FREEDOM OF INFORMATION COMMISSION
OF THE STATE OF CONNECTICUT

In The Matter of a Complaint by FINAL DECISION

Marianne Heffernan,

Complainant

against Docket #FIC 2017-0317

Commissioner, State of Connecticut, Department of Correction; and State of Connecticut, Department of Correction,

Respondents May 9, 2018

The above-captioned matter was heard as a contested case on September 18, 2017 and October 19, 2017, at which times the complainant and the respondents appeared, stipulated to certain facts and presented testimony, exhibits and argument on the complaint. Prior to the contested case hearings, David Weinberg, whose records are at issue in this case, moved to intervene in this case as a party. The hearing officer granted Mr. Weinberg's motion.[1] Mr. Weinberg did not personally appear at the contested case hearing; rather, Attorney Kenneth Rosenthal appeared at the contested case and provided testimony on behalf of Mr. Weinberg.[2] 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.

[1] The Commission notes that, initially, the Office the Chief Public Defender moved, on behalf of David Weinberg, to intervene in this case and the motion was granted. Thereafter, the complainant filed an objection to the motion. The complainant contended, in part, that the Office of the Chief Public Defender should not be permitted to represent Mr. Weinberg in an administrative matter at a time when he had no criminal matter pending and was no longer subject to judicial supervision. Subsequently, Attorney Kenneth Rosenthal, a private attorney, filed an appearance in lieu of the appearance of the Office of the Chief Public Defender. Thereafter, the complainant withdrew her objection.

[2] The Commission notes that Mr. Weinberg could not have personally appeared at the contested case hearings due to the conditions of a judicial Order of Protection requiring that Mr. Weinberg refrain from contact with the family members of Joyce Stochmal, the victim of a homicide, until December 31, 2070. The complainant in this case is Joyce Stochmal's sister. See ¶ 13, below.

2. It is found that, by email dated April 22, 2017, the complainant made a request to the respondents for a copy of records concerning former inmate David J. Weinberg, as follows: a) photographs; b) correctional history; and c) disciplinary history.

3. It is found that the complainant explained that, within the categories of correctional history and disciplinary history, she was seeking "any documentation or tickets that detailed information of any incidents involving [Mr. Weinberg], such as those in which he was put into protective custody, released temporarily for personal/family reasons . . . , and those in which he was reprimanded or punished." She also explained that these two categories should be construed as including the "details of his good time credit and any deductions" to such time for behavioral incidents, as well as records evidencing all of the facilities where Mr. Weinberg had been incarcerated between January 6, 1989 and March 2, 2017. Finally, it is found that the complainant requested that all of the requested copies be provided to her via email, if possible.

4. It is found that, by email dated April 24, 2017, the respondents acknowledged the complainant's request and explained that they processed requests for public records in the order in which they receive such requests. It is further found that the respondents informed the complainant that not all of the records would be delivered by email, as many of the requested records were not maintained in an electronic format.

5. It is found that, by emails dated May 8, 2017 and May 16, 2017, the complainant contacted the respondents to inquire about the status of her request.

6. It is found that, by email dated May 16, 2017, the respondents informed the complainant that her request was still in the queue waiting to be processed. The respondents explained that it would be some time before records responsive to the request would be ready for disclosure, as the respondents received approximately 80 requests for records each month; were required to review all records forwarded to inmates from outside public agencies; and were frequently required to appear before the Commission. Finally, the respondents informed the complainant that they would notify her as soon as the requested records were available.

7. It is found that, by email dated June 6, 2017, the respondents informed the complainant that the Office of the Chief Public Defender, on behalf of Mr. Weinberg, had contacted the respondent department and indicated that Mr. Weinberg objected to the disclosure of the requested records and that therefore the request was denied.

8. By letter dated June 7, 2017 and filed June 8, 2017, the complainant appealed to this Commission, alleging that the respondent violated the Freedom of Information ("FOI") Act by denying her request for the records.

