

FREEDOM OF INFORMATION COMMISSION STATEMENT IN SUPPORT OF DRAFT LCO NO. 3471, AN ACT CONCERNING POLICE ACCOUNTABILITY.

July 17, 2020

The Freedom of Information (“FOI”) Commission strongly supports section 8 of Draft LCO No. 3471, which prohibits certain collective bargaining agreements or arbitration awards approved by the General Assembly from containing provisions that supersede the public records and meetings provisions of the FOI Act.

Section 8 of the proposal amends Conn. Gen. Stat. §5-278(e), and provides that:

For any agreement or arbitration award approved before, on or after the effective date of this section, in accordance with the provisions of sections 5-270 to 5-280, inclusive, on matters appropriate to collective bargaining, as defined in said sections, where there is a conflict between a provision of any such agreement or award and the provisions of the Freedom of Information Act, as defined in section 1-200, the provisions of the Freedom of Information Act shall prevail.

Under express terms of the FOI Act, only federal laws or state statutes can override the disclosure provisions contained therein. See Conn. Gen. Stat. §1-210(a). Despite this explicit rule, Conn. Gen. Stat. §5-278 provides that a term of a collective bargaining agreement or arbitration award may supersede a statute, including the FOI Act, provided that the appropriate statutory procedure has been followed. The provisions of §5-278 are very powerful and have actually yielded overrides of the FOI Act. See e.g., Docket # FIC 2006-211; William T. George v. State of Connecticut, Human Resources Department, Southern Connecticut State University, et. al. (March 28, 2007); and Docket # FIC 2009-020; Richard Stevenson v. Joan M. Ellis, Administrator, State of Connecticut, Department of Correction, Freedom of Information Office, et. al. (January 6, 2010), where the Commission necessarily concluded that the respective collective bargaining agreements superseded the disclosure provisions of the FOI Act, by operation of §5-278, resulting in the nondisclosure of such items as the contents of the personnel files of university teachers and reports of arrests or summons maintained in the personnel files of Department of Correction employees.

More recently, during the 2019 legislative session, the General Assembly approved an arbitration award between the State of Connecticut and the State Police Union (NP-1)¹ that contains provisions superseding the FOI Act, and exempts from disclosure the personnel files and internal affairs investigations of state troopers. It was clearly stated on the Senate Floor when the contract was considered that the exemption was narrow and limited to internal investigations with only a disposition of exonerated, unfounded or not sustained. See portion of Senate Transcript attached (Vol. 62, Part 5, May 31, 2019, at pp. 3424-3430). However, the Commission has already received several complaints alleging that the new provisions in the NP-

¹ Senate Resolution 30 and House Resolution 33, Resolution Proposing Approval of an Interest Arbitration Award between the State of Connecticut and the Connecticut State Police Union (NP-1).

1 agreement are being interpreted and applied very broadly by the union and the Department of Emergency Services and Public Protection, to withhold troopers' personnel files and internal affairs investigations. Those matters are currently pending before the Commission.

On an even larger scale, the Commission is deeply concerned about the effect of these supersedence provisions on the longstanding disclosure rules and exceptions thereto that are explicitly set forth in the FOI Act.

"[W]hen a person accepts public employment, he or she becomes a servant of and accountable to the public." Perkins v. Freedom of Information Commission, 228 Conn. 158, 177 (1993). Accordingly, records relating to a public employee's ability to perform his or her duties, or an investigation of alleged misconduct are legitimate matters of public concern. Even where an investigation results in exoneration, there may be a legitimate public interest in an alleged abuse of power while engaged in the performance of a public employee's duties. Department of Public Safety v. Freedom of Information Commission, 242 Conn. 79, 82 (1997) (court noted that "because of the public interest in the fairness of police investigations, there is a general presumption in favor of disclosure, even for investigative reports that exonerate police officers from the charges that have been brought against them."). There is also a legitimate public interest in knowing the manner in which investigations about public employees are conducted.

In addition, the FOI Act already contains a permissive exemption for "personnel or medical files and similar files the disclosure of which would constitute an invasion of personal privacy." Conn. Gen. Stat. §1-210(b)(2). This exemption has been time-tested, and the subject of longstanding court interpretation that has been relied upon in hundreds of decisions issued by the FOI Commission. See e.g., Perkins, supra.²

To permit parties to a collective bargaining agreement to supersede these time-tested statutory provisions, merely by agreement, without an advocate for the preservation of disclosure, will seriously erode the broad public policy mandates embodied in the FOI Act and ignore the recognition by the General Assembly and the Connecticut Supreme Court that matters relating to the performance of public employees are presumptively a legitimate matter of public concern. See Perkins at 174.

