

FREEDOM OF INFORMATION COMMISSION
OF THE STATE OF CONNECTICUT

In The Matter of a Complaint by

FINAL DECISION

David DesRoches and WNPR,
Connecticut Broadcasting Network,

Complainants

against

Docket #FIC 2017-0682

Executive Director, Nathaniel
Witherell Home, Town of
Greenwich; and Town of
Greenwich,

Respondents

August 22, 2018

The above-captioned matter was heard as a contested case on April 30, 2018, at which time the complainants 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 email dated September 29, 2017, the complainants requested from the respondents: “access to and copies of any surveillance video imagery of Christopher von Keyserling interacting with a woman whom von Keyserling is alleged by Greenwich Police to have ‘pinched . . . in the groin area’ on December 8, 2016, at The Nathaniel Witherell, a property owned and operated by the Town of Greenwich.” The complainants further requested that the respondents “use whatever technology that is available to protect the identity of residents of the Nathaniel Witherell whose images may appear in the video. This could include blurring the image or using some other editing tool that would still allow the image of von Keyerling to be discernible.” Finally, the complainants requested that the respondents waive the fees for the requested record, as disclosure of a video concerning a publicly-paid employee on publicly owned property conducting himself in this matter is in the public interest.

3. It is found that, by email dated October 30, 2017, the respondents denied the complainants' request, indicating that the State's Attorney who was handling the prosecution of Mr. von Keyerling objected to the disclosure.

4. By letter dated November 7, 2017 and filed November 13, 2017, the complainants appealed to this Commission, alleging that the respondents violated the Freedom of Information ("FOI") Act, by failing to provide them with access to and copies of the requested record.

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 record requested by the complainants in paragraph 2, above, is a public record within the meaning of §§1-200(5), 1-210(a), 1-212(a), G.S., and must be disclosed unless it is exempt from disclosure.

9. The Commission takes administrative notice of its final decision in David DesRoches and WNPR v. Chief, Police Dep't, Town of Greenwich; Police Dep't, Town of Greenwich; and Town of Greenwich, Docket #FIC 2017-0070 (Sept. 27, 2017), in which it was held that the requested video in the possession of the Greenwich Police Department did not have to be disclosed. That determination was based entirely on the fact that the request for the video was made to the Greenwich Police Department during a pending criminal

prosecution and, as such, the record did not fall within the definition of the “record of arrest,” as set forth in §1-215, G.S. See ¶ 17, below.

10. At the hearing in this matter, the respondents claimed that the requested video is exempt pursuant to §1-210(b)(3)(D), G.S., (records of law enforcement to be used in a prospective law enforcement action), and §54-86e, G.S., (name and address, and other identifying information, of a victim of sexual assault). The respondents also indicated that the state’s attorney objected to the disclosure of the video because it is an item of evidence in his file concerning a case that has yet to be tried.

11. After the hearing, the respondents submitted the video recording to the Commission for an in camera review. The video, which was submitted on a compact disc, will be referred to as IC-2017-0682-1.

12. In addition, on the in camera index, the respondents claimed that the video recording is exempt from disclosure pursuant to §1-210(b)(3)(G), G.S., (name and address of the victim of a sexual assault); §1-201, G.S., (provision providing a clarifying statement about the Division of Criminal Justice); and §1-215, G.S., (request for record of arrest from law enforcement agency).

13. The Commission notes that, at the hearing, the complainants agreed to accept the requested video with the identity of the alleged victim blurred. Accordingly, the respondents’ claim of exemption pursuant to §54-86e, G.S., need not be addressed.

14. Next, sections 1-210(b)(3)(D) and 1-210(b)(3)(G), G.S., provide in relevant part, that nothing in the FOI Act shall be construed to require the disclosure of:

Records of law enforcement agencies not otherwise available to the public which records were compiled in connection with the detection or investigation of crime, if the disclosure of said records would not be in the public interest because it would result in the disclosure of: . . . (D) information to be used in connection with a prospective law enforcement action if prejudicial to such action. . . [and] (G) the name and address of the victim of a sexual assault. .

..

15. It is found that these exemptions are not applicable to the requested record since the video in this case is not a record of a “law enforcement agency,” rather it is a record of The Nathaniel Witherell Home,¹ which is a nursing home facility.