9. 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 1-218, whether such data or information be handwritten, typed, tape-recorded, printed, photostated, photographed or recorded by any other method.

10. 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 . . . (3) receive a copy of such records in accordance with section 1-212.

11. 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."

12. It is found that the records requested by the complainant in paragraph 2, above, and further described in paragraph 3, above, are public records within the meaning of §§1-200(5), 1-210(a), 1-212(a), G.S., and must be disclosed unless they are exempt from disclosure.

13. It is found that the complainant's nineteen year old sister, Joyce Stochmal, was murdered in Southbury, Connecticut in August of 1984. David Weinberg was arrested for the crime, found guilty by a Superior Court jury, and, on January 6, 1989, sentenced to 60 years in prison. It is found that, in 2010, the Connecticut Innocence Project became involved in Mr. Weinberg's case. It is found that, in March 2017, subsequent to the filing of a habeas corpus petition, the State of Connecticut, the Chief Public Defender's Office and the Connecticut Innocence Project reached a stipulated agreement, whereby Mr. Weinberg's 60-year sentence was commuted to 26 years. The Superior Court accepted the stipulated agreement and Mr. Weinberg was released from prison on March 2, 2017.

14. At the time of the first contested case hearing, the complainant had yet to receive any responsive records. The complainant contended that the records described in paragraphs 2 and 3, above, are public records, which should have been disclosed to her. Specifically, she contended that her sister's murder became a public interest news story; that David Weinberg, as a convicted murder, is a limited purpose public figure; and that the public has a legitimate interest in the correctional records of a convicted murderer who was able to secure a release from prison thirty-four years prior to the completion of the original sentence. The complainant further contended that, factoring heavily into the computation of time in the stipulated agreement referred to in paragraph 13, above, was Mr. Weinberg's "good time credit." At the time the stipulated agreement was being negotiated, the complainant contended that Mr. Weinberg had accumulated 3,722 days of statutory good time credit, which credit was relied upon in determining Mr. Weinberg's

commuted release date. The complainant contended that the public has a legitimate public interest in examining the correctional records that evidence a convicted inmate's behavior in a correctional institution, particularly when such behavior forms the basis for a good time credit of over ten years.

15. At the conclusion of the first contested case hearing, the complainant moved to have the Commission conduct an in camera inspection of the requested records. The hearing officer granted the complainant's motion.

16. On November 2, 2017, the respondents lodged in camera records with the Commission in two batches.

17. The first batch was comprised of a single record that the respondents claim is exempt from public disclosure. Such record shall be referred to as IC-2017-0317-001a.

18. The second batch was originally comprised of 285 pages of records. The intervenor withdrew his objection to the following records: 3 through 5, 76 through 78, 81 through 83, 90, 93, 95, 126 through 133, 135 and 136, 138 through 142, 151, 153, 155, 157 through 161, 170, 217 through 231, 239, 241, and 244 through 247. These records have been disclosed to the complainant.

19. The remainder of the second batch, for which intervenor continues to claim exemptions to disclosure and which have been lodged with the Commission, shall be referred to as follows: IC-2017-0317-001; IC-2017-0317-002; IC-2017-0317-006 through IC-2017-0317-075; IC-2017-0317-079; IC-2017-0317-080; IC-2017-0317-084 through IC-2017-0317-089; IC-2017-0317-091; IC-2017-0317-092[3]; IC-2017-0317-094; IC-2017-0317-096 through IC-2017-0317-125[4]; IC-2017-0317-134; IC-2017-0317-137; IC-2017-0317-143 through IC-2017-0317-150; IC-2017-0317-152; IC-2017-0317-154; IC-2017-0317-156; IC-2017-0317-162 through IC-2017-0317-169; IC-2017-0317-171 through IC-2017-0317-216; IC-2017-0317-232 through IC-2017-0317-238; IC-2017-0317-240; IC-2017-0317-242; IC-2017-0317-243; and IC-2017-0317-248 through IC-2017-0317-285.

