

**FREEDOM OF INFORMATION COMMISSION
STATEMENT IN OPPOSITION TO HB 6709
AN ACT CONCERNING THE DEPARTMENT OF CORRECTION.**

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The Freedom of Information Commission (FOIC) has serious concerns about sections of 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 four 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; #FIC 2007-069, Taylor v. DOC involving records concerning the disciplinary history of a DOC employee); #FIC 2008-029, Taylor v. DOC involving disciplinary records of two correction officers) 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 appealed all four of those decisions, later withdrawing one appeal. Three appeals are still in court. Clearly, DOC is unhappy with the FOI decisions in 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 and prison security. (See e.g., #FIC 2000-040 Jon T. Pepe and Connecticut State Prison Employees, AFSCME Local 391 v. DOC ; #FIC 2004-248 Daniel Henderson v. DOC; #FIC2008-105 Jones 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 examples 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 10. 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 (DEM HAS) and state agencies confer with the Department of Public Works (DPW) if there is any concern about disclosure and safety risks. DEM HAS 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, DEM HAS 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.

Because of its strenuous objections to Sections 1 and 10, the FOIC respectfully urges rejection of HB 6907.

