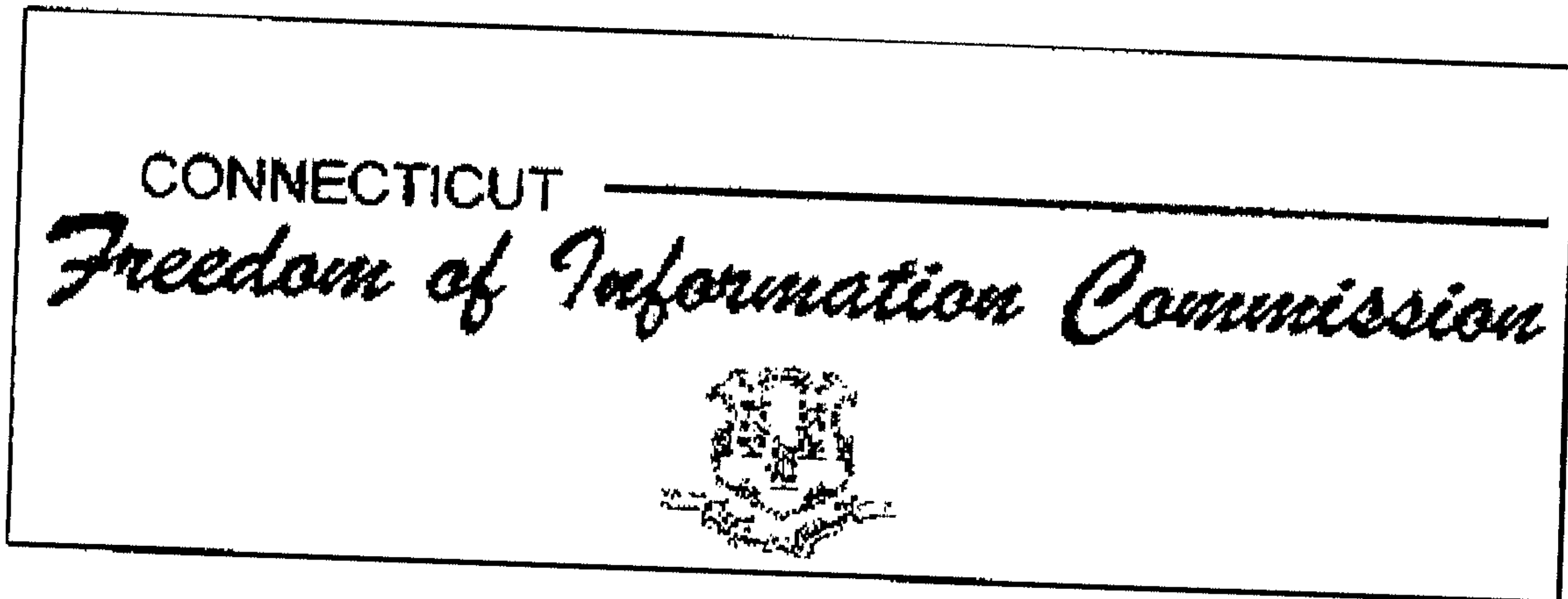

18-20 TRINITY STREET, 1st FLOOR
HARTFORD, CONNECTICUT 06106
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TO:	Robert J. Krzys, Esq.
TELECOPIER NUMBER:	860-371-3700
FROM:	Wendy R.B. Paradis
Pages Transmitted: *(including cover sheet)*	18 Pages
DATE:	December 28, 2009

COMMENTS:

Transmittal of Proposed Final Decision Dated December 23, 2009 and Proposed Final Decision

The current Final Version

TELECOPIER COVER SHEET
IF ANY PROBLEMS OCCUR WITH TRANSMISSION, PLEASE CONTACT SENDER AT THE ABOVE TELEPHONE NUMBER. THANK YOU.

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" NOTE ~~115, 40~~, ¶'s 42-49,

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

Richard Stevenson,
Complainant(s)
against

Notice of Meeting

Docket #FIC 2009-020

Joan M. Ellis, Administrator, State of Connecticut, Department of Correction, Freedom of Information Office; and State of Connecticut, Department of Correction,
Respondent(s)

December 28, 2009

Transmittal of Proposed Final Decision Dated December 23, 2009

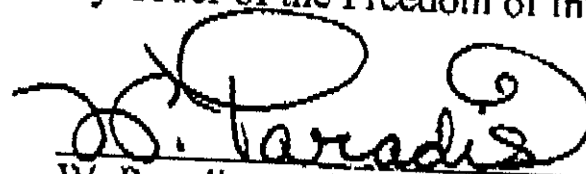
In accordance with Section 4-179 of the Connecticut General Statutes, the Freedom of Information Commission hereby transmits to you the proposed finding and decision dated December 23, 2009, prepared by the hearing officer in the above-captioned matter.