20. During the first contested case hearing, the respondents contended that IC-2017-317-001a is exempt in its entirely pursuant to §1-17a, G.S., (photograph and computerized images in the possession of state agencies).[5] Section 1-17a, G.S., provides, in relevant part, as follows:

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[3] The Commission notes that there are two versions of IC-2017-0317-092 contained in the in camera submission—one version is not redacted; the other is partially redacted.

[4] The Commission notes that there are also two versions of IC-2017-0317-123 contained in the in camera submission—one version is not redacted; the other is redacted with regard to a social security number.

[5] For clarity's sake, the Commission notes that the respondents did not contend that any other record—that is, any record comprising Mr. Weinberg's correctional history or disciplinary history—was exempt from public disclosure.

> (b) No state agency may disclose to the public an individual's photograph or computerized image in connection with the issuance of an identification card or other document by the such state agency, unless such individual has provided his or her express consent for such disclosure. . . .

21. After a careful in camera inspection, and based on the testimony provided at the first contested case hearing, it is found that the entire record in question is a "photograph or computerized image" which was generated "in connection with the issuance of an identification card," within the meaning of §1-17a(b), G.S. It is further found that the individual to whom the record pertains has not provided "express consent" for the disclosure of said record. Accordingly, it is found that IC-2017-0317-001a is exempt from public disclosure. Furthermore, it is concluded that the respondents did not violate the FOI Act when they declined to disclose such record to the complainant.[6]

22. During the second contested case hearing, the intervenor raised the following exemptions to disclosure: §1-210(b)(2), G.S., (personal privacy exemption), and §1-210(b)(18), G.S. (records, the disclosure of which, may result in a safety risk to a correctional facility). In addition, on his index to the in camera records, the intervenor also claimed the following exemptions to disclosure: §1-17(a), G.S. (see ¶ 20, above); §54-142a, G.S., (Connecticut's erasure statute); and §31-128f, G.S. (protection for personnel and medical records in the possession of private employers).

23. First, the intervenor contends that the following records are exempt pursuant to §1-210(b)(2), G.S.: IC-2017-317-001; IC-2017-317-002; IC-2017-317-006 through IC-2017-317-075; IC-2017-317-084 through IC-2017-317-089; IC-2017-317-092[7]; IC-2017-317-096 through IC-2017-317-125; IC-2017-317-134; IC-2017-317-137; IC-2017-317-143 though IC-2017-317-150; IC-2017-317-152; IC-2017-317-154; IC-2017-317-156; IC-2017-317-162 through 169; IC-2017-317-171 thorough IC-2017-317-216; IC-2017-317-248 through IC-2017-317-272; IC-2017-317-276 through IC-2017-317-285.

24. Section 1-210(b)(2), G.S., provides in relevant part that nothing in the FOI Act shall require disclosure of ". . . personnel or medical files and similar files the disclosure of which would constitute an invasion of personal privacy . . . ."

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[6] During the first contested case hearing, the respondents also contended that IC-2017-317-001a was exempt from disclosure pursuant to §1-210(b)(18), G.S. Having found the record exempt in its entirety pursuant to §1-17a, G.S., the Commission need not address the secondary contention.

[7] The intervenor claims that IC-2017-317-092 and IC-2017-317-123 contain a social security number that is exempt from disclosure. The Commission notes that there is in fact a social security number contained in both of these in camera records. The Commission has consistently declined to order disclosure of social security numbers contained in personnel, medical or similar files pursuant §1-210(b)(2), G.S, as such disclosure would constitute an invasion of personal privacy. Accordingly, prior to disclosure of any record, the respondents may redact such numbers wherever they are located. See also IC-2017-317-079; and IC-2017-317-080.

