

NO. CV 106007012S	:	SUPERIOR COURT
	:	
RICHARD SIMONS,	:	
YALE POLICE BENEVOLENT ASSOCIATION	:	JUDICIAL DISTRICT OF
	:	
v.	:	NEW BRITAIN
	:	
FREEDOM OF INFORMATION COMMISSION,	:	
ET AL.	:	OCTOBER 17, 2011

MEMORANDUM OF DECISION

The plaintiffs, Richard Simons and the Yale Police Benevolent Association, appeal from an August 11, 2010 final decision of the defendant, freedom of information commission (FOIC) dismissing a complaint that the plaintiffs had brought to the FOIC. The FOIC in its final decision held that under the freedom of information act (FOIA), General Statutes, Chapter 14, the plaintiffs were not entitled to records that they had requested from the defendants Chief, Police Department, Yale University and Police Department, Yale University (collectively henceforth the police department).¹

The record shows that the FOIC conducted a hearing on the plaintiffs' complaint on November 4, 2009 and subsequently a proposed final decision was rendered on July 12, 2010. This proposed final decision was considered by the FOIC at a regular meeting

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As the plaintiffs' complaint was dismissed by the FOIC in its final decision, the plaintiffs are aggrieved for purposes of § 4-183 (a).

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on July 28, 2010. At that time, the FOIC remanded the matter to the hearing officer to conduct a second hearing in order to give the parties an opportunity to present evidence and argument on a prior case that might have had bearing on the matter;² to whom the request at issue in this matter was made; and whether the request was a personnel matter subject to a FOIA exception. The second hearing occurred on August 2, 2010, a second proposed final decision was issued and the FOIC approved this second proposed final decision on August 11, 2010. (Return of Record, ROR, p.514).

The FOIC in the August 11, 2010 final decision made the following relevant findings.

1. It is found that, by letters dated July 24, 2009 and July 31, 2009, the complainants requested copies of the following information from the respondent chief and the respondent department:
 - a. For fiscal year 2008, "any and all documentation related to wages, salaries, compensation and benefit packages, including but not limited to base salary, overtime payments, meal money, use of department vehicles and fuel paid for by Yale University; for the following positions within the Yale University Police Department, Chief of Police, Assistant Chief of Police, Administrative lieutenant(s), Patrol Coordinator Lieutenant(s), Training coordinator(s), Shift Lieutenant supervisors, Investigative Services

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The prior case was one decided by the FOIC, *Janet R. Perotti and State of Connecticut, Office of the Public Defender v. Chief, Police Department, Yale University*, Docket #FIC 2007-370 (February 13, 2009). This case concluded that the police department was the functional equivalent of a public agency with regard to its law enforcement functions.

Sergeant(s), Communications Coordinator Sergeant(s) and Patrol Sergeants;”³

2. By letter dated and filed with the Commission on August 14, 2009, the complainants appealed to the Commission, alleging that the respondents violated the Freedom of Information (hereinafter “FOI”) Act by failing to provide the complainants with the requested records described in paragraph 1, above.
3. Subsequent to the filing of the complaint, the parties exchanged correspondence. Specifically, it is found that, by letter dated August 21, 2009, the respondents denied the complainants’ requests for the records described in paragraph 1.a, above, stating that the “University is a private employer, and confidential information about its employees’ salary and benefits is not subject to disclosure under the Freedom of Information Act (FOIA).”
4. It is found that, by letter dated September 11, 2009, the complainants reiterated their request to the respondents for the documents described in paragraph 1.a, above, and maintained that the Yale University Police Department (hereinafter “YUPD”) is a public agency under the FOI Act.

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The plaintiffs also requested (b) “Capital expenditures/acquisitions for fiscal years 2008 and 2009, including but not limited to: vehicles (including motorcycles, bicycles and Segway(s), firearms (handguns and long guns), ammunition, radio equipment, computer equipment (MDTs, ‘911 Data’ mobile video systems, laptops and desktops) and tactical equipment (bullet-proof vests, helmets, entry tools, hazardous devices equipment, etc.);” and (c) “Yale Police Department budgets for fiscal years 2008 and 2009.” These documents were eventually provided by Yale University to all plaintiffs. (ROR, Finding 5, p. 515.

6. The complainants contend that the Commission previously concluded that the YUPD is the functional equivalent of a public agency [due to the prior decision in *Perrotti*, supra].

