NO. HHB CV15-6029797S	:	STATE OF CONNECTICUT
COMMISSIONER, DEPARTMENT OF EMERGENCY SERVICES AND PUBLIC PROTECTION, ET AL.	:	SUPERIOR COURT
v.	:	JUDICIAL DISTRICT OF NEW BRITAIN
FREEDOM OF INFORMATION COMMISSION, ET AL.	:	APRIL 8, 2016

Memorandum of Decision

The immediate issue in this case involves the release under the Freedom of Information Act of materials owned by the shooter in the December 14, 2012 murders at the Sandy Hook Elementary School. There is unquestionably a heightened public interest in these materials and no claim of ownership of them or invasion of privacy resulting from their release. But the legal rule established by this case will apply to all future cases in which public disclosure is sought of privately-created documents not used in a criminal trial that the state or local police have involuntarily seized from innocent victims, witnesses, and even suspects. The court must decide this case with those future cases in mind.

The plaintiffs, who are the commissioner of the department of emergency services and public protection, the department itself (department), and, after obtaining permission to intervene, the state division of criminal justice, appeal from the final decision of defendant freedom of information commission (commission) ordering the plaintiffs to disclose to defendants David Altimari and the Hartford Courant newspaper (Courant) documents seized pursuant to search warrants by the Connecticut state police during its investigation of the December 14, 2012 Sandy Hook murders. The commission ruled that these documents were

"public records" that were not exempt from disclosure under the Freedom of Information Act (act). See General Statutes § 1-200 et seq. The court sustains the appeal and reverses the commission's decision.

I

The record reveals the following facts. By letter dated January 24, 2014, the Courant requested from the plaintiffs copies of certain documents referred to in the state police report on the Sandy Hook shootings. These documents included "a spiral bound book written by the shooter entitled 'The Big Book of Granny,'" a photo of the class of 2002-03 at Sandy Hook Elementary School, and a "spreadsheet ranking mass murders by name, number killed, number injured, types of weapons used, and disposition." (Return of Record (ROR), p. 303.)

When the plaintiffs did not file a timely response to this request, the Courant filed a complaint with the commission. On December 8, 2014, after the Courant had filed its complaint, the plaintiffs responded by letter stating that 'there are no documents responsive to your [FOI] request because you have requested access to or copies of . . . items of evidence that were seized or otherwise collected as part of the criminal investigation of the incident. Evidence collected as part of a criminal investigation does not constitute a 'public record' under the Connecticut [FOI] Act." (Internal quotation marks omitted.) (ROR, p. 304.)

A hearing before the commission took place on January 6, 2015. In its May 13, 2015 decision, the commission found that the requested documents were seized pursuant to search warrants for the shooter's residence and that the state police had concluded its investigation with no arrests contemplated. (ROR, p. 305.) The commission ruled that the documents in question were "public records" within the meaning of the act and that no exemption to disclosure applied.

Accordingly, the commission ordered that the plaintiffs provide a copy of each of the requested documents to the Courant free of charge. (ROR, p. 312.)

The plaintiffs appeal.[1]

II

Under the Uniform Administrative Procedure Act (UAPA), General Statutes § 4-166 et seq., judicial review of an agency decision is "very restricted." (Internal quotation marks omitted.) *MacDermid, Inc. v. Dept. of Environmental Protection*, 257 Conn. 128, 136, 778 A.2d 7 (2001). Section 4-183 (j) of the General Statutes provides as follows: "The court shall not substitute its judgment for that of the agency as to the weight of the evidence on questions of fact. The court shall affirm the decision of the agency unless the court finds that substantial rights of the person appealing have been prejudiced because the administrative findings, inferences, conclusions, or decisions are: (1) In violation of constitutional or statutory provisions; (2) in excess of the statutory authority of the agency; (3) made upon unlawful procedure; (4) affected by other error of law; (5) clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record; or (6) arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion."

Stated differently, "[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 [the appellate] court nor the trial court may retry the case or substitute its

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[1]The plaintiffs nonetheless agree that the search warrant affidavit, the warrant itself, and the inventory are public records subject to disclosure under the act.

