

State of Connecticut
Freedom of Information Commission
Docket No. FIC 2021-0051
October 8, 2021

COMPLAINANT’S POST-HEARING BRIEF

I. Case Summary

The Complainant mostly agrees with the Respondent's summary of the case, except for the two matters noted immediately below:

The Respondent states that “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,” (emphasis added). However, the statutory birth index is used by other parties, namely, “members of genealogical societies incorporated or authorized by the Secretary of State to do business or conduct affairs in this state.” The Complainant says as much later in the brief, and Conn. Gen. Stat. § 7-51a(a) codifies this practice into law. The DOH goes even further and claims that this not-always-private index is not, in fact, an index at all.

The Respondent also states that “Nevertheless, the Department does not maintain or keep indexes of births for the years 1897 through 1947.” This is not factually accurate. Although the statutory requirement to keep a birth index was not enacted until 1948, the Department maintains an index according to the dictionary definition of the word. The FOIA request was not for the “statutory index created pursuant to § 7-47,” as the reply implies. The request was simply for “the index to births.” The Merriam Webster Dictionary defines the word index as “a list [...]

arranged usually in alphabetical order of some specified datum (such as author, subject, or keyword).” The Department admits to having such a list dating back to 1897, and has provided it to the Complainant through 1917.

II. Rebuttal to Respondent’s Argument

A. Alleged Statutory Exemptions

The Respondent claims that birth indexes created less than 100 years ago are unambiguously exempt from FOIA by selectively quoting § 7-51, leaving out the fact that this provision only applies to *certified* copies of birth records. § 7-51’s initial text is that “The department and registrars of vital statistics shall restrict access to and issuance of a **certified** copy of birth and fetal death records and certificates less than one hundred years old, to the following eligible parties...,” (emphasis added). Although they claim this *unambiguously* includes an uncertified birth index, instead this unambiguously *precludes* the birth index, as it need not be certified. This statute does not govern the release of uncertified indexes.

Furthermore, Respondent argues that § 7-51a also restricts access to birth indexes, because it states that entitled parties may only access the records onsite during business hours. This is again a misinterpretation of the statute. The Legislature was surely trying to codify rights of genealogists into law, not limit them. Were the intention of this provision to limit rights of access, the Legislature would have added the modifier “*only*” into the text, to note that these actions were limited to being done onsite, during business hours. If the Department’s interpretation of the statute were correct, that genealogists could only do these actions onsite during business hours, there would be numerous bizarre situations that would arise.

§ 7-51a states that, “During all normal business hours, members of genealogical societies incorporated or authorized by the Secretary of the State to do business or conduct affairs in this state shall (1) have full access to all vital records [...] (2) be permitted to make notes from such records (3) be permitted to purchase certified copies of such records.” If this statute were actually limiting what genealogists can do outside of business hours, then it would be unlawful for genealogists to consult copies of vital records or to even purchase copies of vital records on weekends. Not only would this be absurd, but the DPH would also be facilitating violations of this law, by partnering with a third party vendor, VitalChek, which allows all members of the public, including genealogists, to order records 24/7¹. It is not reasonable for the Department's Vital Records Archives to be open 24/7, so surely this law was created to confirm that genealogists could conduct in-depth research onsite during business hours. Nowhere in this law does that create a FOIA exemption, as nothing in this law says that indexes are not disclosable. All § 7-51a does is guarantee that anyone who pays \$20 to a Genealogy Society can access vital records in certain locations at certain times, nothing more, and nothing less.

The Respondent claims that § 7-51 and § 7-51a prevent the release of an uncertified birth index, but a close reading of the laws show that this is not the case. § 7-51 concerns certified copies, and § 7-51a does not prevent access, it expands access.

The Respondent continues to discuss the legislative history of these provisions, stating that if the Legislature wanted to explicitly make birth indexes a public record, they could have. This is true, but also irrelevant. The purpose of FOIA is to make all records public by default. In 1975, by passing FOIA, the Connecticut Legislature absolved themselves of the need to itemize

¹ The DPH's website proudly advertises this service: <https://portal.ct.gov/DPH/Vital-Records/How-to-Obtain-a-Record>.

which records are public. § 1-210 states that “Except as **otherwise provided by any federal law or state statute**, all records maintained or kept on file by any public agency, whether or not such records are required by any law or by any rule or regulation, shall be public records,” (emphasis added). Thus, in light of the fact that the Respondent has not cited a law that prohibits uncertified copies of birth indexes from being disclosed, the records must be disclosed pursuant to FOIA.

