

**STATE OF CONNECTICUT  
FREEDOM OF INFORMATION COMMISSION**

ALEC FERRETTI,	:	DOCKET NO.: FIC 2021-0051
<i>Complainant</i>	:	
	:	
v.	:	FREEDOM OF INFORMATION
	:	COMMISSION
	:	
COMMISSIONER, STATE OF CT,	:	
DEPT. OF PUBLIC HEALTH and	:	
STATE OF CT, DEPT. OF	:	OCTOBER 8, 2021
PUBLIC HEALTH,	:	
<i>Respondents</i>	:	

**RESPONDENTS’ POST-HEARING BRIEF**

The respondents, Commissioner of the Connecticut Department of Public Health and the Connecticut Department of Public Health (“Department” or “DPH”), respectfully submit this post-hearing brief in support of their request to dismiss the present Complaint filed by the complainant, Alec Ferretti.

**I. FACTUAL AND PROCEDURAL BACKGROUND**

On or about August 30, 2020, the complainant submitted a request to the Department pursuant to the Freedom of Information Act (“FOIA”), codified in Conn. Gen. Stat. § 1-200 et seq., by which he sought “the index to births from January 1, 1918 to December 31, 1919 . . . .” (Complainant’s Exhibit (“Compl. Ex.”) B.) By way of a second email dated August 30, 2020, the complainant further requested pursuant to the FOIA “the index of births from 1920-2020.”<sup>1</sup> (Compl. Ex. B.) On September 4, 2021, the Department acknowledged the complainant’s requests in two separate emails. (Compl. Ex. B.)

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<sup>1</sup> The complainant, by way of email dated August 26, 2021, amended his original request to include indexes of births to the present date. This amendment does not affect the respondents’ position.

On or about February 3, 2021, the Department informed the complainant that, pursuant to Conn. Gen. Stat. § 7-51a, it could not release the entire birth index for births occurring from 1920 to 2020. (Compl. Ex. B.) Regarding the complainant's request for birth index data for births occurring in 1918 and 1919, the Department indicated that because the "data is not easily accessible and the staff person who was able to run the program in the past has died," the Department may be significantly delayed in satisfying the request. (Compl. Ex. B.)

On or about February 4, 2021, the complainant filed a complaint with the Freedom of Information Commission ("Commission") alleging that the respondents violated the FOIA and/or Conn. Gen. Stat. § 7-51a in that they failed to produce the following documents requested pursuant to FOIA: "birth indexes from the embargo period, 1920-2020 . . . ." (Complaint, 1.)

On September 24, 2021, a hearing was conducted before the Commission, and Danielle McGee presided as hearing officer. The complainant testified on his own behalf and entered into evidence two exhibits. The Department entered into evidence one exhibit and called Elizabeth Frugale, State Registrar of Vital Records, as a witness.

Ms. Frugale's testimony adduced the following facts:

The Department maintains records in multiple mediums – paper, microfilm, and electronic. Records for births from 1897 through 2001 are maintained in both paper and microfilm format, while records from 2001 to the present are maintained electronically by the towns and municipalities where the birth was recorded.

The Department has microfilmed "thousands and thousands" of older records for the years 1897 through 2000. Through the microfilming process and using the archaic FoxPro database, the Department created an internal reference list, as distinct from the statutory birth index, which is used solely by DPH employees to allow them to search and locate birth

certificates on the microfilm. The only DPH employee who knew how to manipulate and extract data from the FoxPro database, and who likely produced to Mr. Ferretti in 2018 an extracted list of births for the year 1917, is now deceased, and as a result, any attempt to manipulate or extract the data could corrupt the records. If the database is corrupted, the Department would no longer be able to access the records, which would impede its ability to respond to customer services requests for certified copies of vital records. To recreate the database, DPH would have to enter thousands of records manually, which would be very time-consuming and laborious. Nevertheless, the Department does not maintain or keep indexes of births for the years 1897 through 1947.

In 1948, the federal government began requiring the Department to submit to it records of vital events and to create indexes of those records, and, as a result, the Department currently maintains paper birth indexes for the years 1948 through 2000. For the years 2001 through the present, the Department has the ability to generate an index from the data repository maintained by the towns and municipalities, but it does not actually maintain an index of births for those years. The information in these birth indexes, which includes the last name of the person, the mother's name, the date of birth, the town code, and the state filing number, derives from the underlying birth certificates, which are otherwise not public records and access to which is limited to a certain subset of eligible individuals.

The complainant, as a member of a genealogical society authorized to conduct business in Connecticut, is able to make an appointment during normal business hours with the Department to access those birth indexes that it maintains and/or keeps in a manner consistent with state law.

