Since 1975
FREEDOM OF INFORMATION
It's Your Right to Know

Connecticut Freedom of Information Commission · 18-20 Trinity Street, Suite 100 · Hartford, CT 06106
Toll free (CT only): (866)374-3617 Tel: (860)566-5682 Fax: (860)566-6474 · www.state.ct.us/foi/ · email: foi@po.state.ct.us

Dave Altimari and the Hartford Courant,
Complainant(s)
against

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

Notice of Meeting

Docket #FIC 2014-372

April 21, 2015

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, lst floor, Hartford, Connecticut, at **2 p.m. on Wednesday, May 13, 2015.** 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 May 1, 2015.*** 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 May 1, 2015.*** **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 May 1, 2015,*** 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: William Fish, Esq.
Steven M. Barry, Esq. and Lynn D. Wittenbrink, Esq.

2015-04-21/FIC# 2014-372/Trans/wrbp/KKR//TAH

FREEDOM OF INFORMATION COMMISSION
OF THE STATE OF CONNECTICUT

In the Matter of a Complaint by

Report of Hearing Officer

Dave Altimari and the
Hartford Courant,

Complainants

against

Docket #FIC 2014-372

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

Respondents

April 21, 2015

The above-captioned matter was heard as a contested case on January 6, 2015 and February 19, 2015, at which times the complainants and the respondents appeared, stipulated to certain facts 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 January 24, 2014, the complainants requested from the respondents, copies of certain documents referenced in the state police[1] report pertaining to the December 14, 2012 shootings at Sandy Hook Elementary School ("SHES").[2] Such documents shall be referred to herein as "the requested documents."

[1]The State Police is a division within the respondent Department of Emergency Services and Public Protection.

[2]Some of the specific items requested include "a spiral bound book written by the shooter entitled 'The Big Book of Granny';" "class photo of the Class of 2002-2003 at SHES;" "a yellow folder containing hand drawn comic- style pictures and stories about Pokemon-type characters;" "packet containing educational information from SHES for the shooter, including report cards and IEPs;" "list of problems and requests from the shooter to Nancy;" "'Lovebound'" – screenplay or script describing a relationship between a 10 year old boy and a 30 year old man;" and "spreadsheet ranking mass murders by name, number killed, number injured, types of weapons used, and disposition."

3. It is found that, by letter dated January 27, 2014, the respondents' legal affairs unit acknowledged receipt of the request, and informed the complainants that it would be "processed in accordance with the provisions of the Freedom of Information Act and any other applicable provision of law."

4. It is found that, by letter dated May 29, 2014, the complainants renewed their request, having received no responsive documents by that date.

5. By letter of complaint dated and filed June 11, 2014, the complainants appealed to the Commission, alleging that the respondents violated the Freedom of Information ("FOI") Act by failing to comply with their request.

6. By letter dated December 8, 2014, the respondents informed the complainants that "there are no documents responsive to your [FOI] request" because "you have requested access to or copies of...items of evidence that were seized or otherwise collected as part of the criminal investigation of the incident. Evidence collected as part of a criminal investigation does not constitute a 'public record' under the Connecticut [FOI] Act."

7. The complainants contended, at the hearing in this matter, that the requested documents fit squarely within the definition of "public records" in the FOI Act, and must be disclosed, unless proven exempt.

8. The respondents argued that the requested documents are not "public records" because they do not "relate[] to the conduct of the public's business," and because they are evidence under the control of the judicial branch pursuant to a statutory scheme pertaining to search warrants and seized property. The respondents further argued that the requested documents are not "public records" because they are the private property of the shooter and/or his mother, and their disclosure would constitute an invasion of the shooter's and/or his mother's personal privacy. Finally, the respondents argued that the requested documents are not "public records" because the public records retention schedule for the respondent department's records does not include documents seized pursuant to a search warrant.

9. At the January 6th hearing in this matter, the respondents requested that the hearing be bifurcated to permit the Commission to first consider their claim that the requested documents are not "public records," and to consider thereafter whether any exemptions applied to such documents only if the Commission determined that the documents are "public records." The hearing officer denied the request to bifurcate. However, at the February 19th hearing, the respondents were provided an opportunity to claim any exemptions to disclosure.

