

**FREEDOM OF INFORMATION COMMISSION  
STATEMENT IN OPPOSITION TO HB 5922  
AN ACT CONCERNING THE DEPARTMENT OF CORRECTION.**

The Freedom of Information Commission (FOIC) has serious concerns about this proposed bill concerning the Department of Correction (DOC) and DOC records. In addition, the FOIC views this bill as a direct end-run around several recent FOIC decisions that are currently on appeal.

**Section 1.** of the bill would provide a blanket FOI prohibition, absent a court order, on the disclosure of “personnel or medical files or any similar file” of DOC employees (including both current and former) to incarcerated individuals. The proposal is unnecessary because there are already two exemptions contained in the Freedom of Information Act (FOIA) that can be utilized to withhold these kinds of records under appropriate circumstances. C.G.S. §1-210(b)(2) provides for the non-disclosure of personnel, medical or similar files that, if disclosed, would constitute an invasion of personal privacy. The Supreme Court has provided a standard that has withstood the test of time, to determine whether disclosure of such records would invade personal privacy (See Perkins v. FOI Commission, 228 Conn. 158 (1993)). Similarly, section 1-210(b)(18) provides an exemption, specific to DOC, for records that the Commissioner of DOC reasonably believes may result in a safety risk, if disclosed.

In recent cases involving personnel-type records of DOC employees, requested by incarcerated individuals, the DOC essentially took the same approach before the FOIC that it now seeks to have codified by the legislature. It argued that personnel-type records should never be provided to an inmate. The FOIC feels that this is the wrong approach and that each case ought to be handled on an individual basis, applying existing law. Moreover, the FOIC has ruled in at least three very fact-specific cases (#FIC 2006-502, Taylor v. DOC involving disciplinary records of correction officers; 2006-537 Quint v. DOC involving records concerning the reason for dismissal of a native American Religious Elder, a former employee; and #FIC 2007-069, Taylor v. DOC involving records concerning the disciplinary history of a DOC employee) that the DOC failed to prove the applicable exemptions (DOC did not even offer the records at issue for in camera inspection by the FOIC to support their claims). DOC’s approach in each of these recent cases was to present evidence concerning DOC’s general concerns and fears about releasing personnel-type records, without demonstrating a particularized concern or fear about the specific records or requestor at issue. DOC has appealed all three of those decisions. Clearly, DOC is unhappy with the results of those cases and this is a legislative attempt to undo them, or at the least, prevent DOC from ever having to disclose similar kinds of records again.

In this vein, it should be noted that the FOIC’s case-by-case approach has, in years past and where proved by the DOC, resulted in rulings upholding DOC’s claims of exemption for certain records pertaining to DOC personnel. (See e.g., #FIC 2000-040 Jon T. Pepe and Connecticut State Prison Employees, AFSCME Local 391 v. DOC and #FIC 2004-248 Daniel Henderson v. DOC).

**Section 1.** is also flawed because the prohibition on disclosure could be so easily circumvented. All an incarcerated person need do is ask someone else who is not incarcerated to request the records for him or her and the exemption would disappear.

A further problem with Section 1 is that it borrows the language in the FOIA concerning “personnel or medical files or any similar file” (in Conn. Gen. Stat. section 1-210(b)(2)) and then provides a statutory definition of what constitutes a “similar” file. The term “similar file” has already been determined by the courts in cases that have construed the provisions of the FOI Act. (See, e.g., Connecticut Alcohol and Drug Abuse Commission v. FOIC, 233 Conn. 28, 30 (1995)). Adopting a separate definition for these specific DOC records will lead to confusion and inconsistent results.

**Section 2.** of the bill requires that when *any* person makes a request to *any* public agency for *any* public record under the FOIA “regarding a correctional institution or facility”, the agency receiving the request shall notify the DOC. The DOC can then require the agency that maintains the record to withhold it. The first concern with respect to this provision is that it will unnecessarily result in the delay or denial of access to records.