## II. STATUTORY INTERPRETATION

“The process of statutory interpretation involves the determination of the meaning of the statutory language as applied to the facts of the case, including the question of whether the language does so apply. . . . When construing a statute, [o]ur fundamental objective is to ascertain and give effect to the apparent intent of the legislature. . . . In seeking to determine [the] meaning [of the statutory language] . . . [we] first . . . consider the text of the statute itself and its relationship to other statutes.” (Internal citation and quotation marks omitted.) *Tilcon Conn., Inc. v. Comm’r of Env’tl. Prot.*, 317 Conn. 628, 651 (2015); *see also* Conn. Gen. Stat. § 1-2z.

“If, after examining such text and considering such relationship, the meaning of such text is plain and unambiguous and does not yield absurd or unworkable results, extratextual evidence of the meaning of the statute shall not be considered. . . . When a statute is not plain and unambiguous, we also look for interpretive guidance to the legislative history and circumstances surrounding its enactment, to the legislative policy it was designed to implement, and to its relationship to existing legislation and common law principles governing the same general subject matter. . . .” (Internal quotation marks omitted.) *Francis v. Fonfara*, 303 Conn. 292, 297 (2012).

“The test to determine ambiguity is whether the statute, when read in context, is susceptible to more than one reasonable interpretation. . . . We presume that the legislature did not intend to enact meaningless provisions. . . . [S]tatutes must be construed, if possible, such that *no clause, sentence or word shall be superfluous, void or insignificant*. . . .” (Emphasis added.) (Internal citation and quotation marks omitted.) *State v. Drupals*, 306 Conn. 149, 159-60 (2012).

### III. ARGUMENT

#### A. **It is clear and unambiguous that indexes of births less than 100 years old are exempt from disclosure under the FOIA.**

##### 1. **Access to records maintained by DPH is further restricted by state statute, and therefore exempt from disclosure pursuant to the FOIA.**

Pursuant to Conn. Gen. Stat. § 1-210(a), “all records maintained or kept by any public agency . . . shall be public records and every person shall have the right to (1) inspect such records promptly during regular office or business hours, (2) copy such records . . . , or (3) receive a copy of such records . . . .” The statute, however, contains the caveat that such records are disclosable “[e]xcept as otherwise provided by any federal law or state statute . . . .” (Emphasis added.) Conn. Gen. Stat. § 1-210(a).

Our courts consistently “have required that any exemption from disclosure under the ‘otherwise provided’ language of § 1-210(a) be based on the express terms in the state or federal law that either provide for the confidentiality of the documents or otherwise limit disclosure, copying, or distribution of the documents at issue.” *Comm’r of Emergency Services & Pub. Prot. v. Freedom of Info. Comm’n*, 330 Conn. 372, 390 (2007). In other words, the federal or state law must “by [its] terms, provide for confidentiality of records or some other shield from public disclosure.” (Emphasis added.) *Chief of Police v. Freedom of Info. Comm’n*, 252 Conn. 377, 399 (2000). By providing that the public may inspect or copy public records “[e]xcept as otherwise provided by any federal law or state statute,” § 1-210(a) recognizes that federal law and other state statutes may exclude such records from disclosure pursuant to the FOIA.

In the present case, the complainant seeks copies of birth indexes for births that occurred from 1920 through 2020. Disclosure of these records is otherwise limited by state statute. Conn. Gen. Stat. § 7-51, by its terms, limits public disclosure of birth records by restricting access to records less than 100 years old to limited, specifically enumerated categories of persons:

(A) The person whose birth is recorded, if such person is (i) over eighteen years of age, (ii) a certified homeless youth, as defined in section 7-36, or (iii) a minor emancipated pursuant to sections 46b-150 to 46b-150e, inclusive; (B) such person's child, grandchild, spouse, parent, guardian or grandparent; (C) the chief executive officer of the municipality where the birth or fetal death occurred, or the chief executive officer's authorized agent; (D) the local director of health for the town or city where the birth or fetal death occurred or where the mother was a resident at the time of the birth or fetal death, or the director's authorized agent; (E) attorneys-at-law representing such person or such person's parent, guardian, child or surviving spouse; (F) a conservator of the person appointed for such person; (G) ***a member of a genealogical society incorporated or authorized by the Secretary of State to do business or conduct affairs in this state***; (H) an agent of a state or federal agency as approved by the department; and (I) a researcher approved by the department pursuant to section 19a-25.

(Emphasis added.) Conn. Gen. Stat. § 7-51(a)(1).

Conn. Gen. Stat. § 7-51a(a) further restricts even eligible persons' access to vital records:

***During all normal business hours***, members of genealogical societies incorporated or authorized by the Secretary of State to do business or conduct affairs in this state shall (1) have full access to all vital records in the custody of any registrar of vital statistics, including certificates, ledgers, record books, card files, ***indexes*** and database printouts, except for those records containing Social Security numbers protected pursuant to 42 USC 405 (c)(2)(C), and confidential files on adoptions, gender change, gestational agreements and paternity, (2) be permitted to make notes from such records, (3) be permitted to purchase certified copies of such records, and (4) be permitted to incorporate statistics derived from such records in the publications of such genealogical societies.