¹ Additionally, with regard to the claim of exemption pursuant to §1-210(b)(3)(G), G.S., it is found that the alleged victim’s name and address do not appear in nor are they stated in the video.

16. Next, §1-201, G.S., entitled, "Division of Criminal Justice deemed not to be public agency, when," states: "For the purposes of subdivision (1) of section 1-200, the Division of Criminal Justice shall not be deemed to be a public agency except in respect to its administrative functions." This provision provides clarity with regard to the Commission's jurisdiction over the Division of Criminal Justice; it does not provide an exemption to the disclosure of public records. Accordingly, this provision is not relevant to the issue of whether the video record at issue must be disclosed.

17. Finally, §1-215, G.S. provides, in relevant part:

(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 any record of arrest of a juvenile, 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. 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.

(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.

18. In Commissioner of Public Safety v. FOI Comm'n, et al., 312 Conn. 513 (July 15, 2014) ("Public Safety"), the Supreme Court interpreted §1-215, G.S., and ruled that during the pendency of a criminal prosecution, a law enforcement agency must disclose no more than basic police blotter information and one other piece of information, designated by the law enforcement agency: either a press release, the arrest or incident report, or other similar report of the arrest of a person. The legislature responded to Public Safety by enacting Public Act 15-164, An Act Concerning the Disclosure of Arrest Records During a Pending Prosecution under the Freedom of Information Act, which amended §1-215, G.S., by increasing law enforcement agencies' disclosure obligations under §1-215, G.S. Public Act 15-164, however, did not reverse the Public Safety decision.² Accordingly, §1-215, G.S., continues to exclusively govern law enforcement agencies' disclosure obligations under the FOI Act during pending criminal prosecutions.

² The Commission notes that the underlying bill, House Bill 6750, *An Act Expanding the Requirement for Disclosure of Arrest Records during a Pending Prosecution under the Freedom of Information Act*, as originally proposed, sought to reverse the Public Safety decision. The raised bill required that during the pendency of a criminal prosecution, a law enforcement agency must disclose *at least* basic blotter information and one other piece of information, without redaction. All other records were required to be disclosed unless they fell within the FOI Act's "law enforcement exemption" in §1-210(b)(3) of the FOI Act. House Bill 6750 was subsequently amended.

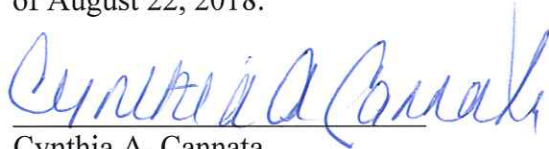
19. It is found that the disclosure requirements set forth in §1-215, G.S., do not apply to the respondents in this matter because neither The Nathaniel Witherell Home nor its executive director are law enforcement agencies. In addition, while §1-215(d), G.S., provides that a state's attorney may intervene in a proceeding before the Commission which involves the adjudication of a request for a record that "documents or depicts the arrest or custody of a person during the period in which the prosecution of such person is pending," see ¶ 17.c-d, above, no such record is at issue in the instant case.

20. Based on the foregoing, it is concluded that the respondents violated the disclosure provisions of §§1-210(a), G.S., and §1-212(a), G.S., when they declined to disclose the requested video to the complainants.

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 disclose the requested record to the complainants, free of charge. The respondents may redact, but are not required to redact, the images of the alleged sexual assault victim and any resident of The Nathaniel Witherell Home prior to disclosing the record.

Approved by Order of the Freedom of Information Commission at its regular meeting of August 22, 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:

DAVID DESROCHES AND WNPR, CONNECTICUT BROADCASTING NETWORK,
c/o Attorney William S. Fish, Jr., Hinckley, Allen & Snyder LLP, 20 Church Street, 18th
Floor, Hartford, CT 06103

EXECUTIVE DIRECTOR, NATHANIEL WITHERELL HOME, TOWN OF GREENWICH; AND TOWN OF GREENWICH, c/o Attorney Valerie Maze Keeney,
Town of Greenwich, 101 Field Point Road, Greenwich, CT 06830



Cynthia A. Cannata
Acting Clerk of the Commission