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 **10:00 a.m. on Wednesday, January 6, 2010.** 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 January 5, 2010 by 3:00 PM.* 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 January 5, 2010 by 3:00 PM.* **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 January 5, 2010 by 3:00 PM* 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: Richard Stevenson, Nicole Anker, Esq.
Terrence M. O'Neill, Esq., J. Wm. Gagne, Jr., Esq.
Daniel P. Hunsberger, Esq., Lynn D. Wittenbrink, Esq. cc: Joan Ellis

FREEDOM OF INFORMATION COMMISSION
OF THE STATE OF CONNECTICUT

In The Matter of a Complaint by

Proposed Final Decision

Richard Stevenson,

Complainant

against

Docket #FIC 2009-020

Joan M. Ellis, Administrator, State of Connecticut, Department of Correction, Freedom of Information Office; and State of Connecticut, Department of Correction,

Respondents

December 23, 2009

The above-captioned matter was heard as a contested case on June 30, 2009, at which time the complainant and the respondents appeared, stipulated to certain facts and presented testimony, exhibits and argument on the complaint. The complainant, an inmate, 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.).

By order of the hearing officer, the hearing was reopened by notice dated August 19, 2009 for the purpose of taking testimony from Daniel P. Callahan, the director of the State Department of Correction, Human Resources Unit. Reopened hearings were held on October 27 and October 30, 2009 at which times the complainant and the respondents appeared and presented additional testimony, exhibits and argument on the complaint.

At the October 27, 2009 reopened hearing, AFSCME Council 4 Locals 387, 391, & 1565, requested and was granted party status in the above-captioned matter. AFSCME Council 4 Locals 387, 391, & 1565 is the labor union for some of the employees who are the subjects of the request records at issue in this matter.

The Commission takes administrative notice of the record in Docket #FIC 2009-466; Curt Rivard v. Lauren Powers, Freedom of Information Officer and Deputy Warden, State of Connecticut, Northern Correctional Institution, Department of Correction; and State of Connecticut, Department of Correction.

At the request of the respondents, the Commission takes administrative notice of the State of Connecticut, Office of Policy and Management, Office of Labor Relations, General Notice No. 2009-14 regarding Correctional Supervisors (NP-8 Unit) Contract Changes dated May 27, 2009.

A Report of Hearing Officer was issued on December 7, 2009. The Commission considered such report at its regular meeting of December 16, 2009. At that time, the Connecticut State Employees Association, SEIU Local 2001 petitioned to intervene. The Commission voted to grant the petition and permit the intervener to submit evidence related to its claims that its collective bargaining agreement with the state precludes disclosure of the records at issue in this matter to inmates. The intervener submitted the evidence on Friday, December 18, 2009, and has been marked as after-filed exhibits.

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 dated December 15, 2008, the complainant made a request to the respondents for a copy of "all names and charges and dispositions of criminal cases against Connecticut Department of Correction administrators, staff, and employees dating from January 2005 through the present."

3. It is found that, pursuant to the respondent Department's Administrative Directive 2.17, all employees of the respondent department must report any arrest, or receipt of any summons received from a law enforcement agency or court, and subsequent disposition, including conviction, to an appropriate supervisor.

4. It is found that the respondent Department maintains records of the information described in paragraph 3, above, as described in the findings below.

5. It is found, however, that by letter dated December 22, 2008, the respondent Ellis informed the complainant that "there is no document responsive to your request. Documentation of this nature is filed by date of occurrence. The Connecticut Freedom of Information statute does not require agencies to answer questions, create documents or do research."

6. By letter dated January 2, 2009 and filed on January 8, 2009, the complainant appealed to this Commission alleging that the respondents violated the Freedom of Information ("FOI") Act by failing to comply with his records request. The complainant requested the imposition of a civil penalty against the respondents.

7. 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.

8. 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 . . . receive a copy of such records in accordance with section 1-212.

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

10. It is found that the records described in paragraph 3, above, are public records within the meaning of §§1-200(5), 1-210(a), and 1-212(a), G.S.

11. It is found that the respondent Department maintains the records described in paragraph 3, above, in the form of "Incident Reports," which forms are used to transmit any written correspondence throughout the Department. According to the respondents, these Incident Reports are filed by date, not by name or category; each facility within the Department maintains its own files of Incident Reports; up to 150 Incident Reports are filed each month in each of the Department's facilities; and the total number of pages of Incident Reports on file for the period requested by the complainant (2005 to the present) would number in the thousands. According to the respondents, they would have to research these thousands of pages to find the records requested by the complainant, because he hasn't identified the specific dates the Incident Reports were filed.