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." (Internal quotation marks omitted.) *Okeke v. Commissioner of Public Health*, 304 Conn. 317, 324, 39 A.3d 1095 (2012). "It is fundamental that a plaintiff has the burden of proving that the [agency], on the facts before [it], acted contrary to law and in abuse of [its] discretion." (Internal quotation marks omitted.) *Murphy v. Commissioner of Motor Vehicles*, 254 Conn. 333, 343, 757 A.2d 561 (2000).

Our Supreme Court has stated that "[a]n agency's factual and discretionary determinations are to be accorded considerable weight by the courts. . . ." (Internal quotation marks omitted.) *Longley v. State Employees Retirement Commission*, 284 Conn. 149, 163, 938 A.2d 890 (2007). "Even for conclusions 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 if its discretion. . . . [Thus] [c]onclusions of law reached by the administrative agency 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. . . . [Similarly], this court affords deference to the construction of a statute applied by the administrative agency empowered by law to carry out the statute's purposes. . . . Cases that present pure questions of law, however, invoke a broader standard of review than is . . . involved in deciding whether, in light of the evidence, the agency has acted unreasonably, arbitrarily, illegally or in abuse of its discretion. . . . Furthermore, when a state agency's determination of a question of law has not previously been subject to judicial scrutiny . . . the agency is not entitled to special deference. . . . We have

determined, therefore, that the traditional deference accorded to an agency's interpretation of a statutory term is unwarranted when the construction of a statute . . . has not previously been subjected to judicial scrutiny [or to] . . . a governmental agency's time-tested interpretation. . . . [When the agency's] interpretation has not been subjected to judicial scrutiny or consistently applied by the agency over a long period of time, our review is de novo." (Citation omitted; internal quotation marks omitted.) *Chairperson, Connecticut Medical Examining Board v. Freedom of Information Commission,* 310 Conn. 276, 281-83, 77 A.3d 121 (2013).

III

The act "makes disclosure of public records the statutory norm. . . . [I]t is well established that the general rule under the [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; internal quotation marks omitted.) *Director, Dept. of Information Technology v. Freedom of Information Commission,* 274 Conn. 179, 187, 874 A.2d 785 (2005) (*Director).*

Section 1-210 (a) of the act provides in part that "[e]xcept 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 and every person shall have the right to (1) inspect such records promptly during regular office or business hours, (2) copy such records in accordance with subsection (g) of section 1-212, or (3)

receive a copy of such records in accordance with section 1-212."[2] The threshold issue in this case is whether the documents seized by the plaintiffs and requested by the Courant constitute "public records" within the meaning of the act.

General Statutes § 1-200 (5) further defines "Public records and files" for purposes of the act as "any recorded data or information relating to the conduct of the public's business prepared, owned, used, received or retained by a public agency, or to which a public agency is entitled to receive a copy by law or contract under section 1-218, whether such data or information be handwritten, typed, tape-recorded, printed, photostated, photographed or recorded by any other method." There is no dispute that the requested documents constitute "recorded data or information," that the plaintiffs are "public agencies," or that the information seized by warrant, while not "owned" by the plaintiffs, was at least "received or retained" by them.

Instead, the dispute centers on whether the documents "[related] to the conduct of the public's business . . . ." The plaintiffs contend that the property seized still belongs to the

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[2]The full subsection provides: "(a) 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 and every person shall have the right to (1) inspect such records promptly during regular office or business hours, (2) copy such records in accordance with subsection (g) of section 1-212, or (3) receive a copy of such records in accordance with section 1-212. Any agency rule or regulation, or part thereof, that conflicts with the provisions of this subsection or diminishes or curtails in any way the rights granted by this subsection shall be void. Each such agency shall keep and maintain all public records in its custody at its regular office or place of business in an accessible place and, if there is no such office or place of business, the public records pertaining to such agency shall be kept in the office of the clerk of the political subdivision in which such public agency is located or of the Secretary of the State, as the case may be. Any certified record hereunder attested as a true copy by the clerk, chief or deputy of such agency or by such other person designated or empowered by law to so act, shall be competent evidence in any court of this state of the facts contained therein." General Statutes § 1-210 (a).

