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Thomas McDonnell,
Complainant(s)
against

Commissioner, State of Connecticut, Department of Emergency Services and Public Protection; and State of Connecticut, Department of Emergency Services and Public Protection,
Respondent(s)

Notice of Meeting

Docket #FIC 2013-586

September 9, 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, lst floor, Hartford, Connecticut, at **2 p.m. on Wednesday, September 24, 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 September 16, 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 September 16, 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 September 16, 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

Wendy Paradis
Acting Clerk of the Commission

Notice to: Thomas McDonnell
Stephen R. Sarnoski, Esq.

2014-09-09/FIC# 2013-586/Trans/wrbp/LFS//VDH

FREEDOM OF INFORMATION COMMISSION
OF THE STATE OF CONNECTICUT

In The Matter of a Complaint by | Proposed Report on Second Remand

Thomas J. McDonnell,

Complainant

against | Docket #FIC 2013-586

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

Respondents | September 9, 2104

The above-captioned matter was heard as a contested case on August 26, 2014, 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. By letter dated and filed September 30, 2013, the complainant appealed to the Commission, alleging that the respondents violated the Freedom of Information ("FOI") Act by not complying with a final Commission decision reached in a previous complaint that the complainant filed against these respondents.

3. The Commission takes administrative notice of the Second Final Decision on Remand in Docket #FIC 2008-416; Thomas J. McDonnell v. Commissioner, State of Connecticut, Department of Public Safety ("DPS") [1]; and State of Connecticut, Department of Public Safety (July 10, 2013). In the final decision, the Commission ordered the respondents, inter alia, to conduct a diligent search for any records responsive to the complainant's request to which Connecticut's erasure statute, §54-142a, G.S., does not apply, and to promptly provide any such records to the complainant.

[1] The Department of Public Safety is now the Department of Emergency Services and Public Protection.

4. In the instant case, the complainant contends that the respondents failed to comply with the Commission's July 10, 2013 order, by failing to provide him with copies of responsive records to which §54-142a, G.S., does not apply.

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

> 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.

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

> [e]xcept 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.

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) and 1-210(a), G.S.

9. Section 52-142a, which is Connecticut's erasure statute, 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 or the charge is dismissed, 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….

10. Section 54-142a(e), G.S., provides in relevant part:

> …any 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….[Any] person charged with the retention and control of such records … shall provide adequate security measures to safeguard against unauthorized access to or

> dissemination of such records or upon the request of the accused cause the actual physical destruction of such records...

11. It is found that on May 8, 2008, the complainant made a written request for:

> "personal access to the case file and then personally selected copies of documents regarding the homicide of Barbara Gibbons on September 28, 1973 in the town of Canaan, Connecticut, case number B-73-1442-C."

12. The respondents denied the complainant's request and the complainant timely filed an appeal to the Commission. Such appeal was Docket #FIC2008-416 and heard as a contested case on October 14, 2008. The respondents claimed that §52-142a, G.S., prohibited disclosure of the entire case file requested by the complainant, with the exception of reports since 2000 concerning forensic testing of certain pieces of physical evidence.

13. On January 29, 2009, the Commission adopted a final decision in Docket #FIC2008-416. The Commission concluded that §52-142a, G.S., does not operate to erase all public records of the underlying crime, and that the statute does not apply to records that do not reference or identify Peter Reilly as the alleged perpetrator of the Gibbons homicide. The Commission ordered the respondents to provide all such records to the complainant.

14. The respondents appealed the final decision to the Superior Court on February 19, 2009. By order dated August 14, 2009, the Superior Court remanded this matter to the FOI Commission, for consideration of the issue of whether the subject of the records may waive the erasure act. On August 25, 2010, the Commission adopted a final decision on remand, which concluded that the erasure act's prohibition against disclosure may not be waived by the subject of the records, except in limited circumstances specified by statute that did not apply to the facts of this case. The Commission again concluded that the respondents violated the FOI Act by failing to provide all non-erased responsive records to the complainant.

15. The respondents again appealed to the Superior Court. The Commission takes administrative notice of all of the pleadings and rulings filed in the administrative appeal, captioned State of Connecticut, Department of Public Safety v. FOI Commission and Thomas McDonnell, Docket #CV09-4019898, Judicial District of New Britain (Cohn, J.).

16. On December 14, 2010, in response to a request by the Court, DPS submitted a general list of the contents of the records that it claims are erased. On January 28, 2011, again in response to a request by the Court, DPS indicated that the case file requested by the complainant contained records that both pertained and did not pertain to Peter Reilly. DPS also claimed for the first time that certain of the records to which §54-142a did *not* apply were subject to other exemptions.