Further, the FOI Commission argues that such provisions, which narrow the public's right of access to public records, may not be proper subjects of collective bargaining in the first instance. See Lieberman v. State Board of Labor Relations, 216 Conn. 253 (1990).

² In Perkins v. Freedom of Information Commission, 228 Conn. 158, 175 (1993), the Supreme Court set forth the test for an invasion of personal privacy, necessary to establish the exemption at §1-210(b)(2), G.S. The claimant must first establish that the records in question are personnel, medical or similar files. Second, the claimant must show that disclosure of the records would constitute an invasion of personal privacy. In determining whether disclosure would constitute an invasion of personal privacy, the claimant must establish both of two elements: first, that the information sought does not pertain to legitimate matters of public concern, and second, that such information is highly offensive to a reasonable person.

The FOI Commission is extremely concerned that there will be increased attempts to circumvent the disclosure provisions of the FOI Act through collective bargaining agreements and arbitration awards and that it will render the FOI Act meaningless. The public's right to access public records and meetings should not be contracted away by collective bargaining agreements and arbitration awards. Rather, such decisions should only be made after robust debate, deliberation, and enactment of statute.

For the foregoing reasons, the FOI Commission strongly supports and urges the General Assembly to pass legislation incorporating the provisions in section 8 of Draft LCO No. 3471.

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Main Street and people are having to struggle, businesses, residents. So, Madam President, for the third time I'm going to stand in opposition of the contract this evening. For the third time, I'm going to ask my colleagues to reject this contract just based on the fact that we heard from Secretary Barnes when he talked about ability to pay, all the reasons he thought we couldn't in a previous contract, but I submit that still as an argument, the fact that we have a Financial Advisory Committee meeting next week where we're transferring shortfalls into the Social Security tax account because we can't, they can't afford it, \$12 million dollars plus \$2.8 million dollars. So, Madam President, thank you for the time. Again, I urge my colleagues to reject.

THE CHAIR:

Thank you, sir. Will you remark further? Senator Winfield.

SENATOR WINFIELD (10TH):

Thank you, Madam President. I rise for a couple of questions to the proponent of the resolution.

THE CHAIR:

Senator Osten, prepare yourself. Senator Winfield, please proceed.

SENATOR WINFIELD (10TH):

Yes, Thank you, Madam President. In discussion about this contract, there's been some concern about freedom of information and files associated with the

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contract so I just want to ask a couple of questions for clarification. So in Article 9 of the contract, I believe there's a provision that concerns the access to the employee's personnel file that is part of this larger discussion and I guess the question is, is the intent therein to restrict access to the entirety of the file? Through you, Madam President.

THE CHAIR:

Senator Osten.

SENATOR OSTEN (19TH):

Thank you very much, Madam President. The answer to that would be no.

THE CHAIR:

Senator Winfield.

SENATOR WINFIELD (10TH):

And so I guess a followup to that, Madam President, and through you, Madam President is then what does the restriction actually do? Through you, Madam President.

THE CHAIR:

Senator Osten.

SENATOR OSTEN (19TH):

Thank you very much, Madam President. In the tentative agreement on personnel files, an employee's officer personnel file and internal

investigations with only a disposition of exonerated, unfounded or not sustained shall not be subject to the Connecticut Freedom of Information Act in order to not have an employee judged when he or she has not been found to be held culpable. Through you, Madam President.

THE CHAIR:

Thank you. Senator Winfield.

SENATOR WINFIELD (10TH):

Thank you, Madam President. And through you, just for clarity, I think that means that everything else is still subject and for slightly further clarity, does that mean if a portion is substantiated and another portion isn't, the portion that isn't substantiated is also potentially disclosable? Through you, Madam President.

THE CHAIR:

Senator Osten.

SENATOR OSTEN (19TH):

Through you, Madam President. If a portion of an investigation is found to have held an employee culpable of an action, that would be FIO able. If a portion of an investigation is found to be exonerated, unfounded or not sustained, that would not be subject to the Connecticut Freedom of Information Act. Through you, Madam President.

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Thank you, Senator Osten. Senator Winfield.