10. 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.

11. 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...Each agency shall keep and maintain all public records in its custody at its regular office or place of business in an accessible place and, if there is no such office or place of business, the public records pertaining to such agency shall be kept in the office of...the Secretary of the State...."

12. 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."

13. It is found that the requested documents were seized pursuant to search warrants, dated December 14, 2012, and December 15, 2012, for the shooter's residence, in connection with the investigation of the shootings at SHES.

14. It is found that, at the time of the request, described in paragraph 2, above, the state police investigation into the shootings was concluded and it had been determined that no arrest would be made in connection therewith.

15. Under §1-200(5), G.S., the requested documents are "public records" if all prongs of that definition are met.

16. First, the requested documents must be "recorded data or information" that is "handwritten, typed, tape-recorded, printed, photostated, photographed, or recorded by any other method." The respondents did not dispute that each of the requested documents meets this prong of the definition, and it is so found.

17. Next, the requested documents must "relate[] to the conduct of the public's business." The respondents claimed, in their post-hearing brief, without argument or

citing to any legal authority, that the requested documents do not "pertain to the conduct of the public's business," under §1-200(5), G.S.

18. In Sheila Young v. Chief of Police, Groton Police Department, FIC 94-378 (September 27, 1995), the Commission concluded that a booklet entitled, "The Right of Death," that was "physical evidence collected from the home" of the requestor following an accident that resulted in her son's death, was a "public record," under §1-200(5), G.S., because it pertained to the investigation and therefore to the conduct of the public's business.

19. With regard to whether the requested documents in this case "relate[] to the conduct of the public's business, it is found that the state police described the items they sought to seize, in the December 15, 2012 search warrant application,[3] as follows:

> Written documents presumed to be authored and/or collected by [the shooter]. These documents include but are not limited to personal notes, memoirs, and thoughts presumably created by [the shooter]. Documents such as these are routinely utilized by investigators to develop a psychological profile of the author of such. (Emphasis added).

20. The Commission takes administrative notice of the summary of the investigation into the shootings prepared by the State's Attorney for the Judicial District of Danbury, dated November 25, 2013 ("summary"). It is found that the summary details not only the actions of the shooter that day, but also concludes that the shooter had "significant mental health issues." It further concludes that the shooter "had a familiarity with and access to firearms and ammunition and an obsession with mass murders...." The summary concludes, based upon the investigation, that "the shooter acted alone and was solely criminally responsible for his actions of that day."

21. In addition, the Commission takes administrative notice of the following: the shootings at SHES constituted one of the worst mass murders in the history of the United States, and that the shootings uniquely captured the attention of not only the residents of the State of Connecticut, but also of the United States and the world.[4] Based upon the foregoing, and the summary, it is found, that in the aftermath of the shootings, there was heightened public interest in the shootings, in determining how and why such shootings occurred, and in preventing such a horrific crime from happening again.

---

[3] This search warrant application pertains to the majority of the requested documents in this case.

[4] "Nation Reels After Gunman Massacres 20 Children at School in Connecticut," by James Barron for the New York Times, December 14, 2012; "World Reaction: 'My Heart is in Newtown'" by Sarah Brown for CNN, December 17, 2012; "Sandy Hook Shooting: World Reactions to Connecticut Tragedy," by Cassandra Vinograd, for the Associated Press, December 15, 2015.