17. On May 27, 2011, the Court issued an Order, which stated:

> To date, the court has ruled that the plaintiff, the department of public safety (DPS), is incorrect in its overly-broad interpretation

> of [the erasure statute], i.e., that any item in the DPS file labeled "Barbara Gibbons murder investigation" is exempt from disclosure under §54-142a due to the dismissal of the charges against Peter Reilly.
>
> "The court has ruled that the correct interpretation of the statute is that adopted by the FOI Commission[.]" (Emphasis in original.)

18. To ensure that any redactions to be made by DPS followed the intent of the FOI Act, as articulated by the Order, the Court appointed Hon. George Levine, as special master, to review the files in the case, with the assistance of an index prepared by DPS.

19. Subsequently, on September 19, 2011, the Court gave permission for the attorneys for DPS and the Commission to assist the special master in his in camera review of the records.

20. On November 26, 2012, DPS moved to remand the matter to the FOI Commission. The complainant objected to the motion; the FOI Commission did not.

21. On January 3, 2013, the Court granted the motion for remand and issued a memorandum of decision, which referenced its previous ruling (the May 27, 2011 Order) in support of the Commission's decision (see paragraph 17, above), and again ruled in favor of the Commission. The Court concluded that records that do not reference or identify Reilly as the alleged perpetrator of the Gibbons homicide are not erased by operation of §54-142a, G.S. The Court noted, as described in paragraph 16, above, that DPS had recently acknowledged that the files contained some records that do not pertain to Reilly, and that DPS now claimed that some of those records were exempt for other reasons. The Court granted DPS's motion for remand to "consider the evidence in the record in light of the standard set forth by the court." (Internal quotation marks omitted.)

22. On July 10, 2013, the Commission issued its Second Final Decision on Remand in this matter. The Commission noted that the respondents conceded to the Superior Court that their file of responsive records contain certain records to which the erasure statute does not apply. The Commission also noted the complainant's suggestion of several categories of records to which §54-142a, G.S., would not apply, such as certain photographs, maps, charts, medical examiner reports in the custody of the respondents, and names of employees assigned to the investigation. Finally, the Commission cited case law on the application of §52-142a, G.S., to demonstrate that there are types of records to which the erasure act does not apply.

23. The Commission ordered the respondents to conduct a diligent search for records to which §54-142a, G.S., does not apply.

24. It is found that on September 11, 2013, the respondents provided approximately 800 pages of newspaper clippings to the complainant. It is found that the respondents also provided approximately 30 pages of records relating to efforts to review the Peter Reilly investigation files, in response to a part of the complainant's original request that is not at issue in this matter.

It is found that the respondents provided no other records pursuant to the Commission's order in its Second Final Decision on Remand.

25. Also on September 11, 2013, the respondents withdrew their appeal to the Superior Court in this matter.

26. Shortly thereafter, on September 30, 2013, the complainant filed his appeal to the Commission alleging that the respondents failed to comply with the Commission's order.

27. The complainant claimed that newspaper clippings were not part of his request for the "case file ... regarding the homicide of Barbara Gibbons." It is found that such records are not responsive to the complainant's request.

28. The complainant contends that he has firsthand knowledge of the contents of the respondents' case file on the Gibbons homicide, because when he was Commanding Officer of the State Police Detective Division, he was ordered to re-investigate the case years after the incident. The complainant asserts, as he has several times over the long course of this case, that the case file contains information that does not reference or identify Peter Reilly as the perpetrator of the homicide, such as (but not limited to) photographs of the exterior of the house, photographs of the church across the street, sketch maps, photos of the victim's automobile, lists of names of investigators that worked on the case, local weather report for the day of the crime, names of people who took polygraph tests, names of prosecutors and dates employed, statements of witnesses that do not contain reference to or identify Reilly, diagram of the crime scene, victim's death and birth certificates, photographs of crime scene evidence, and correspondence among state agencies.

29. As referenced in paragraph 9, above, §54-142a provides in relevant part:

> (a) Whenever in any criminal case ... the accused ... is found not guilty of the charge or the charge is dismissed, all police and court records and records of any state's attorney pertaining to such charge shall be erased.
>
> (e)(3) Any person who shall have been the subject of such an erasure shall be deemed to have never been arrested within the meaning of the general statutes with respect to the proceedings so erased and may so swear under oath.

30. The respondents claim that the §54-142a, G.S., applies to the entire case file concerning the homicide of Barbara Gibbons. In essence, they claim that the erasure statute operates "cover-to-cover."

