

**FREEDOM OF INFORMATION COMMISSION STATEMENT IN
OPPOSITION TO RB 5404,
AN ACT CONCERNING THE NONDISCLOSURE OF CERTAIN INFORMATION
REGARDING DEPARTMENT OF CORRECTION EMPLOYEES TO INMATES
UNDER THE FREEDOM OF INFORMATION ACT**

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The Freedom of Information Commission (FOIC) submits this statement in opposition to Raised Bill 5404 concerning the personnel records of Department of Correction (DOC), for the reasons set forth below. This bill is very similar in content to SB 221, AA Prohibiting Disclosure of Employee Files to Inmates, which has also been opposed by the FOIC.

1. Current law provides an appropriate balance for access, privacy and security. The bill would provide a blanket prohibition, absent a court order, on the disclosure of “personnel or medical files or any similar file” of DOC employees (both current and former) to incarcerated individuals. The proposal is unnecessary because there are already two exemptions contained in the Freedom of Information (“FOI”) Act that can be utilized to withhold these kinds of records under appropriate circumstances. Section 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. Similarly, §1-210(b)(18) provides an exemption, specific to DOC and Department of Mental Health and Addiction Services (DMHAS), for records that the Commissioner of either DOC or DMHAS reasonably believe may result in a safety risk, if disclosed. Thus, both privacy interests and the unique safety and security concerns faced by correctional institutions are already taken into account under current law.

2. The proposal circumvents FOIC decisions that are currently on appeal before the courts. There are cases on appeal that involve personnel-type records of DOC employees, requested by incarcerated individuals, wherein the DOC essentially took the same approach before the FOIC that it now seeks to have codified by the legislature. It argued that personnel 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.

The FOIC has ruled in very fact-specific cases (see, #FIC 2006-502, Taylor v. DOC involving disciplinary records of correction officers; #FIC 2006-537, Quint v. DOC involving records revealing 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 cases was to argue its general concerns and fears about releasing personnel-type records, without demonstrating a particularized concern or fear about the specific records or requestor at issue. The DOC appealed those decisions and they are pending in court.

One additional appeal was filed recently by the DOC of #FIC 2009-020, Stevenson v. DOC, wherein the FOIC ordered limited disclosure of records listing the disposition of criminal cases against certain DOC employees (excluding any records that had been erased by operation of law, and with the names and other identifying information redacted).

Clearly, the DOC is unhappy with the FOIC decisions in the cases it has appealed. Rather than wait for a determination on the status of these issues by the Supreme Court, where the first two cases await argument, the DOC seeks to undo them with proposed legislation, both in this bill and in SB 221.

3. The DOC's security claims have been upheld by the FOIC, where appropriate, under existing law. It should be noted that the FOIC's case-by-case approach has, 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., Docket #FIC 2004-428, Henderson v. DOC; Docket #FIC 2006-467, Zapata v. DOC; Docket #FIC 2007-317, Baker v. DOC; Docket #FIC 2008-105, Jones v. DOC; Docket #FIC 2008-507, Elliott v. DOC; Docket #FIC 2008-627, Elliott v. DOC; and Docket # 2009-090, Sylvia v. DOC).

4. The goal of this bill is illusory. RB 5404 is also flawed because the prohibition on disclosure could be thwarted easily. 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. Some have claimed that people on the outside would "think twice" before making such a request, but it is unclear why they would need to do so, because they would not be violating any rule or law by simply asking for public records. Other proponents have stated that it would require a lot of effort on the part of inmates to ask someone else to make such a request and that the initiative to do so is lacking. Of course, such claims are belied by the fact that these same proponents alternately claim that inmates are incredibly industrious and will pursue any avenue they can to access these records.

5. The arguments describing the need for this proposal are overstated. In addition to stating safety concerns, supporters of this legislation cite increased workload for their agencies due to inmate requests and various costs associated with complying with such requests. However, in reality, requests for personnel file records of DOC employees by incarcerated individuals are very small. To date, access to personnel files has been a very minor area of interest among the inmate population. Approximately 9 complaints brought to the FOIC since 2006 have involved inmate requests for DOC employee personnel records and those complaints were brought by five inmates. Generally, inmates are more interested in obtaining records about their personal situation (i.e., records related to their arrest, conviction and incarceration), than they are in obtaining personnel-related information about correction employees.

6. The proposal overlooks the countervailing public policy interest in disclosure. There is an additional public policy reason why this proposal should be rejected. There are problems within correctional institutions that only the inmates know and can bring to light, highlighting the need for at least some of these kinds of records to be made available. For example, at least one of the pending court cases referenced above involves allegations of health and safety violations by employees of a correctional institution. Surely there is a public interest in this information. As previously stated, the exemptions that exist under current law strike the appropriate balance between the public interest and safety and security. The blanket exemption proposed under this bill would eviscerate those considerations.

For the reasons set forth above, the FOIC urges rejection of RB 5404.