22. The Commission also takes administrative notice of the following: significant public resources were expended in an effort to answer the questions of why the shootings occurred and how to prevent future school shootings. The investigation, which took almost an entire year, was conducted by the state police with assistance from various other municipal, state and federal agencies. The state's attorney was intimately involved in the investigation as well. In response to the shootings, stricter gun laws were debated and passed in Connecticut and a law requiring state agencies to coordinate with other state agencies to address children's behavioral and mental health needs also was passed by the General Assembly. The state created several task forces in response to the shootings, including the Sandy Hook Advisory Commission, charged with making recommendations to improve school security, mental health services, and gun violence prevention. The various task forces spent a tremendous amount of time discussing and debating the various issues that arose from the shootings, and writing reports of their findings.[5]

23. Based upon the foregoing, it is found, under the facts and circumstances of this case, that the requested documents informed the investigation into the shootings. It is found that the requested documents may assist the public in evaluating (a) the quality of the investigation conducted, and the conclusions reached, by the state police and (b) whether the expenditure of state resources in connection with the shootings was justified.

24. Thus, under the facts and circumstances of this case, where there was heightened public interest generally in the shootings and, specifically, in knowing how and why the shootings occurred; the requested documents informed the investigation; significant public resources were expended in conducting a massive, year-long investigation, and in examining gun control measures and mental health issues arising out of the shootings; and where *there will be no criminal prosecution* through which the public otherwise would have any access to the requested documents, the requested documents "relate[] to the conduct of the public's business," within the meaning of §1-200(5), G.S.

25. Next, the requested documents must be "prepared, owned, used, received or retained by a public agency." It is found that the state police "used" the requested documents in performance of its public function to investigate the shootings. It is further found that the requested documents were "received" and are "retained" by the state police. Accordingly, it is found that this prong of the definition also is satisfied.

26. Based on the foregoing, it is concluded that the requested documents are "public records" under the definition in §1-200(5), G.S.

27. Under §1-210(a), G.S., the requested documents are public records, unless a federal law or state statute provides otherwise. The respondents argued, at the hearing in this matter, that there is a "whole statutory scheme" – specifically §§54-33a et seq,

---

[5] "Gov. Malloy Receives Interim Report from the Sandy Hook AdvisoryCommission" Press Release from the Office of the Governor, dated March 18, 2013.

entitled "Searches," and §§54-36a et seq., entitled "Seized Property, that provides that the requested documents are not public records. The respondents also argued that the Fourth Amendment to the United States Constitution mandates the conclusion that the requested documents are not public records.

28. Generally, §§54-33a et seq., entitled "Searches," sets forth the procedure by which a prosecutor may apply to a judge for a search warrant. The statutes further require the applications and supporting affidavits, an inventory of seized property, and the return of the warrant, be filed with the court on forms prescribed by the Chief Court Administrator.

29. Generally, §§54-36a et seq., entitled "Seized Property, sets forth the procedure by which the court may order that items of personal property seized pursuant to a search warrant be returned to their owner or otherwise disposed of, and the circumstances under which such return or disposal may occur.

30. The Supreme Court examined the "except as otherwise provided language" in §1-210(a), G.S., in Chief of Police v. Freedom of Information Commission, 252 Conn. 377 (2000). In Chief of Police, the Court concluded that the Federal Rules of Civil Procedure were not federal laws that "otherwise provided" that the records at issue were not public records under the FOI Act. The Court stated that the "except as otherwise provided language" in §1-210(a), G.S., refers to "federal and state laws that, by their terms, provide for confidentiality of records or some other similar shield from public disclosure." Id. 399-400.

31. Later, in Department of Public Safety v. Freedom of Information Commission, 298 Conn. 703 (2010), the Supreme Court concluded that a provision in Connecticut's Megan's Law requiring that "registration information" ordered by the court not to be disseminated to the public, was a state law that "otherwise provided" that the requested "registration information" was not a public record under §1-210(a), G.S. Id. 725.

32. In Pictometry Int'l Corp. v. Freedom of Information Commission, 307 Conn. 648 (2013), the Supreme Court again examined the "except as otherwise provided" language in §1-210(a), G.S., and concluded that the Federal Copyright Act ("FCA") is a federal law that falls within the "except as otherwise provided" language of §1-210(a), G.S., despite the fact that it does not *prohibit* disclosure, but rather only imposes *limits* on the *copying* of public records. Id. 665, 671, 675-677.