31. Black's Law Dictionary defines "charge" as: "*n.* a formal accusation of an offense as a preliminary step to prosecution... *v.* To accuse (a person) of an offense." (8th Ed., 2004). It is concluded that by using the phrase "pertaining to such charge" instead of "pertaining to such crime," the statute is person-specific, and does not sweepingly cover all records pertaining to the criminal incident.

32. Courts have recognized that the purpose of the erasure statute is to change "the legal effect of an arrest at its source ... to minimize the stigma associated with an arrest, to the point of treating persons who qualified for erasure as if they had never been arrested *as a matter of law*...But there is no evidence in the text of the statute that the legislature sought to go any further than that ... to change history." (Emphasis in original.) Martin v. Hearst Corp., No. 3:12-cv-01023-MPS, 2013 BL 217721 (D. Conn., August 5, 0213).

33. "The erasure statute operates in the legal sphere, not the historical sphere. That is, the erasure statute is designed to return a person's criminal record to the status quo when that person is found not guilty as ...*The erasure statute does not, and could not, purport to wipe from the public record the fact that certain historical events have taken place.* Only in a totalitarian system could law purport to have such a sweeping effect." (Internal quotation marks omitted; emphasis in original). Martin v. Hearst Corp., supra, quoting Martin v. Griffin, No. CV99-0586133S, 2000 WL 872464 (Conn. Super. Ct. June 13, 2000).

34. "The purpose of the Connecticut General Assembly in enacting this statute was to permit a person against whom criminal charges have been dropped to have the fact of his [or her] prosecution 'erased' from his [or her] record. In other words, 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, 93 F.R.D. 364 (D. Conn. 1981) (in related civil litigation plaintiff entitled to "[E]vidence that would have been available to him if defendant had not been arrested and prosecuted...evidence collected by police at time of incident presumably would have existed notwithstanding the criminal prosecution.").

35. See also Sinisgalli v. O'Rourke, No. CV10-6003848, 120511 CTSUP (Conn. Super. Ct., Judicial District of New Britain December 5, 2011) (sworn witness statements and police reports compiled as part of criminal investigation of death not erased with dismissal of criminal charges against defendant); State v. West, 192 Conn. 488, 496 (1984) (records containing no information concerning a person's arrest not erased).

36. The Superior Court's interpretation in this matter is in accord with the reasoning of the cases cited above.

37. The Commission takes administrative notice of the Connecticut Public Records Retention Schedule for the Division of Criminal Justice, Number 13-2-2 (revised Feb. 2012), and the Retention Schedule for Municipal Public Safety and Emergency Services Records (revised Nov. 2012). It is found that both schedules state the following with respect to erased records:

> Erasure encompasses only those records which refer to a formal criminal charge; i.e. an arrest and/or prosecution. Erasure does not encompass records and other by-products of law enforcement investigations created prior to a formal criminal charge – i.e. statements, reports, and intelligence. Erasure also does not encompass records generated after the filing of a formal charge which do not contain a reference to the charge such as mug shots

and fingerprints. Lastly, witness statements or other instances of personal knowledge, recollections and memories of events are never subject to erasure.

38. It is concluded, based on all of the above, that the respondents' claim, that the §52-142a, G.S., operates "cover-to-cover" to erase the entire case file concerning the investigation of the homicide of Barbara Gibbons, is too broad and not in accordance with the language of the statute or court precedent.

39. The respondents also claim that certain of the records are subject to other exemptions from disclosure. "The burden of establishing the applicability of an exemption clearly rests upon the party claiming the exemption...This burden requires the claimant of the exemption to provide more than conclusory language, generalized allegations or mere arguments of counsel...Rather, a sufficiently detailed record must reflect the reasons why an exemption applies to the materials requested." (Citations omitted.) New Haven v. FOI Commission, 205 Conn. 767, 776 (1988).

40. It is found that the respondents provided no evidence as to the applicability of any other exemptions. It is concluded, therefore, that the respondents failed to prove that any of the other exemptions apply to the case file records.

41. It is found that although the respondents reviewed the case file as directed by the Commission in its order in Docket #FIC2009-416, they did not use the standard articulated by the Superior Court in this case to determine whether any particular record was erased. Accordingly, it is found that the respondents failed to comply with the Commission's order in Docket #FIC2009-416.

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

1. The respondents shall forthwith make a diligent search for records to which the §52-142a, G.S., does not apply. If any such records are located, the respondents shall promptly provide copies of such records to the complainant, free of charge. If the respondents do not locate any such records, they shall inform the complainant in writing of such fact and describe their search for such records.

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

Lisa Fein Siegel
as Hearing Officer