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* * *

11. The YUPD presents a unique set of circumstances in the Commission's history [unlike the other precedent that concerned functional equivalents]. . . .

* * *

15. It is found that, under the terms of the Memorandum of Understanding between the City of New Haven and Yale University, which sets forth the agreement of the parties as to the police power of YUPD officers, section 3 of that agreement provides:

In all matters of promotion, termination, discipline and employment, personnel policies and procedures established by the University shall apply to Yale University Police Officers and shall be administered solely by the University. Such officers shall be deemed for all purposes to be agents and employees of the University and shall be paid for their services, including while in emergency service for the City of New Haven, and receive benefits to which they are entitled by law, from the university.

* * *

17. The respondents stipulated that Yale University receives federal research funding from the federal government. It is found that such federal research funding is not spent on the YUPD's budget. It is also found that YUPD employee

salaries and benefits are paid entirely through private funds of the University.

18. It is found that Yale University's budget office sets budgetary guidelines for all Yale University departments. It is also found that such guidelines establish criteria for expenditures and salaries of YUPD officers. It is found that, based on budgetary guidelines, Yale University's Director of Finance for the Office of Public Safety submits the respondents' budgetary requests to Yale's budget office.
19. It is found that no governmental agency exerts control over the salaries and benefits of YUPD employees. Moreover, it is also found that the YUPD does not determine the salaries and benefits of its employees; rather, it is found that such determinations are made by a private entity, Yale University, according to a university-wide salary structure.

* * *

21. Based on the facts and circumstances of this case, it is concluded that the requested records do not relate to the conduct of the public's business, since such records do not relate to the YUPD's governmental function of policing, but rather relate to the salary structure of a private university. . . . Accordingly, it is further concluded that such records are not public records within the meaning of § 1-200(5), G.S.

* * *

25. It is found that the respondents do not maintain records responsive to the request described in paragraph 1.a, above, as they relate to the respondent chief. Accordingly, it is concluded that the respondents did not violate the FOI Act as alleged in the complaint with respect to any such records.

26. It is further found that the only records that the respondents maintain which are arguably responsive to the request described in paragraph 1.a, above, are: (1) letters of appointment and promotion for managerial employees other than the respondent chief, which letters are maintained in such individual employees' personnel files; and (2) copies of requests for overtime, which would contain the name, date, and hours worked, for individual managerial employees, which are maintained in a separate administrative file. It is also found that the records described herein are kept in locked and secured locations and are not accessible to the general public.

* * *

29. It is found that the complainants did not request personnel files, per se. However, it is found that the requested records, to the extent that the respondents maintain them, are contained, in some part, in personnel files. . . .

* * *

31. It is found that the records described in paragraph 26, above, constitute personnel, medical, or similar files within the meaning of § 1-210(b)(2), G.S.

32. With respect to whether the records described in paragraph 26, above, pertain to a legitimate matter of public concern, it is found that, unlike public employee salaries, the YUPD officers are paid with private funds according to Yale's university wide-salary structure; no public funds are used. While the complainants may have need of the records for their private negotiating position in the context of an ongoing collective bargaining issue, such need does not constitute a legitimate public interest.

33. The respondents presented substantial evidence to show that the salaries of managerial positions at Yale, such as the

positions at issue here, are kept confidential and that managerial employees have a high expectation that such salaries will not be disseminated to the general public.

34. Based on the unique facts and circumstances of this case, it is found that the records described in paragraph 26, above, do not pertain to legitimate matters of public concern and, if disclosed, would be highly offensive to a reasonable person. Accordingly, it is concluded that, if the records described in paragraph 26, above, constitute public records, they are exempt from mandatory disclosure pursuant to § 1-210(b)(2), G.S.

* * *

The following order by the Commission is hereby recommended on the basis of the record concerning the above-captioned complaint:

1. The complaint is dismissed. (ROR, pp. 514-21.)

The plaintiffs timely appealed from the final decision of the FOIC, and raised questions of statutory interpretation. As our Supreme Court recently stated: "Because statutory interpretation is a question of law, our review is de novo. . . . When construing a statute, [o]ur fundamental objective is to ascertain and give effect to the apparent intent of the legislature In other words, we seek to determine, in a reasoned manner, the meaning of the statutory language as applied to the facts of [the] case, including the question of whether the language actually does apply In seeking to determine that meaning, General Statutes § 1-2z directs us first to consider the text of the statute itself and its relationship to other statutes. 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 The test to determine ambiguity is whether the statute, when read in context, is susceptible to more than one reasonable interpretation. . . . 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.” (Citation omitted.) *Commissioner of Public Safety v. Freedom of Information Commission*, 301 Conn. 323, 337-38, 21 A.3d 737 (2011). See also *Board of Selectmen v. Freedom of Information Commission*, 294 Conn. 438, 446, 984 A.2d 748 (2010) (“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.”)

