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FREEDOM OF INFORMATION



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Wolfgang Halbig,
Complainant(s)
against

Notice of Meeting

Docket #FIC 2015-786

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

September 15, 2016

Transmittal of Proposed Final Decision Dated September 15, 2016

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 dated September 15, 2016, 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, September 28, 2016**. 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 26, 2016*. 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 26, 2016*. **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 **fifteen (15) copies** be filed *on or before September 26, 2016* 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: Attorney L. Kay Wilson
Assistant Attorney General Terrence M. O'Neill
Assistant Attorney General Steven M. Barry

FIC# 2015-786/Trans/wrbp/VRP/CAL/2016-09-15

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FREEDOM OF INFORMATION COMMISSION
OF THE STATE OF CONNECTICUT

In the Matter of a Complaint by

Report of Hearing Officer

Wolfgang Halbig,

Complainant

against

Docket #FIC 2015-786

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

Respondents

September 15, 2016

The above-captioned matter was heard as a contested case on February 18, 2016, at which time the complainant and the respondents appeared, stipulated to certain facts, and presented testimony, exhibits and argument on the complaint. The respondents submitted for an in camera inspection the records described in paragraph 21, below.

A Report of Hearing Officer was considered by the Commission at its meeting of July 27, 2016, at which time the Commission ordered the case reopened, at the respondents' request, for the purpose of offering evidence concerning the transfer of the mobile video recordings, described in paragraph 3.a., below, from the Newtown Police Department to the respondents. The Commission also permitted the complainant at the reopened hearing to contest the accuracy of the Commission's finding in paragraph 15 of the first Hearing Officer's Report. That finding, which concerned the authenticity of a certain video recording that was the subject of a different case, has been removed from this report with the agreement of the parties.

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 of complaint filed November 17, 2015, the complainant appealed to the Commission, alleging that the respondents violated the Freedom of Information ("FOP") Act by failing to comply with his October 26, 2015 request for certain records

related to the Newtown Police Department's response to the December 14, 2012 shootings at Sandy Hook Elementary School.

3. It is found that the complainant made an October 26, 2015 request to the respondents for:

- a. Mobile Video Recorder DVD's dated 12/14/12 for the Newtown Police dash cameras of Sgt. Bahamonde (2 dvd's); Officer Chapman (1 dvd); Officer Scabrook; and Lt. Sinko (2 dvd's). See the attached photocopies of the DVD labels for these dash camera recordings (mobile video recorder) for your reference.
- b. The official police reports and affidavits of Chief Kehoe, Captain Rios, Lt. Sinko, Lt. Robinson and Lt. Vangehele for events of, and their specific actions on, 12/14/12 in Newtown at the Sandy Hook Elementary School.

4. It is found that the respondents, through their Legal Affairs Unit, acknowledged the request on November 2, 2015.

5. It is found that the respondents by letter dated December 9, 2015 advised the complainant that "the publically disclosable State Police investigation into the Sandy Hook shooting" was available online, that some of the records he sought might be found there, that the State Police were not the repository for Newtown Police Department records, and that any records created by the Newtown Police Department should be requested from them. The respondents further advised the complainant that "if" the State Police were in possession of video footage originating from another agency such as the Newtown Police Department, such copies were frequently seized and logged as evidence, and that seized property was not disclosable under the FOI Act, but might be available from the originating agency.

6. It is found that the complainant had already sought the records from the Newtown Police Department, been told that the records were in the custody of the State Police, and had been told to go to the State Police to request them.

7. It is found that the records were taken by the respondents from, and with the consent of, the Newtown Police Department on February 23, 2013.¹

8. 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

¹ The respondents described this process as a "consensual seizure," a term which the Commission is unable to locate in any reported Connecticut case, although the concept is understandable as a taking of evidence without a warrant and with the consent of the party having possession of the property. The Commission notes, as found in paragraph 13, below, that the respondents did not take the original digital recordings, but rather copies burned onto DVDs for the respondents by the Newtown Police Department.

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.

9. 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.

10. 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.”

11. It is found that the respondents maintain the requested copied records, and that the records are public records within the meaning of §§1-200(5) and 1-210(a), G.S.

12. It is found that the records responsive to the portion of the request described in paragraph 3.a, above, for dash camera videos, consist of multiple DVDs containing the dash camera videos of each named Newtown police officer, and one DVD containing all the dash camera videos.

13. It is found that the DVDs maintained by the respondents are copies, made for the respondents, of the original digital recordings maintained by the Newtown Police Department.

14. It is found that the DVDs were then taken by the respondents from the Newtown Police Department on February 23, 2013.

15. The respondents contend that the requested DVDs are exempt from disclosure because they are seized evidence not subject to the FOI Act.

16. The Commission takes administrative notice of its record and decision in Docket #FIC 2014-461, Wolfgang Halbig v. First Selectman, Town of Newtown et al.

17. In Halbig v. Newtown, the Commission concluded that, at least while in the possession of the Newtown Police Department, the dash camera video from Lieutenant Sinko's vehicle was a public record within the meaning of §§1-200(5), 1-210(a) and 1-212(a), G.S.

18. The Commission also takes administrative notice of its record and decision in Docket #FIC 2014-372, Dave Altimari et al. v. DESPP et al.

19. In Altimari v. DESPP, the Commission thoroughly addressed a similar defense to disclosure raised by the respondents: that records that are seized pursuant to a warrant as evidence are not subject to the FOI Act. The Commission concluded to the contrary, was reversed by the Superior Court (DESPP v. FOIC, Docket No. HHB CV-15-6029797-S, Superior Court, Judicial District of New Britain, Memorandum of Decision dated April 8, 2016, Schuman, J.), and that decision is currently before the Appellate Court.