33. Thus, under the controlling precedent, a federal law or state statute must contain *some* language that specifically provides for confidentiality or non-disclosure of the records at issue, or places limits on disclosure or copying of such records, or provides for a similar shield from public disclosure, in order for it to fall within the "except as otherwise provided" language in §1-210(a), G.S.

34. In the present case, the respondents did not point to any language in the state statutes on which they relied that provides that recorded information or data seized pursuant to a search warrant is not a "public record" under the FOI Act, or that provides for confidentiality, non-disclosure or limits on disclosure; or that provides that such recorded information or data may not be copied or inspected, or that limits copying or inspection. It is found that there are no such provisions. It is further found that these statutes do not provide a "similar shield from public disclosure."

35. Accordingly, it is concluded that the state statutes cited by the respondents do not "otherwise provide[]" that the requested documents are not "public records" under §1-210(a), G.S.

36. With regard to the respondents' additional claim that the requested documents may not be copied or inspected by the public because the judicial department "controls the seized property," it is found that, although the statutes make clear that property may be *seized* and *disposed of* only pursuant to a court order, there is no language in any of the statutes relied upon by the respondents to support the claim that the judicial branch controls the seized property or, more specifically, controls how such property is handled during the time that the respondents retain it.

37. To the contrary, based upon the search warrant applications, it is found that the court's order granting the search warrants in this case specifically require the state police to "find[] said property to seize the same, take and keep it in custody until further order of the court...." (Emphasis added). Moreover, it is found that an internal state police policy regarding the chain of custody for seized property ("policy"), offered as evidence by the respondents in this matter, makes it clear that the *state police* alone have control over the seized property during the time that the property is retained by them (i.e. after the property is seized, but before it is disposed of).

38. The respondents argued that because the policy permits only a limited number of specified personnel to access property seized pursuant to a search warrant, and because a certain process must be followed by the state police with regard to the handling of seized property, such property is not a "public record." However, the Commission notes that the policy, regardless of its content, is not a federal law or state statute that falls within the "except as otherwise provided" language in §1-210(a), G.S. Moreover, a chain of custody policy has no bearing on whether the requested documents are "public records" under the FOI Act. Accordingly, the respondents' reliance on the policy for their claim that the requested documents are not public records under §1-210(a), G.S., is without merit.

39. Additionally, the respondents argued that the requested documents are items of personal property belonging to the shooter and/or his mother, and that the state police are merely the custodians of such personal property. According to the respondents, then, such items are not "public records," and the fact that they were seized by the state police does not transform them into "public records." However, "a person's privacy interest in his [or her] home and personal effects is subject to reasonable governmental intrusion

when the police enter and obtain evidence of a crime pursuant to a search warrant based on probable cause." Wayne Harris, Katherine Harris; Thomas Klebold; Susan Klebold; Theodore B. Mink, III, in his capacity as Sheriff of Jefferson County, Colorado; and Jefferson County Sheriff's Department v. The Denver Post Corporation, 123 P.3d 1166, 1170 (November 14, 2005) ("Denver Post"); see Camera v. Municipal Court of City and County of San Francisco, 387 U.S. 523, 528 (1967) ("[e]xcept in certain carefully defined classes of cases, a search of private property without proper consent is 'unreasonable' unless it has been authorized by a valid search warrant."). Accordingly, "evidence of crime necessarily loses its entirely private character when [the police] lawfully obtain it for use in a criminal investigation and/or prosecution on behalf of the public." Denver Post, at 1170.

40. The respondents also argued, in their post-hearing brief, without explanation or legal analysis, that the Fourth Amendment to the United States Constitution is a federal law that "otherwise provide[s] that the requested documents are not public records under §1-210(a), G.S. It is concluded that the Fourth Amendment does not "otherwise provide[]" that the requested documents are not "public records."