12. It is also found that the Incident Reports, or the information reported therein, are also recorded in the Department's personnel files of its employees, maintained in its Human Resources Unit. Although the respondents had not consulted with the Human Resources Unit regarding how to comply with the complainant's records request, the respondents nevertheless contended that that the Human Resources Unit would have to search through all of its employee personnel files, numbering over 7,000, to find those particular files in which the responsive records may exist.

13. In sum, the respondents' position, as established by their testimony at the June 30, 2009 hearing, was that complying with the complainant's request was an enormous task that would take months or even years to complete, that it was overly burdensome, tantamount to research, and moreover, that it was practically impossible.

14. To more fully investigate the facts concerning the claimed near impossibility of retrieving the records requested by the complainant, the hearing officer, after the close of the June 30, 2009 hearing, ordered the hearing reopened for the purpose of taking testimony from Daniel P. Callahan, the director of the Human Resources Unit of the respondent Department, the notice of which was issued on August 19, 2009. By order dated September 11, 2009, the hearing officer ordered Mr. Callahan to appear before the FOI Commission at the reopened hearing and

to bring with him responsive records of at least one employee of the respondent department so that the hearing officer could determine the nature and content of the requested records.

15. Reopened hearings were held on October 27 and 30, 2009, at which times Mr. Callahan appeared and testified, but he did not bring with him the responsive records as ordered.

16. Based on the testimony at the reopened hearings, it is found that the respondent department's Human Resources Unit maintains a log of the names of all employees who have reported arrests or receipt of a summons from a law enforcement agency or court in a criminal matter in compliance with the respondent department's Administrative Directive 2.17. It is found that said log lists approximately 130 such employees.

17. It is therefore concluded that the respondents' representations and testimony concerning the need to search over 7,000 employee personnel files, and concerning the practical impossibility of retrieving the requested records, was not accurate.

18. It is found that, to compile the requested records, the respondents could retrieve the files of only the employees whose names are in the log, and select from those 130 files the record, or records, that contain the employee's name, the charges and the disposition of the criminal case or cases maintained in the file of that employee.

19. It is found, based on reasonable inferences from the facts on the record, that it is most likely that the records responsive to the complainant's request consist of one or two records per employee, because the report of the arrest or the summons, which would include the name of the employee and the charges, should be contained in a single record and the report of the final disposition should be contained in another. It is found, again based on reasonable inferences from the facts on the record, that only this limited number of pages would need to be collected to fulfill the complainant's request, and not any other records pertaining to the employee's report of arrest or criminal summons, such as the Department's independent investigation of the reported arrest or criminal summons.

20. It is found, therefore, that contrary to their letter of response described in paragraph 5, above, the respondents do maintain records responsive to the complainant's request and that they are able to compile the requested records with much greater ease and efficiency than they testified to at the July 30, 2009 hearing.

21. It is also found that the respondents' claim that compliance with the complainant's request would be practically impossible is completely unfounded.

22. It is also found that compliance with the complainant's request would not require research, but only a search through the specific personnel files corresponding to the log of employees who have reported arrests or summonses. The respondents refused to comply with this Commission's order to submit the requested records for in camera review. Therefore, it is found, based on reasonable inferences from the facts on the record, and utilizing its own expertise concerning the manner in which personnel files are maintained, that the identification of records, in those specific personnel files, reporting employee arrests and summons would not require the exercise of anything more than clerical skills. See Wildin v. FOIC , 6 Conn App. 683 (2000). (A search for identified records that requires neither analysis or the exercise of

discretion is not research, and a record request that is simply burdensome does not make that request one requiring research.)

23. It is therefore concluded that the respondents are obligated to search for the requested records, even if such search is time-consuming.

24. At the reopened hearings held on October 27 and 30, 2009, the respondents abandoned their previous position and contended, instead, that disclosure of the requested records would violate the respondents' undue familiarity policy, that some of the requested records were subject to the erasure provisions of §54-142a(c), G.S., and that all of the requested records were exempt from disclosure pursuant to §1-210(b)(18), G.S.

25. However, although the respondents never claimed that disclosure of the requested records would constitute an invasion of personal privacy pursuant to §1-210(b)(2), G.S., the respondents nevertheless, notified the 130 employees who are the subjects of the requested records pursuant to the provisions in §1-214, G.S.

26. It is found that of the 130 employees, 79 filed written objections to the disclosure of their arrest records. Although 51 employees did not object to the disclosure of their arrest records, the respondents did not provide copies of the records of those employees to the complainant.