20. It is found that, unlike the records in DESPP v. FOIC, the requested records were not seized pursuant to a warrant.

21. It is also found that, unlike the records in DESPP v. FOIC, which were records seized from the home of the Sandy Hook shooter, the dash camera videos in this case were never private records and, one video, in the hands of the Newtown Police Department, had previously been copied for the complainant.

22. It is also found that, unlike the records in DESPP v. FOIC, the requested records are copies made for the respondents, not the original records, and that the Newtown Police Department has a minimal property interest in the DVDs that it made for the respondents.

23. It is also found that the Newtown Police Department has itself no privacy interest in the DVDs.²

24. It is also found that the Court concluded in DESPP v. FOIC, that the evidence seized pursuant to a warrant related to the conduct of the public's business, and therefore constituted public records under the FOI Act.

25. It is also found that that the Court concluded in DESPP v. FOIC that the FOI Act's disclosure provisions only conflicts with the statutes governing

... documents that were private property before seizure by the police and that a court would ordinarily order returned to the rightful owner by the end of a criminal case.... Disclosure to the public under the act in such cases is in direct conflict with the ownership rights protected by the

² The Newtown Police Department claimed no privacy right in the DVD that was provided in Halbig v. Newtown, above.

seizure statutes.... Future cases will undoubtedly involve this sort of *involuntary seizure of a victim's diary or other personal notes, a person's phone records, computer or email communications, bank records, medical records, business records*, and other items. Exposure of these items to the public when the state has not yet seen a need to do so in the criminal case entails a *significant invasion of the owner's privacy and interference with his or her property rights*. [Emphasis added; citations omitted.]

26. It is concluded that neither Altimari v. DESPP nor DESPP v. FOIC controls the outcome in this case.

27. It is therefore concluded the requested dash camera videos are not exempt from disclosure, and the respondents violated the FOI Act by withholding them.

28. With regard to the records described in paragraph 3.b, above, it is found that the responsive records consist of three written and signed statements made by three Newtown police officers to the State Police.

29. The respondents contend that those statements are exempt from disclosure pursuant to §1-210(b)(3)(C), G.S., as signed statements of witnesses.

30. Section 1-210(b)(3), G.S., provides in relevant part that disclosure is not required 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 (A) the identity of informants not otherwise known or the identity of witnesses not otherwise known whose safety would be endangered or who would be subject to threat or intimidation if their identity was made known, (B) the identity of minor witnesses, (C) signed statements of witnesses

31. The complainant contends that §1-210(b)(3)(C), G.S., which was enacted concurrently with §1-210(b)(3)(A), is intended to protect civilian witnesses, not police officer witnesses.

32. In support of his argument, the complainant cites to Sinisgalli v. O'Rourke, Docket No. CV-10-6003848, Superior Court, Judicial District of New Britain, Memorandum of Decision dated December 5, 2011 re Defendant O'Rourke's Motions to Quash and Motions for Protective Orders (Swienton, J.)

33. Sinisgalli raised the question of what duty a defendant tavern owed a patron whom it ejected from its premises and who subsequently died of hypothermia after accepting a ride from the defendant O'Rourke. In the course of discovery (not by an FOI Act request), the plaintiff served a subpoena duces tecum on the Rocky Hill Police Department commanding that copies of certain sworn statements taken in the investigation be produced, to which O'Rourke objected. The police department produced the records, and the defendant O'Rourke then sought a protective order to preclude the use of the sworn statements as evidence.

34. The Court in Sinisgalli concluded that the legislative intent of the FOI Act exemption for signed statements of witnesses was to protect witnesses. Because the police department had determined that no exemptions prevented disclosure, and no claim had been made that the witnesses could be in jeopardy or subject to intimidation, the Court concluded that the police department was within its right to disclose the sworn statements.

35. It is concluded that the Sinisgalli decision that a police department has the discretion to disclose signed witness statements is consistent with the plain meaning of the statute, and does not mean that a police department *lacks* discretion to withhold them.

36. The Commission takes administrative notice of the fact that police officers frequently are witnesses to crimes, and the legislature is presumed to have knowledge of that fact. Had the legislature wished to exclude police officers from the confidentiality provisions of §1-210(b)(3)(C), G.S., it could have done so.

37. It is concluded that the plain language of §1-210(b)(3)(C), G.S., gives the respondents the discretion to either withhold or produce the signed statements of the Newtown police officers that were interviewed by the state police.

38. Further, it is found that in light of the horror of the incident investigated, and the further emotional harm that the families of the victims would suffer from additional publicity that would likely result from the public disclosure of the witness statements, the respondents did not abuse the discretion accorded to them by the statute in declining to release the records.

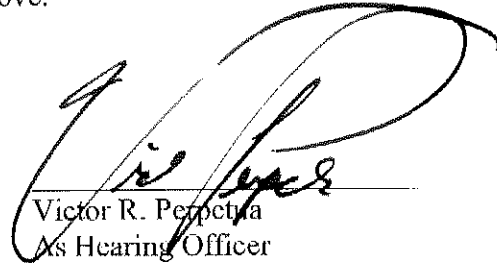
39. Also, it is found that the respondents, not the Newtown Police Department, investigated the crime, and that this case presents the unusual situation in which the Newtown police officers that were first responders, and the signers of the witness statements, were not ultimately officers of the law enforcement agency that investigated the crime.

40. Additionally, it is found that the requested witness statements are not incident reports of an investigating agency, but a record, requested by and produced for the respondents, of the facts observed by first responders, reduced to writing and formalized on signed witness statement forms.

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

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 copies of the dash camera videos described in paragraph 12, above.



Victor R. Perpetua
As Hearing Officer

FIC2015-786/HOR/VRP/09152016