41. Related to the argument set forth in paragraph 40, above, the respondents further argued, in their post-hearing brief, that disclosure of the requested documents under the FOI Act would constitute an invasion of the shooter's and/or his mother's privacy under the Fourth Amendment. The respondents cited no statute or case law to support the necessary preliminary finding that they have standing to raise the privacy rights of the property owners. Indeed, the United States Supreme Court has ruled that "Fourth Amendment rights are personal rights which...may not be vicariously asserted." Rakas v. Illinois, 439 U.S. 128 (1979), citing Brown v. United States, 411 U.S. 223, 230 (1973). However, even if the respondents were found to have standing, it is also found that the respondents' Fourth Amendment/privacy arguments relate to the validity of the search warrant and to the reasonableness of the search itself, not to disclosure under the FOI Act. Accordingly, such arguments lack merit and shall not be further considered herein.

42. Finally, the respondents claim that because the public records retention schedule for records of the respondent department does not include documents that were seized by the state police pursuant to a search warrant, such documents are not "public records." Although it is found that the retention schedule for records of the respondent department does not include documents seized pursuant to a search warrant, it does not follow necessarily that such documents are not "public records" under the FOI Act. Unquestionably, the question of whether or not records are "public records" under the FOI Act is a determination to be made by the FOI Commission. Indeed, the Office of the Public Records Administrator acknowledges this in the following statement included in the respondent department's records retention schedule, posted on its website, of which the Commission takes administrative notice:

> 8. FOIA DISCLOSURE: This retention schedule governs the retention of public records- not the disclosure of public

> records. Refer to CGS §1-200 et seq. or contact the Office of Governmental Accountability, Freedom of Information Commission (FOIC), regarding the disclosure of public records.

Accordingly, the respondents' claim that only those documents listed on the retention schedule are "public records" under the FOI Act is without merit.

43. For all of the foregoing reasons, it is concluded that the requested documents are public records under §1-210(a), G.S.

44. Although the respondents were provided the opportunity to offer evidence that the requested documents are *exempt* from disclosure, the respondents declined to do so. Instead, the respondents offered an affidavit of Christine Plourde, supervisor of the respondent department's Legal Affairs unit, in which Attorney Plourde averred that, although she had not looked at the requested documents, she believed that some of the documents might be exempt from disclosure under §§1-210(b)(2), 1-210(b)(10), 1-210(b)(11) and 1-210(b)(17), G.S.

45. "It is axiomatic that the burden of proving the applicability of any exemption in the act rests with the party claiming the exemption." Director, Dep't of Information Technology v. Freedom of Information Commission, 274 Conn. 179, 189 (2005), citing Ottochian v. Freedom of Information Commission, 221 Conn. 398 (1992). It is found that the respondents failed to prove that any of the requested documents are exempt from disclosure pursuant to any exemption.

46. The Commission notes that the respondents' argument that documents seized pursuant to a search warrant are not "public records," is unprecedented. In Joe Wojtas and the New London Day v. Commissioner, State of Connecticut, Department of Public Safety, Docket 2010-549 (July 13, 2011) ("New London Day"), the respondents did not argue that the documents were not "public records."[6] Rather, the respondents, without contesting that the documents were public records, argued that such public records were exempt from disclosure pursuant to §1-210(b)(3), G.S. – the so-called "law enforcement" exemption.[7]

47. The Commission further notes that the position taken by the respondents in this case—that the requested documents are not public records—is contradicted by the fact that at least some of these documents are discussed, in detail, in the state police reports made available to the public. For example, the "Big Book of Granny," is referenced in state police report number 1200704559, and described in a supplemental

---

[6] The Commission also notes that in New London Day, the state police copied the records at issue, and submitted them for in camera inspection by the Commission.

[7] The Commission further notes that, in most cases, §§1-210(b)(3) or 1-215, G.S., would apply to exempt from public disclosure documents seized pursuant to a search warrant in situations where a criminal investigation or prosecution was pending.

state police report, dated August 23, 2013. The report summarizes pages, chapters or section of the book, sometimes using direct quotes from it.

48. For all of the reasons set forth above, it is concluded that the respondents violated the FOI Act, by failing to provide a copy of the requested documents 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 each of the requested documents, free of charge, to the complainants.

Kathleen K. Ross
as Hearing Officer

FIC/2014-372/kkr/04212015