27. The respondents contend that disclosure of the requested records would be in violation of the respondents' undue familiarity policy, because the records contain the first names of DOC employees. The respondents further contend that the undue familiarity policy is directly related to the safety and security of the prison because a lack of familiarity decreases the risk of a DOC employee being manipulated by an inmate to engage in practices that would endanger any number of DOC employees and inmates.

28. It is found, however, that the respondents testified in Docket #FIC 2009-466 that they do not prohibit inmates from knowing the full names of DOC employees, and that records regularly provided to inmates sometimes include the full names of DOC employees. Thus, it is found that the respondents do not enforce a strict policy against inmates knowing DOC employees' first names, but rather that DOC prefers that the first names not be known or used by inmates, and that correctional officers are trained not to provide their first names. It is found that inmates are only penalized for using a correctional employee's first name when that inmate continues to do so after having been given a directive not to do so. It is found that the directive is given on a case-by-case basis, at the discretion of the employee.

29. To the extent that the respondents are asserting that their undue familiarity policy constitutes a ban against disclosure of correctional officers' first names, it is concluded that such policy is not a statutory defense to disclosure under §1-210, G.S.

30. Moreover, it is found that the evidence fails to support the respondents' position that inmates are unaware of correction officers' first names, or prevented from learning the names from other sources.

31. It is concluded, therefore, that the respondents' contention that the requested records should not be disclosed to the complainant because they include the first names of DOC employees is unsupportable in light of the evidence and the lack of any legal authority to withhold them on that basis.

32. With respect to the respondents' contention that some of the requested records were subject to the erasure provisions of §54-142a(c), G.S., that section provides in relevant part that:

> (c) Whenever 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.

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

> (a) The clerk of the 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 <u>or information pertaining to any charge erased</u> under any provision of this part, except as otherwise provided in this chapter. [emphasis added]
>
> (b) Notwithstanding any other provisions of this chapter, within two years from the date of disposition of any case, the clerk of the court or any person charged with the retention and control of erased records . . . or any criminal justice agency having information contained in such erased records may disclose to the victim of a crime or the victim's legal representative the fact that the case was dismissed. If such disclosure contains information from erased records, the identity of the defendant or defendants shall not be released, except that any information contained in such records, including the identity of the person charged may be released to the victim of the crime or the victim's representative upon written application by such victim or representative to the court stating (1) that a civil action has been commenced for loss or damage resulting from such act, or (2) the intent to bring a civil action for such loss or damage.

34. Pursuant to §54-142g(b), 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 . . . ."

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

36. It is further concluded that the erasure provisions of §§54-142a and 54-142c, G.S., supersede the disclosure requirements of the FOI Act, and that any of the requested records subject to the erasure statutes are not required to be disclosed.

37. It is found, however, that the respondents failed to describe or identify which of the requested records were actually subject to the erasure provisions of §54-142c, G.S. It is found that the respondents failed to provide any evidence as to the number of arrest records that were subject to the erasure provisions of §54-142c, G.S., but only stated that they try to keep track of which records have been erased as best they could.

38. The respondents also refused to comply with the Commission's order, issued on October 30, 2009, to submit all of the subject records, unredacted, for in camera inspection.

39. Although the respondents attempted to submit redacted records in response to the hearing officer's order, described in paragraph 14, above, the Commission believes that it cannot make informed decisions on the basis of edited records, and will not as a matter of policy permit agencies to redact records submitted for in camera inspection.

40. Thus, it is found that there is no credible evidence on the record as to which particular employees' arrest records are subject to the erasure provisions, or even the number of employees whose arrest records are subject to the erasure provisions.

41. It is found, therefore, that the respondents failed to prove which, if any, of the records are subject to the erasure provisions of §54-142c, G.S.

42. The intervener, on brief and in its oral argument to the Commission, contends that pursuant to the Collective Bargaining Agreement (hereinafter "the agreement") between the State of Connecticut and the Connecticut State Employees Association, SEIU Local 2001 (hereinafter "NP-8 Unit") and an April 6, 2009 arbitration award, the requested records that pertain to employees of the NP-8 Unit are exempt from mandatory disclosure to inmates under the FOI Act.

43. It is found that the NP-8 Unit and the State of Connecticut commenced negotiations in September of 2007 for an agreement to succeed the agreement that expired on June 30, 2008. It is found that the NP-8 Unit's declaration of impasse resulted in interest arbitration which began in February of 2008. It is found that one of the issues in dispute was the disclosure of personnel files under the FOI Act. It is found that, in this regard, the arbitrator awarded to the NP-8 Unit its last best offer which added a new section to the agreement, Article 9, that states, "Personnel files of bargaining unit employees shall not be subject to disclosure under the State's Freedom of Information Act where the request for disclosure is made by an inmate or made by someone on behalf of an inmate."

