

FREEDOM OF INFORMATION COMMISSION
OF THE STATE OF CONNECTICUT
18-20 Trinity Street Hartford, CT 06106
Telephone: (860) 566-5682
Toll-free (CT only): (866) 374-3617
Fax: (860) 566-6474

David Taylor,

Complainant(s)

against

Notice of Meeting

Docket #FIC 2008-029

Personnel Department, State of Connecticut,
Department of Correction; and State of
Connecticut, Department of Correction,
Respondent(s)

December 1, 2008

Transmittal of Proposed Final Decision

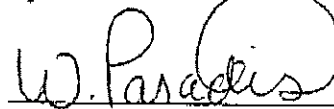
In accordance with Section 4-179 of the Connecticut General Statutes, the Freedom of Information Commission hereby transmits to you the proposed finding and decision prepared by the hearing officer in the above-captioned matter.

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, December 10, 2008**. 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 December 9, 2008*. 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 ten (10) copies** be filed *on or before December 9, 2008*. **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 **eleven (11) copies** be filed *on or before December 9, 2008*, 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: David Taylor
Sandra A. Sharr, Esq.
J. William Gagne, Jr., Esq.
Steven Strom, Esq.
cc: Joan Ellis
cc: David Caron

FREEDOM OF INFORMATION COMMISSION
OF THE STATE OF CONNECTICUT

In the Matter of a Complaint by

Report of Hearing Officer

David Taylor,

Complainant

against

Docket #FIC 2008-029

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

Respondents

December 1, 2008

The above-captioned matter was heard as a contested case on May 21, 2008, August 21, 2008, September 29, 2008, and November 21, 2008, at which times the complainant, the respondent, and the intervenors named below appeared, stipulated to certain facts and presented testimony, exhibits and argument on the complaint. The motions of David Caron and AFSCME Local 391 to intervene as parties were granted at the May 21, 2008 hearing. The complainant, who is incarcerated, appeared via teleconference, pursuant to the January 2004 memorandum of understanding between the Commission and the Department of Correction. See Docket No. CV 03-0826293, Anthony Sinchak v. FOIC et al, Superior Court, J.D. of Hartford at Hartford, Corrected Order dated January 27, 2004 (Sheldon, J.).

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 January 11, 2008, the complainant appealed to the Commission, alleging that the respondents violated the Freedom of Information ("FOI") Act by denying his December 25, 2007 request for public records.
3. It is found that the complainant made a written request on December 25, 2007 to the respondents for the disciplinary histories of two correction officers employed by the Department of Correction ("DOC"), Michel and Carron.
4. It is found that the respondents maintain no records responsive to the complainant's request for the disciplinary history of correction officer Michel.

5. It is found that the respondents acknowledged the complainant's request by letter dated January 3, 2008, at which time they informed the complainant that there were no responsive documents regarding correction officer Michel.

6. It is found that the respondents notified correction officer Caron of the complainant's request, and that Caron objected to the release of documents contained in his personnel file by letter dated January 5, 2008.

7. It is found that, by letter dated January 9, 2008, the respondents notified the complainant that they would not be providing records concerning officer Caron.

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 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:

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.

10. Section 1-212(a)(1), G.S., provides in relevant part: "Any person applying in writing shall receive, promptly upon request, a plain or certified copy of any public record."

11. It is found that the requested records concerning officer Caron are public records within the meaning of §§1-200(5), 1-210(a) and 1-212(a), G.S.

12. It is found that the only record concerning officer Caron that is responsive to the complainant's request is a proposed letter of reprimand that was issued to officer Caron but subsequently withdrawn.

13. Although the respondents initially offered to provide the record for in camera inspection, they subsequently declined to do so.

14. It is found that the proposed letter of reprimand was not physically destroyed, and continues to be maintained by the respondents.

15. The respondents and the intervenors contend that the proposed letter of reprimand should not be disclosed because it is a "false file," and that the proposed letter of reprimand was expunged from the employee's disciplinary file pursuant to the collective bargaining agreement in effect between the respondents and the intervenor local 391.

16. In Lieberman v. Board of Labor Relations, 216 Conn. 253, 261 (1990), our Supreme Court held that "an agreement to destroy public records conflicts with the relevant provisions of the General Statutes, and ... that the destruction of a public employee's discipline records is an illegal subject of collective bargaining." The Court concluded that "the legislature had not provided a blanket exemption from disclosure for all public employee discipline records that the employer has agreed to destroy." Id. at 266.

17. It is concluded that the respondents and the intervenor failed to prove that the proposed letter of reprimand was statutorily exempt simply because the employer had agreed to expunge the record from the employee's personnel file, while maintaining the record in another physical location.

18. The respondent and the intervenor also contend that the Commissioner of Correction has reasonable grounds to believe that disclosure may result in a risk of harm, including a risk of disorder in a correctional institution, and thus that the requested records are exempt under §1-210(b)(18), G.S.

