



FREEDOM OF INFORMATION



Connecticut Freedom of Information Commission • 18-20 Trinity Street, Suite 100 • Hartford, CT 06106
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Charles Evans, Jr., and Roberta Clapper,
Complainant(s)
against

Notice of Meeting

Docket #FIC 2012-527

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 21, 2012

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 23, 2013**. 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 11, 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, the Commission requests that an **original and fourteen (14) copies** be filed **ON OR BEFORE January 11, 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 January 11, 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: Charles Evans, Jr., Roberta Clapper
Terrence M. O'Neill, AAG, Steven M. Barry, AAG

2012-12-21/FIC# 2012-527/Trans/wrbp/KKR/CAL

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FREEDOM OF INFORMATION COMMISSION
OF THE STATE OF CONNECTICUT

In the Matter of a Complaint by

Report of Hearing Officer

Charles Evans, Jr., and Roberta
Clapper,

Complainants

against

Docket #FIC 2012-527

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

December 21, 2012

The above-captioned matter was heard as a contested case on November 15, 2012, at which time the complainants 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 September 17, 2012, the complainants requested copies of all records and photographs related to the car accident that occurred on December 7, 2010, involving John Clapper III (the accident).
3. It is found that, as a result of the accident, four teenagers were killed and one teenager sustained serious life threatening injuries, when the car in which they were riding struck a tree at a high rate of speed. The investigation conducted by the Connecticut State Police determined that the complainant's 16 year-old son, John Clapper III, who was one of those killed in the accident, was the driver.
4. It is found that the records responsive to the request, described in paragraph 2, above, consist of the approximately 1200 page report of the investigation of the Connecticut State Police into the accident. It is found that, in September 2011, the respondents provided the complainants with approximately 230 pages of such report, but that they withheld from the complainants approximately 850 pages, claiming such pages were exempt from disclosure.

Since that time, the respondents have made several unsuccessful attempts to obtain the records that have been withheld.

5. By letter dated September 26, 2012, and filed on September 28, 2012, the complainant appealed to this Commission, alleging that the respondents violated the Freedom of Information (FOI) Act by failing to fully comply with the September 17th request for records, described in paragraph 2, above.

6. 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.

7. 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.

8. 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.”

9. It is found that the records responsive to the September 17th request are public records within the meaning of §§1-200(5) and 1-210(a), G.S.

10. At the hearing in this matter, the complainant Roberta Clapper testified that she believes, based upon evidence she and the complainant Charles Evans, Jr., acquired through an independent investigation of the accident, that her son was not the driver of the car involved in the accident. Specifically, the complainants stated that the independent investigator determined that John Clapper III’s DNA was not found on the driver’s side seatbelt, and that the injuries sustained by him are not consistent with him having been the driver. According to the complainants, the injuries sustained by the surviving teenager are consistent with *him* having been the driver. At the hearing in this matter, the complainants insisted that the State Police had

mistakenly concluded that John Clapper III was the driver, and that evidence of such error is contained in the 850 pages of records that were withheld from them.

11. At the hearing in this matter, the respondents stated that the remainder of the report was withheld from the complainants mainly due to privacy concerns, noting many of the withheld records are “medical” records and also include graphic photographs taken at the crash scene. The respondents cited a federal district court decision interpreting the federal Freedom of Information Act in support of their claim that the crash victims’ families’ right to privacy would be violated by disclosure of such photos. The respondents also argued such records are exempt from disclosure pursuant to HIPPA, §§1-210(b)(2), 19a-411(b), 53-341c, 1-210(b)(17), G.S., and 42 U.S.C. §14616. The complainants requested, and the hearing officer ordered, the respondents to submit such records for in camera inspection, and such records were received by the Commission from the respondents on November 16, 2012. In addition to the exemptions claimed at the hearing, the respondents claimed, on the index to the in camera records, that the “medical” records are exempt from disclosure pursuant to §§1-210(b)(10), 52-146c, and 52-146o, G.S.

