NO. CV 106006278S	.	SUPERIOR COURT
COMMISSIONER, DEPT. OF CORRECTION	:	JUDICIAL DISTRICT OF
V.	:	NEW BRITAIN
FREEDOM OF INFORMATION COMMISSION AND DAVID P. TAYLOR	:	APRIL 5, 2012

MEMORANDUM OF DECISION

The plaintiff, department of correction (the department) appeals[1] from a June 3, 2011 final decision of the defendant freedom of information commission (FOIC) ordering the department to provide the defendant David Taylor[2] redacted copies of certain statements. The statements were given to the department in connection with its decision on whether to grant Taylor a transfer to incarceration in England under General Statutes § 18-91a.

The record shows as follows. Taylor initially brought a complaint to the FOIC on August 10, 2009 involving records maintained by the department and other state agencies, and a hearing was held on January 7, 2010. Four documents at issue at the hearing were so-called victim impact statements provided to the department as it assessed Taylor's

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1 The department is aggrieved for purposes of § 4-183 (a) due to the orders of the FOIC in the final decision.

2 Taylor was the complainant in the FOIC.

request for a transfer pursuant to § 18-91a. A proposed final decision was issued and a final decision was issued on June 30, 2010. After the department appealed to this court from the June 30 final decision, the FOIC moved for a remand to correct some "scriveners' errors" as well as to clarify what items Taylor was still seeking. The remand by this court was granted on November 17, 2010.

Taylor on November 24, 2010 and December 16, 2010 made partial withdrawals of requests for documents that he was seeking from the department. The FOIC then issued a final decision on June 3, 2011. The relevant portions of that decision are as follows:

> 14. It is found that IC 2009-465-001 (lines 25-41), IC 2009-465-002, IC 2009-465-005 and IC 2009-465-006 are victim impact statements. The respondents testified that disclosure of such records may constitute a risk of harm to the people who wrote the statements because, in general, an inmate might get upset with, and seek revenge on, those individuals who have influenced the respondents' decision to deny them a transfer.
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> 15. It is found that the complainant, a British citizen, has been incarcerated in Connecticut since 1999, after killing the woman he had hired to care for his children, and with whom he was having an intimate relationship, after he discovered that this same woman was also carrying on an intimate relationship with another man. It is found that the complainant was convicted of murder and was sentenced in 2001 to 25 years in prison, without eligibility for parole. It is found that the complainant is not scheduled to be released until 2024.
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> 16. It is found that the respondents did not offer any evidence

that the complainant engaged in violent or criminal behavior prior to the incident in 1999 that resulted in his incarceration. It is further found that the respondents did not offer any evidence that the complainant has engaged in violent or aggressive behavior during the 11 years he has been incarcerated, which might give them reasonable grounds to believe that he may harm or seek revenge upon the authors of statements, described in paragraph 14, above, 13 years from now, when he is released from prison.

17. To the contrary, the respondents submitted evidence at the hearing, in the form of work supervisor's reports, demonstrating, and it is found that, the complainant has an "excellent" attitude toward correction officers, other inmates, and regulations. It is also fund that such reports conclude that the complainant's attendance at his job as an electronic technician is excellent; that he is "self-motivated" and "co-operative"; an "excellent worker, dependable and thorough," and that his engineering knowledge has helped others with complex problems.

18. It is found that Stephen Clapp, a counselor supervisor in the Offender Classification & Population Management unit, made the decision to withhold the records from the complainant. It is found that his decision was not reviewed by any other person employed at the Department of Correction. It is found that Mr. Clapp's decision to withhold the records described in paragraph 14, above, was not based on any specific knowledge of the complainant or his behavior during his incarceration, but rather, was based upon his general knowledge and beliefs about how inmates may react, in certain situations.

19. It is found, based on the foregoing, that the respondents failed to prove that the Commissioner of Correction has reasonable grounds to believe that disclosure of the in camera records, described in paragraph 14, above, may result in a safety risk in this case, pursuant to § 1-21-

(b)(18), G.S.

20. It is concluded, therefore, that the respondents violated the FOI Act in failing to disclose the records described in paragraph 14, above.

