pertaining to any charge erased under any provision of this section ...

14. It is found that the respondents are law enforcement agencies. It is concluded that the respondents are prohibited from disclosing erased records pertaining to the charge for which the accused was acquitted.

15. The complainant does not dispute that §52-142a, G.S., prohibits disclosure of erased records, but contends that not all the records that the respondents withheld qualify as erased records within the meaning of §52-142a, G.S. In particular, the complainant contends that surveillance footage and photographs of the crime scene are not erased records and must be disclosed.

16. In Boyles v. Preston, 68 Conn. App. 596 (2002), police seized a videotape from the defendant's home during an unlawful search. The defendant, who was acquitted of the underlying criminal charge, sought to block the plaintiff from using the videotape in a civil suit against him for sexual harassment, claiming that the videotape was an erased record. The court held that the videotape is not a "record" as defined in §54-142a. "Our courts have held that the term 'records' in the Erasure Act does not include evidence obtained by the police in the course of an investigation... The videotape of the [defendant] is not a police or court record subject to erasure pursuant to [§54-142a, G.S.] The videotape simply is a piece of evidence demonstrating how far the defendant went to irritate the plaintiff because she had rejected his sexual advances." Id., 610.

17. It is found that, in this matter, the surveillance footage was made by a camera installed by the owner of Kriola's Café. It is found that the complainant is an attorney who represents the owner of the building in which Kriola's Café is located. It is found that the building owner is a defendant in a civil suit alleging negligent supervision, brought by the administratrix of the person who died as a result of an altercation at Kriola's Café on November 5 or 6, 2011. It is found that the complainant seeks a copy of the footage and other evidence collected by the respondents in order to aid the defense of his client.

18. It is found that, like the videotape at issue in Boyles v. Preston, above, the footage requested by the complainant in this matter is "physical evidence collected by the police at the time of the incident [that] presumably would have existed notwithstanding the criminal prosecution." Penfield v. Venuti, 93 FRD 364, 369 (D. Conn. 1981). "The erasure statute does not, and could not, purport to wipe from the public record the fact that certain historical events have taken place." Martin v. Griffin, No. CV990586133S, 200 WL 872464 (Conn. Super. Ct. June 13, 2000). "There is no evidence in the text of the statute that the legislature sought ... to change history." Martin v. Hearst Corp., No. 3:12-cv-01023-MPS (D. Conn. August 5, 2013).

19. It is concluded that the surveillance footage requested by the complainant is not an erased record within the meaning of §52-142a, G.S. It is concluded that the respondents violated §§1-210(a) and 1-212, G.S., of the FOI Act by failing to disclose such record to the complainant.

20. Following the hearing in this matter, the respondents compiled and provided a log of the other records that they claim are erased and therefore prohibited from disclosure. Such log is

hereby marked as Respondents' Exhibit 2, after-filed. The log consists of a description of the records, referenced by number.

21. It is found that the log references the respondents' investigative file concerning the alleged criminal incident at Kriola's Café on November 5 or 6, 2011.

22. With respect to Record #19 (identified on the log as "mug shot prior charge"), the respondents did not present any evidence that §52-142a, G.S., applies to the prior charge. It is concluded, therefore, that the "mug shot" of the prior charge was not erased. Although the photograph is a record included in the investigation of the Kriola's Café homicide, State v. West, 192 Conn. 488, 496 (1984), instructs that the erasure statute does not apply to a "mug shot" photograph, because the photograph pertains to the subject individual's identity and not to any specific charge.

23. Accordingly, it is concluded that Record #19 is not an erased record within the meaning of §52-142a, G.S. It is concluded that the respondents violated §§1-210(a) and 1-212, G.S., of the FOI Act by failing to disclose such record to the complainant.

24. With respect to the remaining records referenced in the respondents' log, State v. West, supra, 192 Conn. 496, instructs that records "pertaining to [the] charge" includes those that "disclose when or where a person was arrested, the nature of or circumstances surrounding the crime charged or the names of witnesses from whom further information may be obtained." It is concluded that §52-142a, G.S., applies to records that identify or could be used to identify the accused or the crime charged. "The statute was intended to remove the stigma of arrest or other formal charges from those who were never found to have committed any crime." Penfield v. Venuti, supra, 93 FRD 368.

25. With respect to Records #20 and #33 (police photo), Record #35 (photo personal property), Records #48, 80, 112, 118-122, 136, 138-140, 143-145, and 149-152 (labwork and forensic reports), and Record #DISK (photo of physical evidence), it is unclear from the administrative record whether such records identify or describe the person arrested or even whether that person is the subject of such records.

26. It is concluded that if the records described in paragraph 25, above, concern the victim and his condition, and do not identify or describe the person arrested or the crime charged, then they are not erased records within the meaning of §52-142a, G.S., and must be disclosed to the complainant.

27. It is found that Record #18 (mug shot victim) does not identify the person arrested or the crime charged. It is concluded that Record #18 is not erased and the respondents violated §§1-210(a) and 1-212, G.S., of the FOI Act by withholding such record.

28. With respect to Record #DISK (photos of crime scene), it is found that such records typically depict historical facts; that is, it is found that the records typically depict the incidence of the criminal behavior, but do not reveal either the accused's identity or the criminal charge.

29. However, it is concluded that if such photos do identify or describe the person arrested or the crime charged, then such records are erased pursuant to §52-142a, G.S.

30. The respondents claim that §1-210(b)(27), G.S., applies to some of the crime scene photographs in Record #DISK.

31. Section 1-210(b)(27), G.S., states, in relevant part, that disclosure shall not be required of:

Any record created by a law enforcement agency or other federal, state, or municipal governmental agency consisting of a photograph, film, video or digital or other visual image depicting the victim of a homicide, to the extent that such record could reasonably be expected to constitute an unwarranted invasion of the personal privacy of the victim or the victim's surviving family members.

32. It is found that the respondents presented no evidence that the crime scene photographs depict the victim of a homicide in a manner that could reasonably be expected to constitute an unwarranted invasion of the personal privacy of the victim or the victim's surviving family members.

33. Accordingly, it is concluded that the photographs referenced in Record #DISK are not erased records within the meaning of §52-142a, G.S., and §1-201(b)(27), G.S., does not exempt such records from mandatory disclosure. It is concluded that the respondents violated the FOI Act by withholding such records.

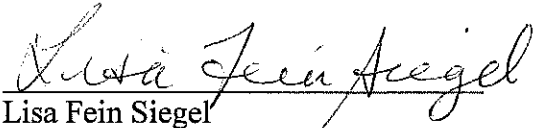
34. With respect to the balance of the records in the investigative file, it is found that such records are police records pertaining to the charge within the meaning of §52-142a, G.S. It is concluded that such records are erased records and the respondents did not violate the FOI Act by withholding them from disclosure.

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 to the complainant the requested records to which §52-142a, G.S., does not apply, as described in paragraphs 19, 23, and 27, above.

2. With respect to the records described in paragraphs 25 and 28, above, the respondents shall examine such records in light of the conclusions of law articulated in this decision. If the respondents determine that any of the records described in paragraphs 25 and 28, above, are erased pursuant to §52-142a, G.S., the respondents shall so inform the complainant in writing, providing reference to the log (Respondents' Exhibit 2, after-filed). The respondents shall forthwith disclose to the complainant any records described in paragraphs 25 and 28, above, that are not erased pursuant to §52-142a, G.S.

3. Henceforth, the respondents shall strictly comply with the disclosure requirements of §§1-210(a) and 1-212, G.S.

  
Lisa Fein Siegel  
as Hearing Officer