44. Section 5-278, G.S., provides in relevant part:

"(b) Any [collective bargaining] agreement... shall be reduced to writing.... The agreement, together with a request for ...approval of any provisions of the agreement which are in conflict with any statute or any regulation of any state agency....shall be filed ...with the clerks of the House of Representatives and the Senate..."

"...The agreement or award shall be deemed approved if the General Assembly fails to vote to approve or reject such agreement or award within thirty days after such filing or submission...."

(Emphasis added.)

"(e) Where there is a conflict between any agreement or arbitration award approved in accordance with the provisions of sections 5-270 to 5-280, inclusive, on matters appropriate to collective bargaining...and any general statute or special act, or regulations adopted by a state agency, the terms of such agreement or arbitration award shall prevail..."

(Emphasis added.)

45. It is concluded that, pursuant to §5-278, G.S., a term of a collective bargaining agreement may supersede a statute, provided that the appropriate statutory procedure has been followed. Absent such procedure, the conflicting term is a nullity. See *Board of Trustees for State Technical Colleges v. Federation of Technical College Teachers, Local 1942, American Federation of Teachers, AFL-CIO*, 179 Conn. 184, 197 (1979);and *Connecticut State College American Ass'n of University Professors v. Connecticut State Bd. of Labor Relations*, 197 Conn. 91, 98-99 (1985) (unless legislators are informed of the statutes or regulations that conflict with the negotiated agreement, vote of approval cannot be deemed to modify statute). The Commission has previously recognized this principle in Docket #FIC 1999-502, Christopher Hofffman and New Haven Register v. Director of Personnel, State of Connecticut, Southern Connecticut State University; and Personnel Office, State of Connecticut, Southern Connecticut State University. Most importantly, the Connecticut Supreme Court recently reaffirmed the principle in *Cox v. Aiken*, 278 Conn. 204, 216 (2006). The Supreme Court also added: "once the legislature has approved a collective bargaining agreement provision that conflicts with a statute or regulation that approval remains effective with respect to future agreements between the state and a particular bargaining unit, and the conflicting provision need not be resubmitted for approval". Id. at 216-217. See §5-278(b), G.S., at paragraph 44, above; but also see *Lieberman v. State Board of Labor Relations*, 216 Conn. 253 (1990).

46. It is found that on April 20, 2009, the state's Office of Labor Relations filed a letter with the clerk of the Senate and enclosed a "corrected supersedence appendix" to supplement the interest arbitration award previously submitted for legislative approval on April 16, 2009, which references a new provision of the agreement as Article 9 and describes it as, "personnel files not subject to disclosure in response to request by inmates or on behalf of inmates." It also

references the statutes and regulations amended as §§1-206(b)(1), 1-210, 1-211, 1-212, 1-214(b)(c), 1-214a, G.S.

47. It is found that, pursuant to the "Resolution Concerning the Joint Rules of the Senate and the House of Representatives," the interest arbitration award was "deemed approved" by the legislature in accordance with the "supercedence" provisions of §§5-270 to 5-280, G.S., on or May 20, 2009 ("hereinafter "the approved agreement").

48. As already found in paragraph 12, above, the requested records are maintained in the personnel files of DOC employees.

49. It is found that the legislature's approval of the interest arbitration award pertaining to the NP-8 Unit contract deprives the Commission of jurisdiction over the records at issue, to the extent such records pertain to NP-8 Unit employees.

50. With respect to the respondents' contention that all of the requested records are exempt from disclosure pursuant to §1-210(b)(18), G.S., that section 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 . . . .

51. Several principles govern the Commission's application of §1-210(b)(18), G.S., to the facts of this case. First, it is a cornerstone of FOI Act case law that an agency must make a particularized showing that an exemption applies, and the propriety of an exemption depends on the information contained in the particular record requested. New Haven v. FIC, 205 Conn. 767 (1988); Perkins v. FOIC, 228 Conn. 158 (1993); Dir., Dep't of Info Tech v. FIC, 274 Conn. 179, 193 (2005). However, in this case, the respondents have refused to comply with the Commission's order to submit the requested records for an in camera inspection, and have refused to allow the Commission to examine the information contained in the particular records requested. The respondents claim a categorical exemption to the disclosure of all records of arrest and summonses, and to the disposition of the arrests and summonses. The Commission is unable to make an informed decision as to the applicability of §1-210(b)(18), G.S., without the knowledge of the particular facts of each arrest, summons, and the disposition. For instance, the reasonableness of the DOC Commissioner's decision to withhold the subject records may depend on the type and seriousness of the specific arrests, summons and dispositions. Even the respondents argued that particular kinds of offenses—such as a use of alcohol or driving while intoxicated—could lead to particular kinds of harm if disclosed.