25. The Supreme Court set forth the test for the exemption contained in §1-210(b)(2), G.S., in Perkins v. Freedom of Information Commission, 228 Conn. 158, 175 (1993). 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 concern, and second, that such information is highly offensive to a reasonable person.

26. It is found that the requested records contain records of the intervenor's various jobs within the correctional facility and are in the nature of a personnel or similar files within the meaning of §1-210(b)(2), G.S.[8] See Stephanie Reitz and The Associated Press v. Comm'r, State of Connecticut, Dep't of Correction, Docket #FIC 2006-343, ¶ 37 (June 27, 2007).

27. It is found that, at the time of the second contested case hearing, other than the first couple of pages, Attorney Rosenthal had not reviewed the requested records. It is further found that Mr. Weinberg had not reviewed the records at all.

28. Attorney Rosenthal testified that, having completed his sentence, Mr. Weinberg now has a right to live a private life, and should be permitted "to move on."

29. It is found that, in this regard, the intervenor offered conclusory testimony rather than specific evidence to prove the application of the claimed exemption. As our Supreme Court has clarified, "[t]he burden of establishing the applicability of an exemption . . . requires the claimant. . . 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. New Haven v. FOI Comm'n, 205 Conn. 767, 775-76 (1988).

30. Moreover, it is found that the complainant provided specific evidence establishing that there was extensive publicity concerning her sister's murder and Mr. Weinberg's trial, conviction and sixty-year sentence. It is further found that the complainant provided specific evidence that Mr. Weinberg was released from prison on March 2, 2017, after having served only twenty-six years, one hundred and eighty-one days of his sixty-year sentence. Finally, it is found that the complainant provided specific evidence that Mr. Weinberg accumulated a significant amount of good time credit, which time factored into his commuted release date.[9]

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[8] At the second contested case hearing, the complainant clarified that she was not seeking Mr. Weinberg's medical records.

[9] See Trans. of Judicial Proceeding regarding Stipulated Judgment, Compl's Ex. F at 3 (Mr. Weinberg's Attorney: "With respect to the sentence calculation, Your Honor, on March 2nd, 2017,. . . the petitioner will have served twenty-six years and one hundred and eighty-one days day for day. Prior to the commencement of serving his [sixty-year] sentence, he has accrued seventy-four days of time served credit as well as seven days jail credit and two days jail credit good time. As of the date of this stipulate, March 2nd, 2017, he has since earned 3,722 days of

31. It is found that the public has a legitimate public interest in a case where the conviction for murder remains intact, yet the convict is able to secure a release from prison twenty-six years early. It is further found that the public has a legitimate public interest in the records that underlie a convicted murder's ability to earn almost thirteen years of "good time credit" in one form or another over the course of twenty-six years. See ¶ 30, n. 6, above.

32. Nonetheless, upon a careful in camera inspection, it is found that some of the in camera records contain information that Mr. Weinberg provided to the Department of Correction during the course of his incarceration. It is found that these records concerned Mr. Weinberg's religion, family and other personal matters. It is found that such matters do not reflect upon Mr. Weinberg's behavior while incarcerated. These records are identified as follows: IC-2017-317-042 (the answer to "question 3"); IC-2017-317-060, line 4[10]; IC-2017-317-061, line 12 (which begins with the number "79"); IC-2017-317-062, lines 6 through 12; IC-2017-317-065 (entire record); IC-2017-317-134 (entire record); IC-2017-317-150 (entire record); IC-2017-317-152 (entire record); IC-2017-317-154 (entire record); and IC-2017-317-156 (entire record).

33. It is found that the records, or portions of records, identified in paragraph 32, above, are not matters of legitimate public concern and the disclosure of these records or portions thereof would be highly offensive to a reasonable person. Based upon the unique facts and circumstances of this case, it is therefore concluded that such records or portions thereof are exempt from mandatory disclosure pursuant to §1-210(b)(2), G.S., and that the respondents did not violate the FOI Act by withholding such records from the complainant.