original owners and therefore is essentially private property. The commission found that the documents relate to the public interest because "there was heightened public interest generally in the shootings and, specifically, in knowing how and why the shootings occurred; the requested documents informed the investigation; significant public resources were expended in conducting a massive, year-long investigation, and in examining gun control measures and mental health issues arising out of the shootings; and where there will be no criminal prosecution through which the public would otherwise have any access to the requested documents . . . ." (ROR, p. 307.)

In determining whether the documents relate to the public business, the court initially observes that there is very little guidance from our appellate courts. The only case cited, *Fromer v. Freedom of Information Commission,* 90 Conn. App. 101, 875 A.2d 590 (2005), relied on by the plaintiffs, is not relevant. In *Fromer*, the court held initially that instructors at the University of Connecticut who developed certain course materials did not constitute "public agencies" within the meaning of the act. Id., 104-07.[3] The court also held that the course materials were not "owned, used, received or retained" by the university within the meaning of § 1-200 (5). Id., 107-110. The court did not reach the issue here of whether documents "[relate] to the conduct of the public's business."

The court must review the commission's reasoning that this statutory term depends heavily on whether the case attracted "heightened public interest," as the Sandy Hook case clearly did. The court disagrees with this approach. The standard of whether a case is a high

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[3]Although the court relied on the definition of "public agency" in § 1-200 (1), the same term appears in § 1-200 (5).

profile case is far too subjective to prove workable or fair. There is no consistent way of determining whether a case has garnered "heightened public interest." Further, the right of the public to documents from a criminal case should not depend on whether the crime is especially heinous or whether the media latches on to the case. Surely, there is a sufficiently valid public interest in crime in more urban locations where, unfortunately, it is more common and the media does not give each case as much attention. In other words, whether documents seized by a search warrant "[relate] to the conduct of the public's business" should not depend on the location or novelty of the crime being investigated.

There is undoubtedly a strong public interest in having access to documents relating to the conduct of all criminal cases. "'Public monitoring of the judicial process through open court proceedings and records enhances confidence in the judicial system by ensuring that justice is administered equitably and in accordance with established procedures.'" *State v. Komisarjevsky,* 302 Conn. 162, 174, 25 A.3d 613 (2011) (quoting *Rosado v. Roman Catholic Diocesan Corp.,* 292 Conn. 1, 30, 970 A.2d 656, cert. denied, 558 U.S. 991 (2009)). For example, the legislature has now amended the act to provide, with some exceptions, that "any record of the arrest of any person shall be a public record . . . ." Public Acts 2015, No. 15-164 (amending General Statutes § 1-215).[4] Although documents seized pursuant to a search warrant are different because the

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[4]General Statutes § 1-215 (b) (Rev. to 2015) now provides in full: "Notwithstanding any provision of the general statutes, and except as otherwise provided in this section, any record of the arrest of any person shall be a public record from the time of such arrest and shall be disclosed in accordance with the provisions of section 1-212 and subsection (a) of section 1-210. No law enforcement agency shall redact any record of the arrest of any person, except for (1) the identity of witnesses, (2) specific information about the commission of a crime, the disclosure of which the law enforcement agency reasonably believes may prejudice a pending prosecution or a prospective law enforcement action, or (3) any information that a judicial authority has ordered to be sealed from public inspection or disclosure. Any personal possessions or effects found on a

original owner still has rights to them, "evidence of crime necessarily loses its entirely private character when a criminal justice agency lawfully obtains it for use in a criminal investigation and/or prosecution on behalf of the public." *Harris v. Denver Post Corp.*, 123 P.3d 1166, 1170 (Colo. 2005). Similarly, although documents may be privately-created and perhaps do not "relate to the public's business" at the time of their creation, the fact that they were lawfully seized by the police means that there was probable cause to believe that, at a minimum, they constitute "evidence of an offense, or . . . evidence that a particular person participated in the commission of an offense . . . ." General Statutes § 54-33a (b).[5] At that point, they do relate to the public's business. For these reasons, the court concludes that documents seized pursuant to a search warrant "[relate] to the conduct of the public's business" and therefore constitute public records under the act.