B. Alleged Non-Existence of Records

The Respondent is relying on a definition of an index that does not match that which is in the dictionary. They claim that their database of who was born before 1948 is not an index, while that is the very definition of an index - it is a finding aid to an otherwise hard-to-navigate subject matter (in this case, sequentially-filed birth certificates). Although the law did not require them to keep an index until 1948, all records held by an agency are subject to FOIA, including those which are not required to be maintained by statute. As quoted previously, § 1-210 states that “Except as otherwise provided by any federal law or state statute, all records maintained or kept on file by any public agency, **whether or not such records are required by any law or by any rule or regulation**, shall be public records,” (emphasis added). Registrar Frugale admitted in her testimony to having an “internal reference list” even though she claimed it was not an index. There is no semantic difference between an internal reference list and an index. They could call it a turducken, but it’s still an index. The Respondent goes on to claim that they previously provided the Complainant with a copy of the reference list from 1917 as a courtesy. The provided data actually covered the period from 1897-1917, encompassing more than half a million names. More importantly, that range, and the range from the current request,

from 1918-1947, are all subject to FOIA, because they are all records held by an agency. To the extent that the FOI Commission were to agree that the reference list is not an index, the reference list would still be subject to a follow-up FOIA request, worded slightly differently.

C. Alleged Inaccessibility of Records

The Respondent provides another reason why they will not export data from 1917-1947. The reference list is contained on an archaic FoxPro database, and they claim that they are unable to manipulate the database because the staffer who was familiar with it recently passed away. Registrar Frugale testified that she was afraid that attempting to export the database could lead to the file being corrupted, but admitted this was not based upon any advice from any IT professionals. The Respondent is claiming to have a complete lack of succession planning for both their staff and their internal computer systems. This seems suspicious. Surely the State is making regular backups of the DPH's files. If there exist *any* copies of the Foxpro file anywhere, then there is no risk from manipulating the database, as any copy could be exported, with backups extant in case of issue.

It must be noted that performing a simple export from an existing database, even a large one or an old one, is not a terribly difficult technological feat². Obscure software and a lack of tech prowess are not valid FOIA exemptions. § 1-211 states that, "Any public agency which maintains public records in a computer storage system shall provide, to any person making a request pursuant to the Freedom of Information Act, a copy of any nonexempt data contained in such records, properly identified, on paper, disk, tape or any other electronic storage device or medium requested by the person, including an electronic copy sent to the electronic mail address

² A quick Google search yielded numerous websites discussing software which can easily export Foxpro to Excel: https://www.dbsofts.com/articles/foxpro_to_excel/

of the person making such request, if the agency can reasonably make any such copy or have any such copy made.”

If the state does not currently have someone available on staff who is knowledgeable enough to work with FoxPro, then they can certainly hire a vendor to handle these tasks, just as their now-deceased staffer did in the recent past. Although the Complainant hopes that someone from the State’s IT department can manipulate the database, the Complainant is willing and able to pay for any vendor’s time and expertise to work with the database, and would even sponsor the vendor’s time to educate the DPH on how to make these types of exports in the future, to avoid the obsolescence of this important genealogical data set. While it is the preference of the Complainant to receive the file in a modern format such as a csv, to the extent that is impossible for the Respondent to do that, it would be acceptable to simply provide the an exact copy of the database file, in the native Foxpro format, leaving the migration work to Complainant.

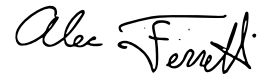
§ 1-211 also states that “On and after July 1, 1992, before any public agency acquires any computer system, equipment or software to store or retrieve nonexempt public records, it shall consider whether such proposed system, equipment or software adequately provides for the rights of the public under the Freedom of Information Act at the least cost possible to the agency and to persons entitled to access to nonexempt public records under the Freedom of Information Act.” Although it is unclear when the Department first began using FoxPro, what *is* clear is that the Legislature has made it clear that agencies should not be able to use poor information technology infrastructure to shirk their responsibilities under FOIA.

In short, the Respondent’s technological incompetence is not a valid reason for them to withhold nonexempt records, especially when nearly identical records have in fact been provided

to the same Complainant in the very recent past.

III. Conclusion

Under FOIA, all records are presumed public unless they fall into an exemption. The Respondent has failed to identify a valid exemption, and the Commission has previously ruled the records public in FIC 2013-004. The Complainant thus requests that the Commission grant the FOIA request.



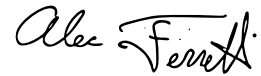
Alec Ferretti, Complainant

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:

Elizabeth Bannon

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Alec Ferretti, Complainant