52. Second, exemptions to disclosure are to be narrowly construed. The respondents, however, have asked the Commission to construe §1-210(b)(18), G.S., broadly to encompass records that do not directly pertain to security information about correction institutions. Nothing in §1-210(b)(18)(A) through (H), G.S., suggests that records that disclose only that a correction officer has been arrested or summoned are the kind of records encompassed by the statute. Such records do not disclose anything about the internal functions of correction facilities or security measures, and indeed do not describe anything that occurred within a correction facility. Without examination of the actual records by the Commission, it is not obvious that the records fall within a narrow construction of the statute, and such a determination cannot be made.

53. Third, it is the agency's burden to prove the applicability of an exemption to disclosure. This burden requires more than conclusory language, generalized allegations or mere arguments of counsel. Wilson v. Freedom of Information Commission, 181 Conn. 324, 399-341(1980). In this case, however, the respondents ask the Commission to endorse their

conclusion that all information about DOC employees is categorically exempt from disclosure, without providing any evidence that the kind of information contained in the requested records has ever been used to cause harm. Moreover, the respondents ask the Commission to rely on their generalized allegations of nefarious consequences when other such allegations—that the records are impossible to collect and assemble, and that records received in camera by the Commission are not maintained securely—are demonstrably false.

54. Fourth, §1-210(b)(18), G.S., sets forth an objective standard that is subject to review by the Commission, even if that standard has a subjective component that can be proven by opinion evidence. In assessing the reasonableness of the Commissioner of DOC's belief that disclosure may result in harm, the Commission may reasonably take into account whether any of the hypothetically harmful scenarios has ever occurred. The fact that the respondents failed to provide a single example of arrest and summons information being used to create harm in a correctional institution at least casts some doubt on the Commissioner of Correction's asserted belief in the harm that might be caused by disclosure.

55. In sum, the case presented by the respondents presents, at a minimum, an honest dispute as to the applicability of the claimed exemption from disclosure to records that reveal only that named correctional employees have been arrested or criminally summoned, and the disposition of such charges.

56. Finally, our Supreme Court has held that where ". . . the applicability of an exemption is in dispute it is not only within the commission's power to examine the documents themselves, it is contemplated by the act that the commission do so." Wilson, supra, at 399. The Court cited §1-205(d) [formerly §1-21j (d)], G.S., which provides in relevant part that

> "Said commission shall have the power to investigate all alleged violations of [the act] and may for the purpose of investigating any violation hold a hearing, administer oaths, examine witnesses, receive oral and documentary evidence, have the power to subpoena witnesses under procedural rules adopted by the commission to compel attendance and *to require the production for examination of any books and papers which the commission deems relevant in any matter under investigation or in question.*" (Emphasis added.)

57. The Supreme Court also held that §1-205(d), G.S., "anticipates that the Commission will play a central role in resolving disputes administratively under the act. To fulfill this role effectively, the Commission's determinations must be informed. It should not accept an agency's generalized and unsupported allegations relating to documents claimed to be exempt from disclosure." See *Church of Scientology of California* v. *United States Department of the Army*, 611 F.2d 738, 742 (9th Cir. 1979).

58. The hearing officer in this case issued a written order, dated October 30, 2009, for the production of the subject records for in camera inspection, which was provided to the respondents at the reopened hearing of October 30, 2009.

59. In response to the order described in paragraph 50, above, the respondents informed the Commission, through counsel, at the October 30, 2009 reopened hearing, that it would not

comply with the order. The respondents claimed that the Commission has improperly disclosed information contained in records that have been submitted for in camera review. The respondents also contended, at the October 30, 2009 reopened hearing, that the order was overly burdensome. The respondents claimed it would take them well over three hours to select the requested records from the employees' personnel files, and redact from them information which it wished the Commission not to see.

60. As with other of their allegations and representations, the respondents offered no evidence in support of their claim. The respondents' contention that this Commission has released information contained in records that have been submitted to it for in camera inspection is patently untrue. There is therefore no basis in fact for the respondents' purported concern with the security of the Commission's in camera procedures.

61. Furthermore, the hearing officer informed the respondents that the Order for Production of In Camera records did not require the respondents to redact the records. The respondents responded that it would considerate it negligent on their part to disclose to this Commission unredacted records for in camera inspection.