IV

As noted, § 1-210 (a) provides that all records of public agencies shall be public records available for public inspection and copying "[e]xcept as otherwise provided by any federal law or

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person at the time of such person's arrest shall not be disclosed unless such possessions or effects are relevant to the crime for which such person was arrested."

[5]Section 54-33a (b) provides in full: "Upon complaint on oath by any state's attorney or assistant state's attorney or by any two credible persons, to any judge of the Superior Court or judge trial referee, that such state's attorney or assistant state's attorney or such persons have probable cause to believe that any property (1) possessed, controlled, designed or intended for use or which is or has been used or which may be used as the means of committing any criminal offense; or (2) which was stolen or embezzled; or (3) which constitutes evidence of an offense, or which constitutes evidence that a particular person participated in the commission of an offense, is within or upon any place, thing or person, such judge or judge trial referee, except as provided in section 54-33j, may issue a warrant commanding a proper officer to enter into or upon such place or thing, search such place, thing or person and take into such officer's custody all such property named in the warrant."

state statute. . . ." The plaintiffs argue that the statutes governing search and seizure in Title 54 of our General Statutes constitute "state [statutes]" that fall within this exception. The commission concedes that this precise issue has not previously been subjected to judicial scrutiny [or to] . . . a governmental agency's time-tested interpretation. . . ." (Internal quotation marks omitted.) *Chairperson, Connecticut Medical Examining Board v. Freedom of Information Commission,* supra, 310 Conn. 282. (Plaintiff's brief, p. 18.) Accordingly, the court's review of this issue is de novo or plenary. Id., 283. Accord *Pictometry International Corp. v. Freedom of Information Commission,* 307 Conn. 648, 670, 59 A.3d 172 (2013).

Our Supreme Court has observed in this context that "[t]he exemptions contained in [various state statutes] reflect a legislative intention to balance the public's right to know what its agencies are doing, with the governmental and private needs for confidentiality. . . . [I]t is this balance of the governmental and private needs for confidentiality with the public right to know that must govern the interpretation and application of the [act]." (Internal quotation marks omitted.) *Dept. of Public Safety v. Freedom of Information Commission,* 298 Conn. 703, 726, 6 A.3d 763 (2010). The one occasion in which our Supreme Court has held that a state or federal law did not fall under the § 1-210 (a) exception was in *Chief of Police v. Freedom of Information Commission,* 252 Conn. 377, 746 A.2d 1264 (2000). There the Court concluded that the Federal Rules of Civil Procedure were not federal laws that "otherwise provided" for nondisclosure. The Court relied on the rule that the "otherwise provided" exception "suggests, instead, a reference to federal and state laws that, by their terms, provide for confidentiality of records or some other

similar shield from public disclosure." Id., 399.[6]

As far as can be ascertained, however, in every other case in which our appellate courts have addressed the issue, the courts have found that state or federal laws qualified under the § 1-210 (a) "otherwise provided" exception. See *Pictometry International Corp. v. Freedom of Information Commission,* supra, 307 Conn. 648 (copying provisions of federal copyright law fell within exception); *Commissioner of Correction v. Freedom of Information Commission,* 307 Conn. 53, 52 A.3d 636 (2012) (disclosure of information about person held by the state on behalf of a federal immigration agency barred by federal regulation); *Commissioner of Public Safety v. Freedom of Information Commission,* 301 Conn. 323, 21 A.3d 737 (2011) (disclosure, in town grand lists, of home addresses of certain public officials precluded by combination of state statutes); *Dept. of Public Safety v. Freedom of Information Commission*, supra, 298 Conn. 725-27 (provision of state Megan's law regarding release of sex offender information restricted by court order fell under exception); *Commissioner v. Freedom of Information Commission,* 204 Conn. 609, 619-23, 529 A.2d 692 (1987) (state statute concerning publication of information regarding organized crime fell within exception under predecessor Freedom of Information Act); *Galvin v. Freedom of Information Commission*, 201 Conn. 448, 454-62, 518 A.2d 64 (1986) (autopsy reports fall within exception because disclosure restricted under regulations expressly authorized by state statute); *Groton Police Dept. v. Freedom of Information Commission,* 104 Conn. App. 150, 160, 931 A.2d 989 (2007) (state statute mandating confidentiality of