19. Section 1-210(c), G.S., provides:

Whenever a public agency receives a request from any person confined in a correctional institution or facility or a Whiting Forensic Division facility, for disclosure of any public record under the Freedom of Information Act, the public agency shall promptly notify the Commissioner of Correction or the Commissioner of Mental Health and Addiction Services in the case of a person confined in a Whiting Forensic Division facility of such request, in the manner prescribed by the commissioner, before complying with the request as required by the Freedom of Information Act. If the commissioner believes the requested record is exempt from disclosure pursuant to subdivision (18) of subsection (b) of this section, the commissioner may withhold such record from such person when the record is delivered to the person's correctional institution or facility or Whiting Forensic Division facility.

20. Section 1-210(b)(18), G.S., provides that disclosure is not required of:

Records, the disclosure of which the Commissioner of Correction, or as it applies to Whiting Forensic Division facilities of the Connecticut Valley Hospital, the Commissioner of Mental Health

and Addiction Services, has reasonable grounds to believe may result in a safety risk, including the risk of harm to any person or the risk of an escape from, or a disorder in, a correctional institution or facility under the supervision of the Department of Correction or Whiting Forensic Division facilities. Such records shall include, but are not limited to:

(A) Security manuals, including emergency plans contained or referred to in such security manuals;

(B) Engineering and architectural drawings of correctional institutions or facilities or Whiting Forensic Division facilities;

(C) Operational specifications of security systems utilized by the Department of Correction at any correctional institution or facility or Whiting Forensic Division facilities, except that a general description of any such security system and the cost and quality of such system may be disclosed;

(D) Training manuals prepared for correctional institutions and facilities or Whiting Forensic Division facilities that describe, in any manner, security procedures, emergency plans or security equipment;

(E) Internal security audits of correctional institutions and facilities or Whiting Forensic Division facilities;

(F) Minutes or recordings of staff meetings of the Department of Correction or Whiting Forensic Division facilities, or portions of such minutes or recordings, that contain or reveal information relating to security or other records otherwise exempt from disclosure under this subdivision;

(G) Logs or other documents that contain information on the movement or assignment of inmates or staff at correctional institutions or facilities; and

(H) Records that contain information on contacts between inmates, as defined in section 18-84, and law enforcement officers;

21. The precise issue of whether a correction officer's disciplinary records are exempt from disclosure under §1-210(b)(18), G.S., has been addressed by the Commission in Taylor v. DOC, docket #FIC 2006-502. ("Taylor I").

22. In Taylor I, the Commission concluded that the DOC had failed to prove that disciplinary records of corrections officers, requested by inmates, are exempt from disclosure pursuant to §1-210(b)(18), G.S.

23. It is found that the evidence presented by the respondents in this case is substantially the same as the evidence presented by the respondents in Taylor I.

24. In general, the respondents presented evidence in both cases that any information whatsoever about a correction officer could hypothetically be used by an inmate to manipulate that correction officer, whether by ingratiation or coercion, and that such manipulation could

reasonably constitute a safety risk within the meaning of §1-210(b)(18), G.S. The argument essentially reduces to a claim that the kinds of manipulation by use of information that are legally permissible outside of a prison—for example, ingratiation by a subordinate with his employer by use of information about the employer, or retaliation by a subordinate against his employer by use of negative information about the employer—is not permissible inside a prison, because such ingratiation or retaliation undermines the sometimes fragile control exercised by a single correction officer against many, potentially dangerous, inmates.

25. More specifically, as in Taylor I, the respondents presented evidence, for example, that inmates having knowledge that complaints were made, or discipline was considered, against a correction officer, could make similar complaints against the officer in order to limit the officer's ability to perform his or her job. For example, the respondents presented evidence that an inmate could threaten to complain about an officer's method of "shaking down" a cell in order to make the officer reluctant to conduct a thorough "shake down" in the future.

26. It is concluded however, that based upon the same kind of evidence, the Commission in Taylor I concluded that such evidence does not meet the burden of proof required under §1-210(b)(18), G.S.

27. Although the DOC's appeal of the Commission's decision in Taylor I was sustained by the Superior Court (Docket Numbers CV-07-4015438-S and CV-07-4016766-S, Department of Correction v. FOIC, J.D. of New Britain, Memorandum of Decision dated November 3, 2008 (Cohn, J.), the judgment sustaining that administrative appeal has itself been appealed by the Commission to the Appellate Court. Therefore, pending the final resolution of Taylor I by the Appellate or Supreme Court, the Commission maintains that its decision in Taylor I was correct, and that its decision in this case is bound by the standard of proof applied in that earlier decision. The Commission notes that, just as in Taylor I, the respondents failed to present any evidence of the actual information contained in the requested record, whether by testimony or by the in camera submission of the requested record itself, or any evidence how that specific information could be used to undermine safety or security in a correctional institution.

28. It is therefore found that the respondents failed to prove that there are reasonable grounds to believe that disclosure of a correction officer's disciplinary record to an inmate may result in a risk of harm, including a risk of disorder in a correctional institution, and thus that the requested records are exempt under §1-210(b)(18), G.S.

29. It is therefore concluded that the respondent violated §§1-210(a) and 1-212(a), G.S., by failing to provide a copy of the requested 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 respondent shall forthwith provide the complainant with the requested records.



Victor R. Perpetua
As Hearing Officer

FIC/2008-029HOR/VRP/120108