Also, as the Appellate Court has stated in setting the applicable standard of review: “Judicial review 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. . . . An administrative finding is supported by substantial evidence if the

record affords a substantial basis for fact from which the fact in issue can be reasonably inferred The substantial evidence rule imposes an important limitation on the power of the courts to overturn a decision of an administrative agency . . . and . . . provide[s] a more restrictive standard of review than standards embodying review of weight of the evidence or clearly erroneous action [I]t is something less than the weight of the evidence, and the possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency's finding from being supported by substantial evidence [A]s to questions of law, [t]he court's ultimate duty is only to decide whether, in light of the evidence, the [agency] has acted unreasonably, arbitrarily, illegally, or in abuse of its discretion Conclusions of law must stand if the court determines that they resulted from a correct application of the law to the facts found and could reasonably and logically follow from such facts." *Blinkoff v. Commission on Human Rights & Opportunities*, 129 Conn. App. 714, 720-21, 20 A.3d 1272 (2011).

With these principles in mind, the court must first address, as noted by the FOIC in its final decision, FOIA § 1-210 (a), providing that "all records maintained or kept on file by any public agency . . . shall be public records" and that these records are to be "maintain[ed] . . . in its custody at its regular office or place of business in an accessible place." This provision has been interpreted in *Lash v. Freedom of Information Commission*, 116 Conn. App. 171, 188, 976 A.2d 739 (2009), rev'd in part on other

grounds, 300 Conn. 511, 14 A.3d 998 (2011) to mean that each department of a public agency must be considered separately to determine exactly what is maintained or kept at the department to which the request for records is made. See also *Albright-Lazzari v. Murphy*, Superior Court, judicial district of New Britain, Docket No. CV 10 5014984 (April 21, 2011, *Cohn, J.*) (mayor, even though the town's executive officer, was not required to produce records beyond those that his office particularly maintains).⁴

Here, the FOIC has found that the plaintiffs made their requests to the "respondent chief and the respondent department." (ROR, Finding 1, p. 514). The fiscal matters of the police department have properly been delegated by Yale University to its budget office. (ROR, Finding 18, p. 518). Indeed, it was the Yale budget office that supplied the plaintiffs with records that were initially part of their request. (ROR, Finding 5, p. 515). The police department does not maintain any of the records at issue as regards the police chief. (ROR, Finding 25, p. 519). The only other records "arguably responsive" to the plaintiffs' request are letters of appointment and promotion for managers other than the

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As the plaintiffs correctly point out, an agency cannot remove documents that it maintains to another site to avoid its duty to disclose under § 1-210 (a). See, e.g., *Smith v. Director of Human Resources, Connecticut Lottery Corporation*, Docket #FIC 2007-228 (February 13, 2008), appealed at Superior Court, judicial district of New Britain, Docket No. 08-4017049 (appeal withdrawn, December 17, 2010). The record does not support the contention of the plaintiffs that the police department was required to keep salary information on file at its offices. Rather, the FOIC found that, in the regular course of business, the documents at issue were maintained by the university.

police chief, contained in individual personnel files, and material relating to overtime for these managers. (ROR, Finding 26, p. 519). Thus, the issue, as correctly found by the FOIC, is whether these specific managerial records were properly held exempt from disclosure under FOIA.