(Emphasis added.)

Conn. Gen. Stat. §§ 7-51 and 7-51a(a) thus set forth guidelines for the public disclosure of vital records maintained by the Department, and section 7-51a(a) specifically identifies birth indexes among those records. Those guidelines impose stricter limitations on such disclosure than Conn. Gen. Stat. § 1-210 permits, as they authorize only limited classes of persons to access records in only a limited manner. Because subjecting such records to the unfettered access that the FOIA grants would conflict with the guidelines set forth in Conn. Gen. Stat. §§ 7-51 and 7-51a, such records fall under the "except as otherwise provided by . . . other state statute" exception to Conn. Gen. Stat. § 1-210(a) and, as a result, are not records accessible to the public

under that section. Accordingly, the complainant's claim that the Department's denial of his request for such records violated the FOIA fails.

**2. The legislative history of Conn. Gen. Stat. §§ 7-51 and 7-51a shows intent to exempt records maintained by the Department from public disclosure.**

“The test to determine ambiguity is whether the statute, when read in context, is susceptible to more than one reasonable interpretation.” (Internal citation and quotation marks omitted.) *State v. Drupals, supra*, 306 Conn. at 159-60. “We presume that the legislature did not intend to enact meaningless provisions. . . . [S]tatutes must be construed, if possible, such that no clause, sentence or word shall be superfluous, void or insignificant. . . .” (Internal citation and quotation marks omitted.) *Id.* at 160. “When construing a statute, [the reviewing body's] fundamental objective is to ascertain and give effect to the apparent intent of the legislature. . . . In other words, [it] seek[s] to determine, in a reasoned manner, the meaning of the statutory language as applied to the facts of [the] case . . . .” (Internal citations and quotation marks omitted.) *Dep't of Pub. Safety v. Freedom of Info. Comm'n*, 298 Conn. 703, 720-21 (2010).

In 1971, the legislature enacted Public Act 71-228, which amended Conn. Gen. Stat. § 7-51 to expand the groups of persons eligible to access records held by local registrars and the State Department of Health to include members of genealogical societies incorporated in or authorized to do business in Connecticut. In 1980, the legislature enacted Public Act 80-280, which amended Conn. Gen. Stat. § 7-51a by granting members of genealogical societies the ability to copy microfilmed birth records, specifically identifying among those records birth indexes, prior to the year 1900.

The legislative history and clear terms of sections 7-51 and 7-51a demonstrate that the legislature's intent was not only to restrict access to these records to specifically enumerated

*categories* of persons, but also to restrict the *manner in which* members of genealogical societies may access those records. If the legislature had intended for the Department to allow access to vital records to the general public, or to provide copies, electronic or otherwise, of documents enumerated in section 7-51a(a)(1), e.g., birth indexes, to members of genealogical societies, it easily could have included specific language expressing such intent. *See, e.g., Windels v. Envtl. Prot. Comm'n*, 284 Conn. 268, 299 (2007) (legislature knows how to convey its intent expressly). The statute contains no such authorization, and courts and other quasi-judicial bodies “are not permitted to supply statutory language that the legislature may have chosen to omit.” *Conn. Light & Power Co. v. Dept. of Public Utility Control*, 266 Conn. 108, 119 (2003).

By specifically limiting access to vital records, including birth indexes, to specifically identified categories of persons, and by specifically identifying the *manner in which* those limited categories of eligible persons can access the records, the clear intent of the legislature in enacting and amending sections 7-51 and 7-51a is that those records are not public. The manner in which the complainant requests records that are otherwise not public is not permitted by statute and, accordingly, the Complaint must be dismissed.

**B. The FOIA does not obligate the Department to produce records that it neither maintains nor keeps.**

The FOIA governs disclosure of public records by public agencies unless otherwise limited by federal law or state statute. In the present case, the indexes the complainant seeks are exempt from the FOIA because they are otherwise limited by state statute. Nevertheless, even in instances where federal law or state statute do not further limit disclosure, the FOIA requires public agencies to disclose only those “records *maintained or kept* by” said agency. (Emphasis added.) Conn. Gen. Stat. § 1-210(a). In interpreting the federal FOIA, as codified in Conn. Gen. Stat. § 1-200 et seq., the United State Supreme Court has stated that “[t]he Act does not obligate



agencies to create . . . documents; it only obligates them to provide access to those which it in fact has created and retained . . . even though the agency's failure to [create a document] deprives the public of information which might have otherwise been available to it." *Kissinger v. Reporters Comm'n for Freedom of the Press*, 445 U.S. 136, 152 (1980). *See also Jolley v. Bragdon*, 2008 Conn. Super. LEXIS 1058, Docket No. CV075012256 at \*12 (Conn. Super. Ct. April 22, 2008).

