

FREEDOM OF INFORMATION COMMISSION
OF THE STATE OF CONNECTICUT

In the Matter of a Complaint by

FINAL DECISION

Robert Cushman,

Complainant

against

Docket #FIC 2016-0688

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

Respondents

June 14, 2017

The above-captioned matter was heard as a contested case on March 24, 2017, 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 September 15, 2016, the complainant requested from the respondents records pertaining to the arrest of a particular individual on September 9, 2016, for driving under the influence and failure to “drive upon the right,” including all records relating to the certifications, maintenance, and repair/calibration log book for the Draeger Alcotest 9510 with a particular serial number, for the time frame from September 1, 2016 to September 15, 2016.

3. It is found that the respondents provided some records responsive to the request, but did not provide the records described in paragraph 2, above, pertaining to the Draeger Alcotest 9510 for the particular time frame requested (the “Draeger records”).¹

¹ The Draeger Alcotest 9510 is “an advanced breath alcohol measuring instrument for evidential applications.” https://www.draeger.com/en_aunz/Alcohol-And-Drug-Detection/Products/Breath-Alcohol-and-Drug-Testing/Evidential-Alcohol-Measuring-Devices/Alcotest-9510

4. By email dated and filed September 27, 2016, the complainant appealed to this Commission, alleging that the respondents violated the Freedom of Information (“FOI”) Act by failing to provide the records he requested.

5. At the hearing in this matter, the complainant indicated that he was satisfied with the response to his request, except with respect to the Draeger records. The Draeger records are the only records that remain at issue in this case.

6. Section 1-200(5), G.S., provides:

“[p]ublic 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:

[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 . . . (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 concluded that the Draeger records are public records within the meaning of §§1-200(5) and 1-210(a), G.S.

10. It is found that the complainant’s client was pulled over by the state police for erratic driving and that a “breathalyzer” test was administered using a particular Draeger Alcotest 9510 machine. It is found that the printed results of the breathalyzer test indicated that the device had been last calibrated on July 26, 2016. At the hearing in this matter, the complainant clarified that, by his request, he was seeking records indicating that this particular device had been sent to Draeger for calibration, and returned to the state police, as well as certification that the machine was calibrated on July 26, 2016. The records the respondents provided to the complainant indicated that this device was last sent to Draeger to be calibrated on March 6, 2014, and was returned to the state police on March 21, 2014.

11. At the hearing in this matter, the respondents contended, through a witness, that a search for the Draeger records was conducted, but that the records the complainant was seeking were not located. The witness did not personally conduct the search, nor was she able to testify as to who conducted the search or the nature and scope of such search.

12. Thus, the hearing officer ordered the respondents to provide to the Commission by April 24, 2017, an affidavit from the individual who conducted the search regarding the nature and scope of the search.

13. On April 24, 2017, the Commission received from the respondents the affidavit of Mark Anderson, Lead Examiner for the Breath Analysis section at the State Police Forensic Laboratory. In his affidavit, Mr. Anderson stated that, sometime between October 18 and October 20, 2016, at the request of the legal affairs unit, he conducted a search for maintenance and calibration records responsive to the request. Mr. Anderson further stated that the maintenance and calibration records for the Draeger machines generally are kept in paper files in the laboratory ("lab"), filed and categorized by machine, and implied that, therefore, his search was limited to a search of the paper file for the Draeger machine at issue in this matter. He stated that this initial search did not locate any records pertaining to the July 26, 2016 calibration. Mr. Anderson additionally stated that, after the hearing in this matter, however, he conducted "an extensive search" of the lab, and that, after an "extensive search," he located additional maintenance and calibration records for the machine at issue. Such records were provided to the legal affairs unit for review, and then provided to the complainant on April 24, 2017. The affidavit, with these records attached, have been marked as Respondents' Exhibit 12 (after-filed).

14. It is found that the additional maintenance and calibration records referenced in paragraph 13, above, indicated that the Draeger machine at issue was sent by the lab to Draeger for service on May 23, 2016, calibrated by Draeger on July 26, 2016, returned to the lab on August 1, 2016, and checked in/certified for use by the lab on August 2, 2016.

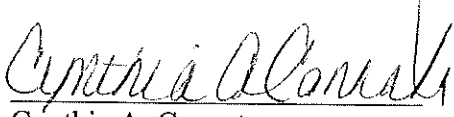
15. Based upon the foregoing, it is found that the respondents initially failed to conduct a thorough and diligent search for the Draeger records responsive to the request, described in paragraph 2, above. It is also found that such failure resulted in an approximately six month delay in providing those records to the complainant. It is further found that the respondents failed to provide the requested records to the complainant promptly, as required by §§1-210(a) and 1-212(a), G.S.

16. It is concluded that the respondents violated §§1-210(a) and 1-212(a), G.S.

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

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

Approved by Order of the Freedom of Information Commission at its regular meeting of June 14, 2017.

A handwritten signature in cursive script, appearing to read "Cynthia A. Cannata".

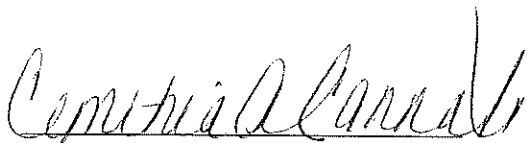
Cynthia A. Cannata
Acting Clerk of the Commission

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:

Robert Cushman
705 North Mountain Road
Newington, CT 06111

Commissioner, State of Connecticut, Department of Emergency
Services and Public Protection; and State of Connecticut,
Department of Emergency Services and Public Protection
c/o Stephen R. Sarnoski, Esq.
Assistant Attorney General
State of Connecticut,
Office of the Attorney General
110 Sherman Street
Hartford, CT 06105



Cynthia A. Cannata
Acting Clerk of the Commission