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

1. The respondents shall, forthwith, provide the complainant with a copy of the in camera records described in paragraph 14, of the findings above, free of charge.

2. In complying with paragraph 1 of the order, above, the respondents may redact all individual victims' names and contact information from each such in camera record.

(Final Decision Post Remand, pp. 5-6).

The FOIC filed the "Final Decision Post Remand" with the court on June 7, 2011. The department, FOIC and Taylor then proceeded to file briefs and have oral argument on the department's objections to the FOIC's orders requiring disclosure of the redacted impact statements. The standard of review of the department's objections is guided by well-established principles as set forth by our Supreme Court. "[J]udicial review of the [commission's] action is governed by the Uniform Administrative Procedure Act [(UAPA), General Statutes §§ 4-166 through 4-189], and the scope of that review is very restricted . . . . 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." (Citations omitted; internal quotation marks omitted.) *Board of Selectmen* v. *Freedom of Information Commission*, 294 Conn. 438, 446, 984 A.2d 748 (2010).

Further, "[b]ecause 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 the 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; internal quotation marks omitted.) *Commissioner of Public Safety* v. *Freedom of Information Commission*, 301 Conn. 323, 338, 21 A.3d 737 (2011).

Viewing the department's claims under this standard, the court observes that the department before the FOIC relied upon an exception to the freedom of information act (FOIA), § 1-210 (b) (18), and relies upon this exception as well as in its appeal to this court.[3] It provides as follows: "Nothing in [FOIA] shall be construed to require disclosure of . . . [r]ecords, the disclosure of which the Commissioner of Correction . . . has reasonable grounds to believe may result in a safety risk, including the risk of harm to any person or risk of escape from, or a disorder in a correctional institution . . . ."

As seen in Finding 18, an employee of the department testified at the FOIC hearing about why the department considered the disclosure of the victim impact statements to be a safety risk. He stated: "I see it as a safety concern for the victims in the statements they may have provided, and I don't know if it would have angered [Taylor]. I have to take that assumption for every offender that I review for these types of requests. I

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[3] Therefore, under the standard of review, these legal claims, having never been considered by the FOIC before and no court having issued an opinion thereon, must be reviewed de novo by this court. The issue presented is one of statutory interpretation.

don't know if he's going to be revengeful. I mean we've had offenders use other offenders who are either cellmates, who are discharging soon, we have had situations like that, maybe they have family friends on the outside. So I don't know how the reaction would be when he sees, you know, the victims' statements, and I have concerns for that–for their safety. . . .

"Just the course of my . . . being in the department for many years, we've had situations where offenders have tried–attempted to hire other offenders to carry out assaults, crimes and so forth, and they have been caught. . . . Yes, thank you Russell Peeler is a perfect example of that . . . . If I remember correctly, he had witnesses to his crime. It was a very serious crime. And he attempted to hire an offender to harass, intimidate and carry out an assault, if possible, on the . . . witnesses . . . .

"I just don't know how he . . . and I'm talking in general with any offender–how he or she would feel about a victim's statements. And inmates–or offenders, I should say, are very vengeful. . . . It appears from today's hearing and from what I'm reading, [Taylor] really wants to get to England, and if, for some reason, he thinks that a particular witness hindered that transfer, I would imagine it would upset him. And to what degree, I don't know, but I have to think of the worst in the event that–it could happen." (ROR, pp. 75-78).

On the other hand, the FOIC has, in its supplemental decision, interpreted the § 1-

210 (b) (18) exception to require specific proof by the department that the disclosure to Taylor, as opposed to inmates in general, would pose a safety risk. In Findings 16 and 17, the FOIC sets forth facts indicating that Taylor is a model inmate. Therefore, in Finding 19, the FOIC concludes that the reasons stated by the department to justify a safety risk here are not reasonable.

In a prior decision, this court was faced with a similar dispute between the department and the FOIC, also involving Taylor. In that case, Taylor requested the disciplinary record of two industrial supervisors, employees of the department.[4] See *Commissioner of Correction* v. *Freedom of Information Commission*, Superior Court, judicial district of New Britain, Docket No. CV 07 4015438 (November 3, 2008, *Cohn, J.*), aff'd as moot, 129 Conn. App. 425, 22 A.3d 630 (2011), cert. denied, 303 Conn. 935, __ A.3d __ (2012). As here, the evidence as found by the FOIC was that Taylor was not a safety risk, while the department's witness stressed the reasonableness of finding a safety risk based upon his many years of supervising inmates in general. The FOIC concluded that such evidence did not provide the reasonable grounds required in § 1-210 (b) (18).