12. It is found that the in camera records generally consist of: reports prepared by EMTs (first responders) at the scene of the accident, emergency room records and hospital records; records obtained through the COLLECT system; educational records; records of, and photographs taken by, the Office of the Chief State Medical Examiner; and photographs taken by the police at the accident scene. The in camera records will be identified herein as IC 2012-527-203 through IC 2012-527-1193.¹ At the hearing in this matter, the complainants stated they were not seeking the educational records contained in the report submitted for in camera review, and withdrew the complaint with respect to such records. Thus, such records will not be further considered herein.

§1-210(b)(2), G.S.

13. With regard to the respondents’ §1-210(b)(2), G.S., claim of exemption, that section provides, in relevant part, that disclosure is not required of “personnel or medical files and similar files the disclosure of which would constitute an invasion of personal privacy.”

14. 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.

15. 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

¹ The respondents numbered the in camera records beginning with the number 1, but included the 202 pages released to the complainants. Thus, the first page of records requiring in camera inspection is IC 2012-527-203. The Commission will use the page numbers assigned to them by the respondents in order to avoid the confusion that might be caused by renumbering them.

concern, and second, that disclosure of such information is highly offensive to a reasonable person.

16. The respondents claim that the following records are exempt from disclosure pursuant to §1-210(b)(2), G.S.: IC 2012-527-203 (social security number only)², IC 2012-527-204 through 210, IC 2012-527-265 through 933, IC 2012-527-949 through 1125, IC 2012-1175 through 1177, IC 2012-527-1182 through 1184, and IC 2012-527-1187 through 1189.

17. After careful review of the in camera records, it is found that IC 2012-527-265 through 268, IC 2012-527-882, IC 2012-527-883, IC 2012-527-929 through 933, IC 2012-527-949 through 951, and IC 2012-527-997 through 1002, although identified as “medical records” by the respondents, are fax cover sheets, signed medical release forms, and police narrative reports, none of which contains medical information. It is further found that such records are not personnel, medical or similar files, within the meaning of §1-210(b)(2), G.S.

18. After careful review of the in camera records, it is found that IC 2012-1175 through 1177, IC 2012-527-1182 through 1184, and IC 2012-527-1187 through 1189 are photographs taken at the scene of the accident by the police in the course of their investigation. It is further found that such records are not personnel, medical or similar files, within the meaning of §1-210(b)(2), G.S.

19. Accordingly, it is found that the records, described in paragraphs 17 and 18, above, are not exempt from disclosure pursuant to §1-210(b)(2), G.S.

20. After careful review of the in camera records, it is found that IC 2012-527-204 through 210, IC 2012-527-269 through 881, IC 2012-527-884 through 928, IC 2012-527-952 through 996, and IC 2012-527-1003 through 1125, identified collectively as “medical records” by the respondents on the in camera index, are reports prepared by EMTs (first responders), emergency room records and hospital records, pertaining to those involved in the accident, both deceased and surviving. It is further found that such records are personnel, medical or similar files within the meaning of §1-210(b)(2), G.S.

21. At least since 1999, this Commission has held that an individual’s privacy rights are extinguished at death. See Ron Robillard v. Freedom of Information Officer, State of Connecticut, Department of Mental Health and Addiction Services, et al., Docket #FIC 2011-297 (April 25, 2012)(disclosure of medical records not an invasion of privacy because no privacy rights exist with respect to deceased); David Collins and the New London Day v. Commissioner, State of Connecticut, Department of Public Safety, et al., Docket #FIC 2008-607 (April 22, 2009), *affirmed*, Commissioner, State of Connecticut, Department of Public Safety v. Freedom of Information Commission et al., HHB-CV-09-4020983S (June 4, 2010), *appealed on other grounds*, Commissioner, State of Connecticut v. Freedom of Information Commission, et al., AC 32381 (appeal pending); Alexander Wood and the Manchester Journal Inquirer v. Commissioner, State of Connecticut, Department of Public Safety, et al. Docket

² With regard to IC 2012-527-203, in keeping with Commission precedent, social security numbers are not ordered disclosed.