In the present case, Mr. Ferretti submitted a request pursuant to the FOIA for indexes of births, cumulatively, from January 1, 1918 through 2020. The testimonial evidence makes clear that the only years for which the Department maintains or keeps birth indexes are 1948 through 2000. Any request for indexes outside this limited timeframe falls outside the scope of the FOIA as the Department neither maintains nor keeps indexes for births occurring during those years. Nor does the FOIA obligate the Department to create documents from the records it does maintain.

Furthermore, it is worth noting that, not only is the Department not obligated to create a birth index where one does not already exist, the record makes clear that any attempt to do so risks corrupting the Department's entire electronic record maintenance database. While at one time the Department employed someone who was familiar with the system and who, it appears, was able to export data from that system, that person is no longer with the Department; as a result, there exists no person with the expertise required to safely manipulate and/or export the data.<sup>2</sup> As Ms. Frugale testified, if the database is corrupted, the Department would lose the

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<sup>2</sup> Mr. Ferretti testified that in June of 2018, he received a copy of a "birth index" for 1917. From Ms. Frugale's testimony, as well as the Department's February 3, 2021 email to the complainant explaining that the "staff person who was able to run the program in the past has died;" Compl. Ex. B; it appears as though the file produced to Mr. Ferretti was in fact an internal reference list, which the Department was not obligated to create or export, rather than a birth index as required by federal law and Conn. Gen. Stat. § 7-47.

ability to search any of the records stored in the database and, as a result, could not respond to customer service requests for certified copies of records. Any effort to recreate the database, which consists of thousands and thousands of records, would have to be done by hand.

The complainant's request for birth indexes for years for which the Department does not maintain indexes falls outside of the scope of the FOIA and, as a result, the portion of the complaint stemming from the Department's failure to produce birth indexes for the years 1918 through 1947 and 2001 to the present must be dismissed.

**C. The complainant may access the records maintained or kept by the Department during normal business hours in the manner prescribed by statute.**

As discussed above, the records sought by the complainant are exempt from the FOIA, and instead disclosure of those records is governed by Conn. Gen. Stat. §§ 7-51 and 7-51a. To the extent that the Department maintains or keeps birth indexes for the years the complainant seeks, he may access those indexes at the time and in the manner prescribed by statute.

The Department does not dispute that the complainant is a member of a genealogical society incorporated or authorized by the Secretary of State to do business or conduct affairs in Connecticut, and therefore falls within a class of persons eligible to access records less than 100 years old. *See* Conn. Gen. Stat. § 7-51. Nevertheless, our statutes do not grant even eligible persons unfettered access to such records. Rather, Conn. Gen. Stat. § 7-51a, by its terms, explicitly restricts genealogists' access as follows:

***During all normal business hours***, members of genealogical societies incorporated or authorized by the Secretary of State to do business or conduct affairs in this state shall (1) have full access to all vital records in the custody of any registrar of vital statistics, including certificates, ledgers, record books, card files, ***indexes*** and database printouts, except for those records containing Social Security numbers protected pursuant to 42 USC 405 (c)(2)(C), and confidential files on adoptions, gender change, gestational agreements and paternity, (2) be permitted to make notes from such records, (3) be permitted to purchase certified copies of such records, and (4) be permitted to incorporate statistics derived from such records in the publications of such genealogical societies.

(Emphasis added.) Conn. Gen. Stat. § 7-51a(a).

In the present case, the complainant, as a member of a genealogical society, may *during normal business hours*: (1) have full access to the requested indexes, (2) take notes from said indexes, (3) purchase certified copies of the underlying vital records, and (4) incorporate statistics derived from those records in a genealogical publication. As Ms. Frugale testified, the complainant is welcome to make an appointment to visit the Department for the purposes of inspecting the birth indexes maintained by the Department in the manner prescribed by statute. Because the Department is allowing the complainant access to the records he requested in a manner consistent with state law, the respondents have not violated the FOIA and/or Conn. Gen. Stat. § 7-51a, and, accordingly, the complaint must be dismissed.

#### IV. CONCLUSION

WHEREFORE, for the foregoing reasons, the respondents respectfully request that the Commission dismiss the complaint.

RESPONDENTS

COMMISSIONER, STATE OF CONNECTICUT  
DEPARTMENT OF PUBLIC HEALTH and  
STATE OF CONNECTICUT DEPARTMENT OF  
PUBLIC HEALTH

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**CERTIFICATION**

This is to certify that a copy of the foregoing was electronically filed with the Freedom of Information Commission and electronically delivered on this 8th day of October, 2021 to the following:

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