34. However, it is found that the intervenor failed to prove that the remainder of the requested records do not pertain to a legitimate matter of public concern and that their disclosure would be highly offensive to a reasonable person. It is therefore concluded that the remainder of the requested records are not exempt from disclosure pursuant to §1-210(b)(2), G.S. Consequently, it is concluded that the respondents violated the disclosure provisions of §§1-210(a) and 1-212(a), G.S., by denying the complainant's request for a copy of such records.

35. Second, the intervenor contended that a portion of IC-2017-317-092 and IC-2017-317-123 are exempt from disclosure pursuant to §1-210(b)(18), G.S. It is found that the only reason that the intervenor raises a §1-218(b)(18), G.S., exemption with regard to these records is to prevent the disclosure of his social security number. See Index to In Camera Records at 3. Because this concern has been addressed by the Commission above, see ¶ 23, n. 7, above, this matter will not be addressed further.

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statutory good time credit, 740 days of seven-day job credit. Additionally, the petitioner has earned 120 days of outstanding meritorious good time credit all told therefore according to these calculations, the petitioner will have discharged [] thirty-nine year[s]. . . .")

[10] For the benefit of all of the parties, the Commission clarifies that, while the in camera records contained page numbers from 1 through 285, they did not contain line numbers. Where the Commission finds that certain information within an in camera record may be redacted or only certain lines may be disclosed, line numbers have been added to the record at issue.

36. Third, the intervenor contended that the following records are exempt pursuant to §1-17a, G.S.: IC-2017-317-75; IC-2017-317-091; and IC-2017-317-092.

37. After a careful in camera inspection, it is found that each of the records identified in paragraph 36, above, contains a "photograph or computerized image" which was generated "in connection with the issuance of an identification card," within the meaning of §1-17a (b), G.S. It is further found that the individual to whom the record pertains has not provided "express consent" for the disclosure of said record. Accordingly, it is found that photograph or the computerized images are exempt from public disclosure pursuant to §1-17a, G.S. Furthermore, it is concluded that the respondents did not violate the FOI Act when they declined to disclose the photograph or computerized image contained in these records to the complainant.

38. However, it is concluded that, other than the photograph or computerized image, the remainder of the records are not exempt from disclosure pursuant to §1-17a, G.S. Consequently, it is concluded that the respondents violated the disclosure provisions of §§1-210(a), and 1-212(a), G.S., by denying the complainant's request for a copy of the remainder of such records.

39. Fourth, the intervenor contended that the following records are exempt from disclosure pursuant to §54-142a, G.S., (Connecticut's erasure statute), because the underlying criminal charges have been "nolled": IC-2017-317-094; IC-2017-317-232 through IC-2017-317-238; IC-2017-317-317-240; IC-2017-317-242; and IC-2017-317-243.

40. Section 54-142a(c), G.S., provides in relevant part that:

> (c) [w]henever any charge in a criminal case has been nolled in the Superior Court, or in the Court of Common Pleas, if at least thirteen months have elapsed since such nolle, all police and court records and records of the state's or prosecuting attorney or the prosecuting grand juror pertaining to such charge shall be erased.

41. Section 54-142c, G.S., provides in relevant part that:

> (a) [t]he clerk of court or any person charged with retention and control of erased records . . . or any criminal justice agency having information contained in such erased records shall not disclose to anyone the existence of such erased records or information pertaining to any charge erased under any provision of this part, except as otherwise provided in this chapter. (emphasis supplied)

42. Pursuant to §54-142g, G.S. and for purposes of 54-142c, G.S., a "criminal justice agency" is defined as including "any . . . government agency created by statute

which is authorized by law and engages, in fact, as it principal function in activities constituting the administration of criminal justice, including, but not limited to, . . . the Department of Correction . . . ."