#FIC 2008-480 (July 8, 2009), *affirmed* Commissioner, State of Connecticut, Department of Public Safety v. Freedom of Information Commission et al., HHB-CV-09-4021543S (June 4, 2010), N.B. Superior Court, Cohn, J., *appealed on other grounds*, Commissioner, State of Connecticut v. Freedom of Information Commission, et al., AC 32381 (appeal pending); Crowley v. Commissioner, State of Connecticut, Department of Public Health, Docket #FIC 2007-123 (August 8, 2007); David K. Jaffe v. State of Connecticut, Connecticut Lottery Corporation, Docket #FIC 1999-019 (April 19, 1999)(disclosure of deceased employee's personnel file would not be an invasion of personal privacy because privacy rights terminate at death). The Commission notes that federal court decisions interpreting the federal FOI Act relate to federal records and are not controlling in proceedings before this Commission.

22. Accordingly, it is found that disclosure of the following in camera records, pertaining to John Clapper III, consisting of reports of EMTs (first responders), would not constitute an invasion of privacy, pursuant to §1-210(b)(2), G.S.: IC 2012-527-206 and 207, IC 2012-527-889 through 897, IC 2012-527-912 through 920, IC 2012-527-957 through 965, and IC 2012-527-980 through 988.

23. Moreover, it is found that disclosure of the remainder of the in camera records, consisting of emergency room records pertaining to John Clapper III (IC 2012-527-884 through 888, IC 2012-527-898 through 911, IC 2012-527-921 through 928, IC 2012-527-952 through 956, IC 2012-527-966 through 979, IC 2012-527-989 through 996), also would not constitute an invasion of personal privacy, pursuant to §1-210(b)(2), G.S.

24. In addition, it is found that disclosure of IC 2012-527-204 and 205, consisting of reports prepared by EMTs (first responders) would not constitute an invasion of personal privacy, pursuant to §1-210(b)(2), G.S., as those records also pertain to individuals who are deceased.

25. Accordingly, it is found that the records, described in paragraphs 22, 23, and 24, above, are not exempt from disclosure pursuant to §1-210(b)(2), G.S.

26. With regard to certain records pertaining to the survivor, specifically IC 2012-527-208 through 210 and IC 2012-527-783 through 792, which are reports prepared by EMTs (first responders), it is found that such records contain information that could potentially shed light on the possible failure of the State Police to properly investigate the accident. Therefore, it is found that such records pertain to a legitimate matter of public concern and therefore are not exempt from disclosure pursuant to §1-210(b)(2), G.S.

27. With regard to the emergency room and hospital records pertaining to the surviving individual, however, it is found that such records do not pertain to a legitimate matter of public concern, as they do not contain information that would shed light on the possible failure of the State Police to properly investigate the accident. *Accord* The Greenwich Time v. Commissioner, State of Connecticut, Department of Public Health, et al., Docket FIC 2010-026 (January 11, 2011)(disclosure of patient's medical records maintained by public agency would constitute invasion of personal privacy under FOI Act because such medical records do not bear on whether or not respondents properly investigated physician's conduct). It is further found

that disclosure of such records would be highly offensive to a reasonable person. Accordingly, it is found that disclosure of the following records would constitute an invasion of personal privacy pursuant to §1-210(b)(2), G.S.: IC 2012-527-269 through 782, IC 2012-527-793 through 881, and IC 2012-512-1003 through 1125.

28. It is therefore concluded that the respondents did not violate the FOI Act in withholding the records described in paragraph 27, above, from the complainants.

§52-146c, G.S.

29. The respondents also claim that the records described in paragraph 26, above, are exempt from disclosure pursuant to §52-146c, G.S. That section provides, in relevant part, that:

[i]n civil and criminal actions, in juvenile, probate, commitment and arbitration proceedings...and in legislative and administrative proceedings, all communications shall be privileged and a psychologist shall not disclose any such communications unless the person or his authorized representative consents to waive the privilege and allow such disclosure.