SENATOR WINFIELD (10TH):

Thank you, Madam President. I think there are concerns that many people have hearing what we've learned about these police contracts. I also know that these kind of provisions exist in other contracts and I just wanted to pull out a little bit of the discussion about what we're actually doing here so I thank the good Senator for her answers. Thank you, Madam President.

THE CHAIR:

Thank you, Senator Winfield. Will you remark further on the resolution that is before the Chamber? Senator Fasano.

SENATOR FASANO (34TH):

Thank you, Madam President. I kind of felt left out not being involved in the last contract and I'm not gonna talk about the fact that CPI may be frozen with respect to TANF and the others, I'm not gonna talk about the fact that this contract once again crowds out social services, I'm not gonna talk about the fact that we are cutting aid to those who need it most when we approve these contracts. But I do want to talk about a few things in this bill that raises concerns with this resolution. Madam President, there are items in this contract that I think were best left to the legislature and let me just say what those are. In this contract under the State Police Union deal, certain personnel, official personnel folders will not be subject to FOI. That raises some concern as to the ability to look at

these files. FOI to me should not be subject to collective bargaining. That's a public policy issue and even if exonerated or unfounded or not sustained, they're not subject to FOI so those people who talk about transparency have to be concerned that the legislature's not weighing in on this issue. This has been raised by a number of organizations. I know folks down in the House, particularly on the other side of the aisle were very concerned over this issue. In addition, remove from an officer's file is any investigation when it's completed. Once again, transparency which we hear so much about in this building, particularly on the police side has been through collective bargaining taken out and people seem not to care. This is a public policy issue which is left up to us as legislators. Madam President, I would also point out for those who may not be all that familiar with this contract that a new Worker's Comp Committee has been created and this Worker's Comp Committee is made up of the State Police Union President or the designee, DESPP Director of Human Services, and the State Police Colonel. So now we've taken Worker's Comp and moved it to a whole different group of people. I would argue not totally objective from the issue for which they're gonna be a fact finder. Madam President, I believe that issue is in the domain and the control of the legislature, not one for collective bargaining.

Madam President, I underscore what Senator Formica talked about which is the men and women in our uniforms who protect us and I think Senator Osten also gave proper credit to those folks, but we have FOI concerns that truly are a balance of public interest, and we've taken those concerns and we've moved them out of our domain and into collective

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bargaining. Now, I cannot profess whether this is the first time or not, but I can tell you, it's the first time I've seen it in a union contract that's come before us that FOI is now subject matter of collective bargaining. I don't think this goes to any of the criteria that I know of in statute so why would you do this? Why would you silence transparency? I don't know the answer to the question but what I do know is it doesn't seem to follow through what I hear in this Chamber. It doesn't seem to follow through in the judiciary bills that have come before us and the debate up here and downstairs, that we don't transparency and that we don't want information that should be revealed held in secret.

As I said, Madam President, at this point I'm not going to repeat all the issues relative to the finances because in this contract, there's something new and different, something that raises a red flag for a few in this circle who talked about transparency of the police. This is something that when you vote for it and if you vote for it, it would be difficult to reconcile that vote with past votes and perhaps even future votes. Thank you, Madam President.

THE CHAIR:

Thank you, Senator Fasano. Will you remark further on the contact, excuse me, on the resolution that is before us? Will you remark further on the resolution that is before the Chamber? If not, Mr. Clerk, please call for the vote and the machine will be opened.

CLERK:

An immediate roll call vote has been ordered in the Senate. An immediate roll call vote has been ordered in the Senate on Senate Resolution No. 30. An immediate roll call vote has been ordered in the Senate on Senate Resolution No. 30. An immediate roll call vote has been ordered in the Senate on Senate Resolution No. 30. Immediate roll call vote in the Senate. An immediate roll call vote has been ordered in the Senate on Senate Resolution No. 30. An immediate roll call vote has been ordered in the Senate on Senate Resolution No. 30. An immediate roll call vote has been ordered in the Senate.

THE CHAIR:

Have all the Senators voted? Have all the Senators voted? The machine will be locked. Mr. Clerk, please announce the tally.

CLERK:

Senate Resolution No. 30.

Total number voting	36	
Necessary for adoption	19	
Those voting Yea		20
Those voting Nay		16
Absent and not voting		0

THE CHAIR:

[Gavel] The Resolution is adopted. Mr. Clerk.

CLERK: