NO. CV 09 4020325S	:	SUPERIOR COURT
DIVISION OF CRIMINAL JUSTICE, JOHN ROSE, CORPORATION COUNSEL AND EDDIE PEREZ, MAYOR, CITY OF HARTFORD	:	JUDICIAL DISTRICT OF NEW BRITAIN
V,	:	
FREEDOM OF INFORMATION COMMISSION, ET AL.	:	FEBRUARY 25, 2010

NO. CV 09 4020326S	:	SUPERIOR COURT
DIVISION OF CRIMINAL JUSTICE, JOHN ROSE, CORPORATION COUNSEL AND EDDIE PEREZ, MAYOR, CITY OF HARTFORD	:	JUDICIAL DISTRICT OF NEW BRITAIN
V.	:	
FREEDOM OF INFORMATION COMMISSION, ET AL.	:	FEBRUARY 25, 2010

MEMORANDUM OF DECISION

These consolidated appeals by the plaintiffs[1] seek review of two final decisions rendered on March 11, 2009 by the freedom of information commission (FOIC) on the

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1 The plaintiffs are the division of criminal justice (DCJ), an intervenor before the freedom of information commission, John Rose, corporation counsel, and Eddie Perez, mayor, City of Hartford (the city). The documents at issue in #FIC 2008-531 concerned Diggs Construction, but Diggs was not made a respondent in the FOIC and is not a plaintiff in the appeal in CV 09 4020325.

complaint of the Hartford Courant and an employee-reporter Jeffrey Cohen (the Courant).[2] Each appeal relates to the right of the public, under the Freedom of Information Act (FOIA), to obtain records relating to a grand jury being conducted pursuant to General Statutes § 54-47b and following.

The record shows as follows. In Docket No. CV 09 4020325, #FIC 2008-531, on July 8, 2009, the Courant requested of the city that it produce the following: (1) all requests for information or subpoenas for information/records sent to or made of Diggs Construction by law enforcement agencies on or after January 1, 2006 to the present; (2) all subpoenas for Diggs Construction employees or officials to appear made of the Diggs Construction by law enforcement agencies on or after January 1, 2006 to the present; and (3) All documents including e-mails and other electronic documents, turned over to such law enforcement agencies by Diggs Construction from January 1, 2006 to the present in response to any such subpoenas or requests for information. The city denied these requests by letter dated July 16, 2008. (#FIC 2008-531, Return of Record, ROR, p. 5).

In Docket No. CV 09 4020326, #FIC 2008-532, also on July 8, 2008, the Courant requested from the city (1) all requests for information or subpoenas for records sent to or made of the city by law enforcement agencies on or after January 1, 2006, (2) all requests

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[2] As the FOIC has entered an order in each case that the city provide the Courant with the documents at issue in these appeals, the court concludes that the DCJ and the city are aggrieved as required by General Statutes § 4-183 (a).

or subpoenas for city employees or officials by law enforcement agencies to appear on or after January 1, 2006, and (3) all documents including e-mails and other electronic documents turned over to such law enforcement agencies by the city from January 1, 2006 in response to any such subpoenas or request for information. The Courant's request to the city was denied on July 16, 2008. (ROR, #FIC 2008-532, p. 5).

The FOIC proceeded to hold a hearing on the two dockets and eventually issued two final decisions on March 11, 2009. The basic issue at the hearing was whether the city and the DCJ could rely on an exemption to the FOIA for "[r]ecords . . . exempted by . . . state statutes. . . . § 1-210 (b) (10)."

In # FIC 2008-531, the FOIC concluded (Finding 18) that the Connecticut grand jury statutes "do not . . . provide the clear, affirmative statement of confidentiality required to shield the records at issue from public disclosure under the FOI Act." It further concluded in Finding 20 that "had the legislature intended, by enacting the Grand Jury Statutes, to conceal the records at issue in this case, wherever located, it would have done so explicitly."

In Finding 21, the FOIC concluded that "because the requests for records in this case were directed to the respondent [city], and not to the grand jury, the . . . procedures [of the grand jury confidentiality statutes] are not implicated in the determination of whether the records in this case are exempt from disclosure." Therefore, the FOIC

ordered that the city provide the Courant with copies of each of the records sought in its July 8, 2008 request. (ROR, #FIC 2008-531, pp. 257-58).

The final decision of the FOIC in #FIC 2008-532 was identical. The FOIC in Finding 15 indicated that the city employees had turned over any requested records in their possession to the city officials named as respondents in the FOIC proceeding. It concluded in Finding 16 "that the [grand jury confidentiality statutes] do not . . . provide the clear, affirmative statement of confidentiality required to shield the records at issue from public disclosure under the FOI Act." In Finding 18, regarding the grand jury confidentiality statutes it concluded that "had the legislature intended, by enacting the Grand Jury Statutes, to conceal the records at issue in this case, wherever located, it would have done so explicitly." In Finding 19, the FOIC stated: "Accordingly, it is concluded that because the requests for records in this case were directed to [the city], and not the grand jury, the . . . procedures set forth in [the grand jury confidentiality statutes] are not implicated in the determination of whether the records in this case are exempt from disclosure." The FOIC, as in the previous docket, ordered the city to provide the Courant with each of the records sought in its July 8, 2008 request. (ROR, pp. 260-62). This consolidated appeal from the two final decisions followed.

The court reviews the final decisions in accordance with the recent case of *Board of Selectmen* v. *Freedom of Information Commission*, 294 Conn. 438, 446, 984 A.2d 748

(2010): "Our review of these claims is guided by well established principles. [J]udicial review of the commissioner's action is governed by the Uniform Administrative Procedure Act [(UAPA)], General Statute §§ 4-166 through 4-189], and the scope of that review is very restricted. . . . [R]eview of an administrative agency decision requires a court to determine whether there is substantial evidence in the administrative record to support the agency's findings of basic fact and whether the conclusions drawn from those facts are reasonable. . . . Neither this court nor the trial court may retry the case or substitute its own judgment for that of the administrative agency on the weight of the evidence or questions of fact. . . . Our ultimate duty is to determine, in view of all of the evidence, whether the agency, in issuing its order, acted unreasonably, arbitrarily, illegally or in abuse of its discretion. . . . Cases that present pure questions of law, however, traditionally invoke a broader standard of review than ordinarily is involved in deciding whether, in light of the evidence, the agency has acted unreasonably, arbitrarily, illegally or in abuse of its discretion. . . . We have determined, therefore, that we will defer to an agency's interpretation of a statutory term only when that interpretation of the statute previously has been subjected to judicial scrutiny or to a governmental agency's time-tested interpretation and is reasonable." See also *Rainforest Café, Inc.* v. *Dept. of Revenue Services*, 293 Conn. 363, 371 (2009); *Jim's Auto Body* v. *Commissioner of Motor Vehicles*, 285 Conn. 794, 803-804, 942 A.2d 305 (2008).

The FOIC ordered the plaintiff city to disclose the records set forth in the Courant's complaint, in each case, as requests 1-3. By the third request, the disclosure included documents before the grand jury turned over to it by the city plaintiffs and Diggs as well. The FOIC reasoned that the Courant had asked the plaintiff city for documents, and the grand jury statutes did not serve as an exemption to such an independent request.

There is no question that a direct request to the grand jury for such records would be unavailing, and exempt from the FOIA under § 1-210 (b) (10). Section 54-47e requires an investigatory grand jury to conduct its proceedings "in private." Our Supreme Court, in considering the extent of disclosure of the grand juror's report on the conclusion of the grand jury involved in these appeals, declared in *In re Investigatory Grand Jury No. 2007-04*, 293 Conn. 464, 474-75, 977 A.2d 621 (2009): "Under the common law, grand jury proceedings were presumptively secret, even after the conclusion of the investigation. . . . In order to obtain access to the grand jury's report and related documents, the burden was on the person seeking disclosure to show that in the particular circumstances [of the case], the benefits of disclosure outweigh the benefits of continued secrecy. . . . [T]his court [has] held that, when the legislature enacted § 54-47g (b) in 1988 . . . it abrogated this common-law rule with respect to the finding of the grand jury and established a rebuttable presumption of disclosure . . . . Although § 54-47g (c) continues to recognize the purposes behind the common-law presumption regarding the

confidentiality and secrecy of grand jury proceedings, the statute favors disclosure after the grand jury has completed its investigation." (Citations omitted; internal quotation marks omitted.) Thus, this case affirms the principle of grand jury secrecy, central to criminal investigations for at least two hundred years.

By contrast, a request to the city for records that is truly independent of the grand jury process must be complied with under FOIA. Thus, in the case of *Nasto* v. *Freedom of Information Commission*, Superior Court, judicial district of New Britain, Docket No. CV 08 4016200 (July 23, 2008, *Cohn, J.*), involving the similar parties to this appeal, the Courant requested the plaintiff city supply it with records that had been turned over to the chief state's attorney. This court held that the city's records were not protected by an exemption from the FOIA for requests made to states' attorneys. See also *Cozen O'Connor* v. *U.S. Dept. of Treasury*, 570 F.Supp.2d 749, 776 (E.D.Pa., 2008) (exemption for grand jury secrecy does not apply to requests for documents independent of and extrinsic to the grand jury investigation).

The issue thus becomes whether these records were in effect being requested of the grand jury. The court differs with the FOIC's conclusion as found in Finding 21 in #FIC 2008-531 and Finding 19 in #FIC 2008-532 that because the requests for records in these cases "were directed to the respondent [city], and not to the grand jury, the statutory procedures [providing for grand jury secrecy] are not implicated in the determination of

whether the records in this case are exempt from disclosure." Here, in both requests of July 8, 2008, the Courant in point 3 sought "all documents . . . turned over to such law enforcement agencies" for the grand jury proceedings.[3] The FOIC's order allowing the Courant to have access to such records, as the request was *framed*, and at the time when the records were sought,[4] invaded the principle of grand jury secrecy and was erroneous. *State* v. *Rivera*, 250 Conn. 188, 202, 736 A.2d 790 (1999).[5] The FOIA exemption for statutes in § 1-210 (b) (10) was applicable to this request.

The first two requests of the Courant, involving subpoenas, are, however, subject to a different analysis. Section 54-47e, as set forth above, provides that an investigation of an investigatory grand jury "shall be conducted in private." The Supreme Court has

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While the words "grand jury" do not appear in the July 8, 2008, request, the summary of facts in the defendants' brief of September 15, 2009 states that "[t]he documents that the Commission ordered to be disclosed to the Courant" included "public records produced to the grand jury in response to any such subpoenas." (FOIC and Courant, Defendants' joint brief at 2).

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The grand jury was in session at the time of the Courant's July 8, 2008 letter. Subsequently, while these appeals were pending, the work of the grand jury came to an end and agreed upon disclosures were made to the Courant. This did not render the appeals moot as the issues here are "capable of repetition, yet evading review." *State* v. *Boyle*, 287 Conn. 478, 487 n.3, 949 A.2d 460 (2008).

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In contrast to the FOIC findings, there is no exception to grand jury secrecy, as seen in Supreme Court precedent, for the fact that the summoned witnesses may voluntarily reveal to the public any records that they provided to the grand jury.

frequently stated that it is "well established that the general rule under the [FOI act] is disclosure, and any exception to that rule will be narrowly construed in light of the general policy of openness expressed in the [act] . . . . [Thus] [t]he burden of proving the applicability of an exception [to disclosure under the act] rests upon the party claiming it." (Citations omitted.) *Director, Dept. of Information Technology* v. *Freedom of Information Commission*, 274 Conn. 179, 187, 874 A.2d 785 (2005). See also *Director of Health Affairs Policy Planning* v. *Freedom of Information Commission*, 293 Conn. 164, 977 A.2d 148 (2009) (a statutory privilege that forbids disclosure of peer review documents does not apply to requests under the FOIA).

The plaintiffs argue that the disclosure of subpoenas would impinge on the secrecy of the grand jury. The court agrees, however, as to *these* subpoenas, with the FOIC's findings that the grand jury statutes (including § 54-47e) "do not provide the clear, affirmative statement of confidentiality required to shield records at issue from public disclosure under the FOI Act." (ROR, #FIC 2008-531, p. 258; #FIC 2008-532, p. 261).

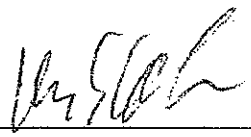
It is true that the federal law is otherwise and prohibits a freedom of information request for grand jury subpoenas. *Lopez* v. *Dept. of Justice,* 393 F.3d 1345, 1350 (D.C. Cir. 2005); *Blackwell* v. *Federal Bureau of Investigation*, 2010 Dist. Lexis 3313 (D.D.C. January 15, 2010). These cases are based, however, on Federal Rule of Criminal

Procedure 6 (e) (2) that prohibits disclosure of identity of witnesses before a grand jury. The federal statutes and rule 6 are sufficient to support a statutory exemption from the federal FOIA.

In light of the quite general language in Connecticut's grand jury statutes, the court relies instead on the recent case of *Better Government Association* v. *Blagojevich*, 899 N.E.2d 382 (Ill. App. Ct. 2008). There the court refused to apply federal law and held that subpoenas issued in connection with a grand jury investigation were not exempt under the Illinois Freedom of Information Act. The disclosure of the subpoenas would assist in supplying the "sunshine of public scrutiny." Id, 391. In these present appeals, moreover, there was a specific finding in each final decision that "no evidence was produced at the hearing to show that disclosure of the records . . . would in any way prejudice any proceedings being conducted by the grand jury." (ROR, #FIC 2008-531, Finding 24, p. 259; #FIC 2008-532, Finding 22, p. 262).

Therefore, the court agrees with the final decision of the FOIC ordering the city plaintiffs to disclose "all requests for information or subpoenas" as sought by the Courant in its July 8, 2008 letters. The exemption of § 1-210 (b) (10) does apply to this particular

request for records before the grand jury, but not to subpoenas from the grand jury in the possession of the city plaintiffs. The appeal is therefore sustained in part and dismissed in part.



Henry S. Cohn, Judge