30. It is found that §52-146c, G.S., creates a testimonial privilege that prohibits a psychologist from disclosing communications with a patient in civil, criminal or other proceedings. Because the respondents are not psychologists testifying about communications with a patient, it is found that §52-146c, G.S., is inapplicable, and does not therefore exempt the records, described in paragraph 26, above, from disclosure.

31. Moreover, it is found that the records, described in paragraph 26, above, do not contain communications between a psychologist and a patient. Accordingly, it is found that such records are not exempt from disclosure pursuant to §52-146c, G.S.

§1-210(b)(10), G.S.

32. Next, the respondents claim that the records described in paragraphs 17, 18, 22, 23, 24 and 26, above, are exempt from disclosure pursuant to §1-210(b)(10), G.S.

33. Section 1-210(b)(10), G.S., provides that disclosure is not required of :

[r]ecords, tax returns, reports and statements exempted by federal law or the general statutes or communications privileged by the attorney-client relationship, marital relationship, clergy-penitent relationship, doctor-patient relationship, therapist-patient relationship or any other privilege established by the common law or the general statutes, including any such records, tax returns, reports or communications that were created or made prior to the

establishment of the applicable privilege under the common law or the general statutes (emphasis added).

34. With regard to the records described in paragraphs 17 and 18, above, it is found that such records do not involve a doctor-patient relationship, and therefore are not exempt from disclosure pursuant to §1-210(b)(10), G.S.

35. It is found that the records described in paragraphs 22, 24 and 26, above, are reports that were not prepared by a doctor, but rather, were prepared by a firefighter, ambulance driver or other emergency medical technician, and that therefore, no doctor-patient relationship existed or exists with respect to such reports. Accordingly, no privilege could have attached to such reports and therefore such reports are not exempt from disclosure pursuant to §1-210(b)(10), G.S.

36. With regard to the records, described in paragraph 23, above, it is found that, because he died enroute to the hospital, no doctor patient relationship was established between John Clapper III and any doctor or health care provider and therefore no privilege attached to such records. See Watertown Police Union, Local 541 v. Waterbury Hospital, 2002 Conn. Super. LEXIS 373 (February 13, 2001)(no privileged communications could have occurred between doctor and patient when patient was comatose). Accordingly, such records are not exempt from disclosure pursuant to §1-210(b)(10), G.S.

§52-146o, G.S.

37. Next, the respondents argue that records and photographs, described in paragraphs 17, 18, 22, 23, 24, and 26 above, are exempt from disclosure pursuant to §52-146o, G.S. That section provides, in relevant part:

(a)...in any civil action or any proceeding preliminary thereto or in any probate, legislative or administrative proceeding, a physician or surgeon, as defined in subsection (b) of section 20-7b, shall not disclose (1) any communication made to him by, or any information obtained by him from, a patient or the conservator or guardian of a patient with respect to any actual or supposed physical or mental disease or disorder or (2) any information obtained by personal examination of a patient, unless the patient or his authorized representative explicitly consents to such disclosure.

38. It is found that §52-146o, G.S., creates a testimonial privilege that prohibits a physician or surgeon from disclosing communications or information about a patient in civil, probate, legislative or administrative proceedings. Because the respondents are not physicians or surgeons testifying about communications or information regarding a patient, it is found that §52-146o, G.S., is inapplicable, and does not therefore exempt the records or photographs described in paragraph 37, above, from disclosure.

HIPAA

39. Next, the respondents argue that the records and photographs, described in paragraphs 17, 18, 22, 23, 24, and 26, above, are exempt from disclosure pursuant to the Health Insurance Portability & Accountability Act of 1996 (HIPAA).

40. It is found that HIPAA applies to any entity that is: a health care provider that conducts certain transactions in electronic form; a health care clearinghouse; or a health plan. It is found that an entity that is one or more of these types of entities is a "covered entity" required to comply with HIPAA. 45 C.F.R. 160.103, 45 C.F.R. 164.502.

41. It is found that the respondents are not a health care clearinghouse, a health plan, or a health care provider. It is found, therefore, that the respondents are not "covered entities" required to comply with the HIPAA regulations.