Second, it must be pointed out that there is currently a mechanism for review and decision-making concerning disclosure of *any* records, wherever they are maintained, when there are reasonable grounds to believe disclosure may result in a safety risk (including harm to any person or to any government-owned or leased institutions or facilities). See Conn. Gen. Stat. section 1-210(b)(19). Under this review process, municipal agencies consult with the Department of Emergency Management and Homeland Security (DEMHAS) and state agencies confer with the Department of Public Works (DPW) if there is any concern about disclosure and safety risks. DEMHAS or DPW then make the decision whether to withhold the record if there are reasonable grounds to support such withholding. Thus, under this proposed mechanism, agencies would then be required to notify *two* agencies, DEMHAS or DPW *and* DOC for any records “regarding” DOC institutions or facilities.

The proposed language is an attempt by the DOC to totally control the flow of information regarding its facilities. The FOIC feels that this additional layer is unnecessary since Conn. Gen. Stat. section 1-210(b)(19) already provides a single clearinghouse where determinations are to be made concerning records requested by the public that, if disclosed, might pose a security risk. The single clearinghouse approach, codified in 1-210(b)(19) ensures uniform results and is far less cumbersome than the new, multi-layer approach advanced by DOC.

Further, this section of the bill fails to define what the phrase “records regarding a correctional institution or facility” truly means. Does this phrase refer to the physical structures of DOC facilities or does it mean any record in any way connected to DOC? This language is too vague and potentially a large loophole for the non-disclosure of otherwise public records.

**Section 3** of the bill is also troubling. Under the FOIA, agencies are required to waive the fees for providing copies of public records if an individual (any individual, not just an inmate) is indigent. See Conn. Gen. Stat. section 1-212(d)(1). DOC is proposing, by

way of Section 3, to codify its current policy concerning inmates and public records. Under the DOC policy, prisoners are *never* indigent. Under DOC's proposal, inmates will always be charged twenty-five cents per page for requested records and if an inmate has insufficient funds to pay the fee at the time the records are requested, DOC will encumber the inmate's internal inmate account (See lines 121-128 and lines 336-331). DOC has essentially set up a credit system, not contemplated by the current law. Current law *requires* an agency to *waive* the fee, not extend credit, to indigent persons. The FOIC has ruled in several cases (one of which is currently on appeal, See #FIC 2006-683, Quint v. DOC) that DOC's policy does not comport with the FOIA and is void. DOC has been advised on several occasions in Commission decisions, in several different ways that it must come up with a standard of indigence. And, as long as that standard is reasonable and fairly applied, it will not be second-guessed by the FOIC. The FOIC has never advocated that prisoners should always get free records. DOC has refused to act upon the orders of the FOIC, and appears to be ignoring an order of the Court wherein it denied the DOC's Request for Stay of the FOIC decision, during the pendency of DOC's appeal (Food Services Division, State of Connecticut, DOC v. FOIC, HHB-CV-07-4014939S, Motion for Stay Denied, 9/28/07, (Levine, J)).

Rather than come up with a standard of indigence concerning inmates (such as application of the federal poverty guidelines) DOC argues that no inmate should ever be considered indigent because the cost of incarceration should be counted as income. The implications of this argument are profound (what if the Judicial Department counted the cost of incarceration as "income" and denied inmates access to the courts?) and would have a strong chilling effect on inmate requests for public records. The DOC is clearly trying to limit inmates' FOI requests through this proposal and its outright refusal to establish an indigency standard. As in the case of Section 1. of this bill, DOC is attempting to codify what it has been advised by the FOIC (and by a court in denying DOC's Request for Stay) is improper under current law.

One final point about this issue is worth noting. In **Section 7.** of the bill, the DOC proposes to impose a deduction of "up to twenty per cent" of all deposits made into an inmate's account for the purpose of repaying outstanding copying fees (lines 336-331). Clearly, there would be many administrative and accounting costs associated with the scheme contemplated by the bill. One wonders how the costs associated with the administration of such a scheme would compare against a scheme that simply acknowledged certain inmates as indigent, as required by law, and waived the copying fees. This point illustrates the FOIC's contention that this proposed bill is simply an attempt to legislate DOC's desire to severely limit inmates' access rights afforded under the FOIA.

For all of the above reason, the FOIC respectfully urges rejection of HB 5922.

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