62. On November 3, 2009, the respondents purported to comply with the order, as described in paragraph 39, above, by submitting only redacted records. Because the attempted compliance was substantially in violation of the express order for production, the hearing officer did not accept the redacted records for in camera inspection.

63. Thereafter, the hearing officer issued a subpoena for the production of unredacted copies of the requested records for in camera inspection. As of the date of this report, the respondents have not complied.

64. It is found that the respondents have willfully obstructed the fact finding process of this Commission at almost every opportunity, starting with their claim at the first hearing in this matter that "there is no document responsive to [his] request." It is improper for a public agency, subject to the jurisdiction of this Commission to unilaterally determine the manner in which this Commission will conduct its investigation of alleged violations of the FOI Act. Such determination is solely within the purview of the Freedom of Information Commission.

65. In light of the respondents' inaccurate claims and representations at the hearings in this matter, which they continued to make, an entire month later, in their July 30, 2009 brief, it is found that the respondents' credibility concerning the content of records in this case may reasonably be questioned.

66. It is concluded, therefore, that an in camera inspection of the requested records by this Commission is essential for the Commission to determine whether or not the respondents have met their burden of proof.

67. Based on the facts and circumstance of this case, it is found that the respondents have failed to prove the applicability of either §§54-142c, or 1-210(b)(18), G.S., or the provisions of the interest arbitration award, to the requested records.

68. Nonetheless it is concluded that the names of correction officers who have reported being arrested or summoned are exempt from disclosure pursuant to §1-210(b)(18), G.S.

69. It is concluded, therefore, that the respondents violated the disclosure provisions of §§1-210(a), and 1-212(a), G.S., by failing to comply with the complainant's records request, with the exception of the names of correction officers who have reported being arrested or summoned.

70. At the reopened hearings held on October 27 and 30, 2009, counsel for the respondents informed this Commission that she was not representing the subjects of the requested records but, nonetheless submitted a motion that the subjects of the records be permitted to testify on their own behalf, however, anonymously.

71. On brief, the respondents suggested the use of pseudonyms for each employee, such as Jane or John Doe, or that each employee be identified by a number. The respondent contended that this would permit any employee who wished to testify at the reopened hearing to do so "without fear of their identity being revealed and without creating a security risk within a correctional facility or anywhere else." The respondents also contended that the use of pseudonyms has a basis in the Connecticut Practice Book, citing §11-20A(h)(1) which states in part that "[p]seudonyms may be used in place of the name of a party or parties only with prior approval of the judicial authority and only if the judicial authority concludes that such an order is necessary to preserve an interest which is determined to override the public's interest in knowing the names of the party or parties ...."

72. Notwithstanding the fact that the FOI Commission's administrative hearings are governed by the Uniform Administrative Procedures Act and not by the Connecticut Practice Book, §11-20A(h)(1) of the Practice Book also provides that the "judicial authority shall first consider the reasonable alternatives to any such order . . . ."

73. In regards to reasonable alternatives, it is found that the subjects of the requested records were represented by their union counsel, who argued, at the October reopened hearings, that disclosure of the requested records would constitute an invasion of personal privacy and because some of the arrest records were subject to the erasure provisions of §54-142a(c), G.S.

74. It is found that a reasonable, and appropriate, alternative to an order permitting the use of pseudonyms in this case would have been to take the representations and legal arguments of union counsel and conduct an in camera review of the requested records, which alternative would have upheld the fundamental principle of openness of the Commission's proceedings, protected the identity of the subjects of the records, and provided the Commission with a factual basis from which to assess the union counsel's representations and arguments and make informed findings of fact and legal conclusions. Because the respondents have refused to provide unredacted copies of the requested records for in camera inspection, the Commission has been prevented from performing its function.

75. Accordingly, the respondents' motion, described in paragraph 69, above, was denied.

76. With respect to the complainant's request for the imposition of civil penalties, §1-206(b)(2), G.S., provides in relevant part:

> In any appeal to the Freedom of Information Commission under subdivision (1) of this subsection or subsection (c) of this section, the commission may confirm the action of the agency or order the agency to provide relief that the commission, in its discretion, believes appropriate to rectify the denial of any right conferred by the Freedom of Information Act. ... [U]pon the finding that a denial of any right created by the Freedom of Information Act was without reasonable grounds and after the custodian or other official directly responsible for the denial has been given an opportunity to be heard at a hearing conducted in accordance with sections 4-176e to 4-184, inclusive, the commission may, in its discretion, impose against the custodian or other official a civil penalty of not less than twenty dollars nor more than one thousand dollars.