42. Based upon the foregoing, it is concluded that the respondents violated the disclosure provisions of §§1-210(a) and 1-212(a), G.S., by failing to disclose the records, described in paragraphs 17, 22, 23, 24, and 26, above, to the complainants.

§53-341c, G.S.

43. The respondents also claim that the photographs, described in paragraph 18, above, are exempt from disclosure pursuant to §53-341c, G.S. With regard to such claim of exemption, that provision prohibits any peace officer, firefighter, ambulance driver, emergency medical responder, emergency medical technician or paramedic who responds to a request for medical assistance and who, other than in the performance of his or her duties, knowingly (1) takes a photograph of such person without his or her consent or (2) transmits, or disseminates or otherwise makes available to a third person such image without such person's consent.

44. It is found that the photographs, described in paragraph 18, above, were taken by a police investigator in the performance of his duties, specifically, his investigation of the accident. It is further found that the respondents offered no evidence at the hearing that any photographs were taken by any firefighters, or emergency medical personnel for any purpose.

45. Accordingly, it is found that the records, described in paragraph 18, above, are not exempt from disclosure pursuant to §53-341c, G.S.

46. Based upon the foregoing, it is concluded that the respondents violated the disclosure provisions of §§1-210(a) and 1-212(a), G.S., by failing to disclose the records, described in paragraph 18, above to the complainants.

§ 19a-411(b), G.S.

47. Next, the respondents claim that IC 2012-527-1126 through 1173 and IC 2012-527-1190 through 1193, are records of the Office of the Chief State Medical Examiner, and that such

records therefore are exempt from disclosure pursuant to §19a-411(b), G.S. That section provides, in relevant part:

(b) The report of examinations conducted by the Chief Medical Examiner, Deputy Chief Medical Examiner, an associate medical examiner or an authorized assistant medical examiner, and of the autopsy and other scientific findings may be made available to the public only through the Office of the Chief Medical Examiner and in accordance with this section, section 1-210 and the regulations of the commission [Commission on Medicolegal Investigations]. Any person may obtain copies of such records upon such conditions and payment of such fees as may be prescribed by the commission, except that no person with a legitimate interest in the records shall be denied access to such records....
(emphasis added)

48. After careful review of the records described in paragraph 47, above, it is found that IC 2012-527-1126 through 1131, IC 2012-527-1132 through 1139, IC 2012-527-1141 through 1149, IC 2012-527-1151 through 1162, and IC 2012-527-1164 through 1173, are “reports of examinations conducted by the medical examiner and of the autopsy and other scientific findings,” within the meaning of §19a-411(b), G.S. Accordingly, it is found that such records are exempt from disclosure.

49. Based on the foregoing, it is found that the respondents did not violate the FOI Act, as alleged, by withholding the records described in paragraph 48, above, from the complainants.

50. However, it is found that IC 2012-527-1131, IC 2012-527-1140, IC 2012-527-1150, and IC 2012-527-1163, are police reports and as such, are not exempt from disclosure pursuant to §19a-411(b), G.S.

51. It is therefore concluded that the respondents violated the disclosure provisions of §§1-210(a) and 1-212(a), G.S., by failing to disclose the records, described in paragraph 50, above to the complainants.

42 U.S.C §14616

52. Next, the respondents claim IC 2012-527-216 through 218 are exempt from disclosure pursuant to 42 U.S.C §14616.

53. The respondents offered no testimony or evidence with respect to the records described in paragraph 52, above. However, the Commission takes administrative notice of the respondents’ website, on which they have posted an explanation of the COLLECT system, as follows:

The Connecticut On-Line Law Enforcement Communications Teleprocessing (COLLECT) System is utilized throughout Connecticut to access valuable online State and Federal law enforcement resources....The COLLECT system provides access to in-state COLLECT files and access to two national systems, National Crime Information Center (NCIC) and International Justice and Public Safety Information Sharing Network (NLETS)....COLLECT also provides its users with access to other state systems and files such as Department of Motor Vehicles, Sex Offender Registry, Protective Order Registry, Department of Correction, State Police Criminal History Weapons, Offender Based Tracking System and Paperless Re-Arrest Warrant Network and more.