The FOIC concluded in its final decision that the plaintiffs' complaint must be dismissed because those records in fact in the custody of the police department were not maintained by a *public* agency. Under FOIA, a public agency includes one that is "deemed to be the functional equivalent of a public agency pursuant to law." § 1-200 (1) (B). Our Supreme Court recently summarized "functional equivalent" under FOIA as follows: "See *Connecticut Humane Society v. Freedom of Information Commission*, 218 Conn. 757, 760, 591 A.2d 395 (1991) ('[i]n determining whether an entity is the functional equivalent of a public agency, we consider the following criteria: [1] whether the entity performs a governmental function; [2] the level of governmental funding; [3] the extent of governmental involvement or regulation; [4] whether the entity was created by the government' [internal quotation marks omitted]; *Board of Trustees v. Freedom of Information Commission*, 181 Conn. 544, 553-54, 436 A.2d 266 (1980) (court's first adoption of this test." *Mayfield v. Goshen Volunteer Fire Co.*, 301 Conn. 739, 753, n.8, 22 A.3d 1251 (2011). This test is to be applied on a case by case basis, subject to the

findings of the FOIC. See *Cos Cob Volunteer Fire Co. No. 1 v. FOIC*, 212 Conn. 100, 106, 561 A.2d 429 (1989).

In its findings, the FOIC concluded that as to its salary and benefit records, the police department was not the functional equivalent of a public agency. In Finding 15, the police department's salaries and benefits were found to be under the control of Yale University, and in fiscal matters, it had no relationship with the city of New Haven. In Finding 17, monetary grants by the federal government to Yale were found not to be a source of funds for the police department. In Finding 18, Yale's budget office was found to establish criteria for the expenditures and salaries of the police department. In Finding 19, the FOIC concluded that a private entity, Yale University, controlled the police department's salaries and benefits, and not a governmental agency. In Findings 8 and 21, the FOIC decided that based on the "facts and circumstances" of the case, the functional equivalence test did not extend to records relating to salary. For these records, the police department simply was not funded or created by a governmental entity. See *Mayfield v. Goshen Volunteer Fire Department*, supra, 301 Conn. 739.⁵

The court concurs in this analysis and also of the FOIC in Findings 6, 7, 10, 12, 13 and 14 that the FOIC final decision in *Perrotti* does not control the plaintiffs' FOIA complaint. In *Perrotti*, a public defender sought to obtain the work histories of two officers of the police department who had arrested her client. The FOIC held that the

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The record supports the FOIC's findings. (ROR, pp. 117-19, 133, 144-45, 151-59).

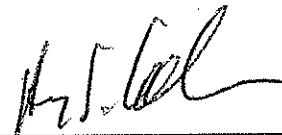
request in *Perrotti* related to the police department's law enforcement functions, and with regard to law enforcement, the police department was the functional equivalent of a public agency. In so concluding, the FOIC did not address the scope of the activities of the police department such that any and all future requests for records would be presented to the functional equivalent of a public agency. Thus, the FOIC could conclude legally on this complaint that a request to the police department for salary information was not similar to a request for law enforcement records. For example, in the *Cos Cob* Supreme Court decision, and in the FOIC as well, the volunteer fire company was the functional equivalent of a public agency when performing its governmental function of fire protection, but not when performing social or fraternal functions.

The FOIC also made findings, assuming that the police department were a public agency, as regards managerial salary and benefit information contained in the appointment, promotional and overtime records. It concluded that the police department properly might claim the FOIA exemption from disclosure for "personnel or medical files and similar files the disclosure of which would constitute an invasion of personal privacy." § 1-210 (b) (2).

In Finding 29, the FOIC found that the records requested were "in some part" personnel files. In Finding 30, the *Perkins v. Freedom of Information Commission*, 228 Conn. 158, 175, 635 A.2d 783 (1993) test for invasion of person privacy was stated to have two parts. "[F]irst, 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.” In Finding 32, the FOIC found that the plaintiffs’ need for the records in a collective bargaining dispute did not constitute a legitimate matter of public concern. The police department’s officers were paid with private funds under Yale’s salary structure. In Finding 33, the FOIC found that salaries of Yale’s managerial employees, as here, are kept confidential and that these employees have a “high expectation that such salaries will not be disseminated to the general public.” In addition, in Finding 34, the FOIC found that these records, based on the employees’ expectations of non-dissemination, did not pertain to legitimate matters of public concern and, “if disclosed, would be highly offensive to a reasonable person.”⁶ The court concludes that the FOIC has correctly applied the law in *Perkins* to the facts found.

The FOIC has not acted unreasonably, arbitrarily, illegally or in abuse of its discretion. Therefore the appeal is dismissed.



Henry S. Cohn, Judge

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The chief of the police department testified that the managers would regard the disclosure of the salary and benefit information as an invasion of personal privacy. (ROR, p. 159). This testimony taken with the other evidence in the record on Yale’s control constitutes substantial evidence for the findings by the FOIC on exemption 2.