43. It is concluded that the Department of Correction is a criminal justice agency for purposes of the erasure provisions of §54-142c, G.S.

44. However, because no evidence was offered at either of the contested case hearings to support this exemption, and because it was not apparent from the face of the records that §54-142a, G.S., applied to such records, on March 28, 2018, the hearing officer issued an order directing the intervenor to submit an affidavit indicating the steps he took to confirm that records identified in paragraph 39, above, have been erased.

45. On April 6, 2018, the intervenor filed his affidavit with the Commission.

46. It is found that, in order to confirm whether certain criminal arrest information contained in the in camera records had been erased, the intervenor reviewed his criminal history report, which he obtained from the State Police Bureau of Identification ("SPBI"). It is found that the SPBI report revealed no criminal history with regard to the matters reflected in the in camera records identified in paragraph 39, above. It is therefore found that, based on the results of the SPBI's report, the intervenor was able to determine that the information contained in such in camera records has been erased.

47. Based on the evidence contained in the intervenor's affidavit, it is found that the records identified in paragraph 39, above, have been erased within the meaning of §54-142a(c), G.S. It is concluded that such records are exempt from disclosure and that the respondents did not violate the provisions of the FOI Act when they declined to disclose such records to the complainant.

48. Finally, the intervenor contended that certain records are exempt from disclosure pursuant to §31-128f, G.S.

49. Section 31-128f, G.S., provides, in relevant part, as follows:

> No individually identifiable information contained in the personnel file or medical records of any employee shall be disclosed by an employer to any person or entity not employed by or affiliated with the employer without the written authorization of such employee except where the information is limited to the verification of dates of employment and the employee's title or position and wage or salary or where the disclosure is made: (1) To a third party that maintains or prepares employment records or performs other employment-related services for the employer; (2) pursuant to a lawfully issued administrative summons or judicial order, including a search warrant or

> subpoena, or in response to a government audit or the investigation or defense of personnel-related complaints against the employer; (3) pursuant to a request by a law enforcement agency for an employee's home address and dates of his attendance at work; (4) in response to an apparent medical emergency or to apprise the employee's physician of a medical condition of which the employee may not be aware; (5) to comply with federal, state or local laws or regulations; or (6) where the information is disseminated pursuant to the terms of a collective bargaining agreement. . . .

50. Section 31-128a (2), G.S., defines employer as "an individual, corporation, partnership or unincorporated association."

51. It is found that the respondents maintain the requested records. It is further found that the respondents are public agencies, not individuals, corporations, partnerships or unincorporated associations that employ Mr. Weinberg. Accordingly, it is concluded that the provisions of §31-128f, G.S., do not constitute an exemption to the disclosure of the requested public records.

52. In sum, it is concluded that the in camera records, other than those records identified in paragraphs 21, 32, and 39, above, and those portions specifically identified in paragraphs 32 and 37, above, and generally identified in footnote 7, above, must be disclosed to the complainant. It is further concluded that the respondents violated the disclosure provisions of §§1-210(a) and 1-212(a), G.S., when they declined to provide such records to the complainant.

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 provide the complainant with a copy of the requested records, as described in paragraph 52 of the findings, above, free of charge.

Approved by Order of the Freedom of Information Commission at its regular meeting of May 9, 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:

MARIANNE HEFFERNAN, 390 Peter Road, Southbury, CT 06488

COMMISSIONER, STATE OF CONNECTICUT, DEPARTMENT OF CORRECTION; AND STATE OF CONNECTICUT, DEPARTMENT OF CORRECTION, c/o Attorney Nicole Anker, Department of Correction, 24 Wolcott Hill Road, Wethersfield, CT 06109

Intervenor: Attorney Kenneth Rosenthal, Green & Sklarz, LLC, 700 State Street, New Haven, CT 06511

Cynthia A. Cannata
Acting Clerk of the Commission

FIC 2017-0317/FD/CAC/5/9/2018