76. Section 1-205(b)(1), G.S., provides in relevant part:

> Any person denied the right to inspect or copy records under section 1-210 or wrongfully denied the right to attend any meeting of a public agency or denied any other right conferred by the Freedom of Information Act may appeal therefrom to the Freedom of Information Commission, by filing a notice of appeal with said commission.

77. Section 1-205(d), G.S., provides in relevant part:

> The [FOI] commission shall, subject to the provisions of the Freedom of Information Act promptly review the alleged violation of said Freedom of Information Act and issue an order pertaining to the same. Said commission shall have the power to investigate all alleged violations of said Freedom of Information Act and may for the purpose of investigating any violation hold a hearing, administer oaths, examine witnesses, receive oral and documentary evidence, have the power to subpoena witnesses under procedural rules adopted by the commission to compel attendance and to require the production for examination of any books and papers which the commission deems relevant in any matter under investigation or in question.

78. Section 1-240(b), G.S.. provides: "(b) Any member of any public agency who fails to comply with an order of the Freedom of Information Commission shall be guilty of a class B

misdemeanor and each occurrence of failure to comply with such order shall constitute a separate offense."

79. It is concluded that the complainant has a right to file a complaint with the Commission under §1-206(b)(1), G.S., to have that complaint fully investigated and heard according to the provisions of §1-205(d), G.S., and to rely on the Commission's powers to issue orders in connection with such investigation and hearing, according to the provisions of §1-205(d), G.S., and §1-240(b), G.S.

80. It is found that the respondents have refused to comply with the Commission's orders to produce the records at issue for in camera inspection, in defiance of §§1-205(d) and 1-240(b), G.S.

81. It is found that the effect of the respondents' defiance has been to prevent the Commission from fully investigating the complainant's appeal to the Commission.

82. It is therefore found that the complainant has been denied the right conferred by the FOI Act to file a complaint and have it fully investigated and heard.

83. The grounds offered by the respondents for refusing to submit the records at issue are that the Commission will not protect the confidentiality of the records, that it would be unduly burdensome to provide the records in camera, and that the Commission lacks jurisdiction to issue an order for in camera inspection.

84. Furthermore, at the October 30, 2009 hearing on this matter, respondents' counsel stated:

> With regard to the other employees, because there is precedent that when those items have been given in the past there have been occasions where there has been a release of the information that—even that was redacted, we will not be providing redacted information to this commission with regard to all of the other employees. That will not be complied with. [Transcript, p. 14]

85. It is found that the respondents' grounds are without any basis in law or fact.

86. In considering whether, in its discretion, to impose a civil penalty, and in what amount, the Commission finds that the actions of the respondents were a deliberate and flagrant violation of the Commission's order to produce the records for an in camera review, which precluded the Commission from considering the content of the records claimed to be exempt.

87. Moreover, the Commission finds that the actions of the respondents are direct challenge to the very powers and jurisdiction of the FOI Commission, a challenge without basis in law or fact. Instead of providing the Commission with the evidence it needs to make a fully informed decision, the respondents have instead essentially asserted that it is entirely within their

discretion whether to respond to the Commission's order and subpoena, and further entirely within their discretion whether to provide the complainant access to the requested records.

88. The Commission therefore concludes that such actions would ordinarily require the imposition of the maximum civil penalty allowed by law.

89. It is found, however, that the respondent Ellis is the only individually named party to the complaint, that she has been given an opportunity to be heard at a hearing conducted in accordance with §§4-176e to 4-184, G.S., and that she is not the official directly responsible for the denial. The Commission therefore declines to impose a civil penalty.

90. Nonetheless, the Commission condemns in most extreme terms the conduct of the respondents in defying the authority of the Commission as an administrative tribunal.

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

1. With the exception of those records that pertain to employees of the NP-8 Unit, the respondents shall forthwith provide to the complainant, free of charge, all records reflecting reports of arrest or summons of correction officer who have reported their arrests or summons, the charge, and the disposition of any criminal cases against Department of Correction administrators, staff and employees, dating from January 2005 through December 15, 2008.

2. In providing such records, the respondents may redact the names of correction officers and any information from the records other than the information described in paragraph 1 of the order, above.

3. With respect to the records not covered by the collective bargaining agreement, the respondents are ordered to provide to the complainant those records that are not subject to erasure pursuant to §54-142c.

4. The respondents shall thereafter provide the Commission with an affidavit, prepared by a person with knowledge of the records at issue, indicating that they have provided all records requested, with the exception of the records that are covered by the NP-8 collective bargaining agreement and those records that are erased pursuant to §54-142c.

5. The order in this case is limited to the specific facts of this case, where the request was made by an inmate. Nothing in this decision shall be construed to limit the rights of the public to the requested records.

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