54. Title 42 U.S.C. §14616 establishes a Compact between the states and the federal government for the sharing of electronic criminal history information. Article IV of the Compact provides that “[a]ny record obtained under this Compact may be used only for the official purposes for which the record was requested,” and that each “Compact officer shall...ensure that records obtained under this compact are used only by authorized officials for authorized purposes...” Although not argued by the respondents that this portion of 42 U.S.C. §14616 is the basis for their claim of exemption, the Commission makes this assumption.

55. After careful review of the in camera records claimed to be exempt pursuant to 42 U.S.C §14616, it is not clear, on the face of such records, that they were obtained pursuant to the Compact. However, even assuming that the records described in paragraph 52, above, were so obtained, this Commission has previously held that the respondents’ contractual agreement not to *disseminate* records obtained pursuant to the Compact does not relieve them of their duty under the FOI Act to *disclose* the records to the complainants upon request. See David Collins and the New London Day v. Commissioner, State of Connecticut, Department of Public Safety, et al., Docket #FIC 2008-607 (April 22, 2009), *affirmed*, Commissioner, State of Connecticut, Department of Public Safety v. Freedom of Information Commission et al., HHB-CV-09-4020983S (June 4, 2010), *appealed* Commissioner, State of Connecticut v. Freedom of Information Commission, et al., AC 32381 (appeal pending); Alexander Wood and the Manchester Journal Inquirer v. Commissioner, State of Connecticut, Department of Public Safety, et al. Docket #FIC 2008-480 (July 8, 2009), *affirmed* Commissioner, State of Connecticut, Department of Public Safety v. Freedom of Information Commission et al., HHB-CV-09-4021543S (June 4, 2010), N.B. Superior Court, Cohn, J., *appealed* Commissioner, State of Connecticut v. Freedom of Information Commission, et al., AC 32381 (appeal pending).

56. Accordingly, it is found that the records, described in paragraph 52, above, are not exempt from disclosure pursuant to 42 U.S.C. §14616.

57. Based upon the foregoing, it is concluded that the respondents violated the disclosure provisions of §§1-210(a) and 1-212(a), G.S., by failing to disclose the records, described in paragraph 52, above to the complainants.

§1-210(b)(1), G.S.

58. Finally, the respondents claim that IC 2012-527-211 through 215 are exempt from disclosure pursuant to §1-210(b)(1), G.S.

59. Section 1-210(b)(1), G.S., provides that disclosure is not required of:

[p]reliminary drafts or notes provided the public agency has determined that the public interest in withholding such documents clearly outweighs the public interest in disclosure.

Section 1-210(e), G.S., further provides that [n]otwithstanding the provisions of subdivisions (1) and (16) of subsection (b) of this section, disclosure shall be required of:

(1) Interagency or intra-agency memoranda or letters, advisory opinions, recommendations or any report comprising part of the process by which governmental decisions and policies are formulated, except disclosure shall not be required of a preliminary draft of a memorandum, prepared by a member of the staff of a public agency, which is subject to revision prior to submission to or discussion among the members of such agency....

60. After careful review of the records, described in paragraph 58, above, it is found that such records are not preliminary drafts or notes within the meaning of §1-210(b)(2), G.S. Further, it is found that such records are interagency memoranda or reports comprising part of the process by which governmental decisions are formulated, and that such records were not prepared by a staff member and subject to revision. Accordingly, it is found that such records are not exempt from disclosure pursuant to §1-210(b)(1), G.S. or §1-210(e), G.S.

61. Based upon the foregoing, it is concluded that the respondents violated the disclosure provisions of §§1-210(a) and 1-212(a), G.S., by failing to disclose the records, described in paragraph 58, above to the complainants.

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 records, described in paragraphs 17, 18, 22, 23, 24, 26, 50, 52 and 58, above, at no cost, to the complainants.

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

A handwritten signature in cursive script, appearing to read "Kathleen K. Ross", written over a horizontal line.

Kathleen K. Ross
as Hearing Officer

FIC 2012-527/hor/kkr/12212012