The court reversed the FOIC and agreed with the department: "[T]he

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[4] Subsequent to the issue as raised in court, the General Assembly enacted § 18-101f that prohibited such requests by inmates.

commissioner of DOC and his staff certainly have the experience to know when a particular request will result in a safety risk. Having received the reasons given by the DOC for declining to make the record available, the FOIC is not free to reject DOC's reasons because the are "hypothetical" and not based on actual events. . . . The FOIC's role is to determine whether the DOC's reasons were pretextual and not bona fide, or irrational."[5]

The court concludes, as it did in the personnel records case, that § 1-210 (b) (18) is met if reasonable reasons given by the department are drawn from observations about inmates in general as opposed to a specific inmate making the request. The court's conclusion is supported by the recent decision of our Supreme Court in *Commissioner of Correction* v. *Coleman*, 303 Conn. 800, __ A.3d __ (2012). The issue in *Coleman* was whether the trial court had properly approved the actions of the department in ending an

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[5] To the extent that the legislative history should be consulted, because § 1-210 (b) (18) is ambiguous, the court repeats its prior statement from the 2008 case: "It is true that the commissioner of DOC must have 'reasonable grounds to believe' that the risk exists. Section 1-210 (b) (18) as initially proposed would have created an exemption only on the certification of the DOC commissioner that disclosure of the records would amount to a security risk. As adopted, however, the provision allows the FOIC to provide a review function that an inmate denied records would have an avenue of appeal. As Representative Knopp stated: 'The purpose of the amendment was to adopt an objective standard that provided *some basis* for review in court in the event that an inmate wishes to appeal the denial of a public record. And therefore, the commissioner needs to make an affirmative finding that there are reasonable grounds to believe that disclosure of the public record may result in a safety risk . . . .' (42 H.R. Proc., Pt. 9, 1999 Sess., p. 3125.) (Emphasis added.)"

inmate hunger strike. The inmate argued that the trial court's "finding of a probable negative impact on safety, security and order was based on speculation and conjecture and, therefore, was an abuse of discretion." Id., 828.

The Supreme Court rejected this claim: "Finally, we note that the judgment of the department officials in the context of assessing the seriousness of a threat to institutional security inherently 'turns largely on purely subjective evaluations and on predictions of future behavior. . . . Indeed, the administrators must predict not just one inmate's future actions . . . but those of the entire population. . . .' Accordingly, the trial court, in its role as fact finder, was free to, and did in fact, credit the professional judgment of the department officials charged with maintaining the safety, security and order within the prison system in determining whether the defendant's conduct posed an unacceptable risk." (Citations omitted.) Id., 828-29.[6]

Interpreting § 1-210 (b) (18) as the department argues, the court finds substantial evidence in the record[7] that supports the department's grounds as reasonable that it would

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The internal quotation was taken from *Hewitt* v. *Helms*, 459 U.S. 460, 474, 103 S.Ct. 864, 74 L.Ed. 2d 675 (1983). See also *Florence* v. *Board of Chosen Freeholders*, 566 U.S. __ (April 2, 2012) (security risk justifies strip search of arrestees regardless of severity of crime).

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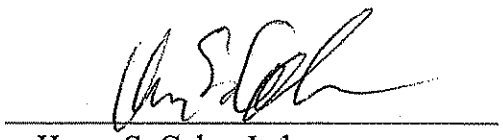
See the testimony of the department's employee above.

pose a safety risk for inmates to receive copies of the victim impact statements.[8] The final decision is based on errors of fact and law. Therefore the appeal of the department is sustained.



Henry S. Cohn, Judge

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8 The department had reasonable grounds for concluding that the redaction of the name and contact information of the victims would not resolve the security risk. The court has reviewed the impact statements in camera and it is clear that on disclosure to Taylor, he would easily identify those that wrote the statements.