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[6]The Court added that "[t]here is nothing [in the legislative history of § 1-210 (a)] . . . that suggests that the legislature intended this very general language to encompass the kinds of individualized and possibly hypothetical determinations under federal discovery rules that the plaintiff's argument would suggest." Id., 399-400.

information regarding child abuse fell within exception). In these cases, the Court has interpreted the § 1-210 (a) exception more broadly than in *Chief of Police*. The Court has noted that the principle that exceptions to the act must be narrowly construed does not apply, because "[t]hat principle applies to exemptions set forth *within* the act, not to other laws, especially not to laws enacted by a different sovereign." (Emphasis in original.) *Commissioner of Correction v. Freedom of Information Commission,* supra, 307 Conn. 65 n.17. In another case, the Court held that General Statutes § 12-55, which authorizes the publication of town grand lists, fell under the § 1-210 (a) exception with regard to the home addresses of certain public officials "despite the lack of an explicit exception . . . ." *Commissioner of Public Safety v. Freedom of Information Commission,* supra, 301 Conn. 339. The Court reasoned that another statute in the act, General Statutes § 1-217 (a), prohibits the disclosure of these addresses as a general matter, and that the Court should resolve the issue by "[r]eading these statutes together . . . ." Id.

Most recently, the Court, in *Pictometry International Corp. v. Freedom of Information Commission,* supra, 307 Conn. 648, held that certain federal copyright laws satisfied the "otherwise provided" exception. The Court initially noted some special concerns based on the supremacy clause. "In other words, it is reasonable to conclude that, when the legislature enacted the federal law exemption, it intended, in the spirit of comity and deference to the supreme law of the land, to forestall any such preemption claims by providing in the first instance that the act does not apply to public records to the extent that any such application would conflict with federal law." Id., 673. The Court then focused on whether federal law "conflicts with" state law with regard to the copying of copyrighted documents. Id., 673. The Court stated that "to the extent that the application of the act *conflicts with* applicable federal law, the act does not apply."

(Emphasis added.) Id., 673-74. The Court added: "to the extent that the act and the Copyright Act impose *conflicting obligations*, the Copyright Act is a 'federal law' for purposes of the federal law exemption. Accordingly, although the federal law exemption does not entirely exempt copyrighted public records from [disclosure under] the act, it exempts them from copying provisions of the act that are *inconsistent with* federal copyright law." (Emphasis added.) Id., 674.[7] See also *Commissioner v. Freedom of Information Commission,* supra, 204 Conn. 621 ("Moreover, it is presumed that the legislature, in enacting a statute, acts with the knowledge of existing relative statutes and with the intention of creating one consistent body of law.")

Synthesizing these decisions, the court must look to see whether there is a conflict or inconsistency between the act and the other state statutes. The inquiry must focus on whether the state statute in question, by its terms, provides for confidentiality of records or some other similar shield from public disclosure, although there is no need for an "explicit exception" to the act. Further, the principle that exceptions to the act must be narrowly construed does not apply in this context.

With these principles in mind, the court turns to an analysis of the state statutes governing disposition of property seized by warrant. These statutes are found in Parts II and III of Chapter 959 of the General Statutes, which are entitled "Searches" and "Seized Property" respectively, and run from §§ 54-33a through 54-36p. Initially, § 54-36a (b) (1) provides that, when a law enforcement agency seizes property pursuant to a search warrant, the agency, subject to only

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[7]The Court distinguished *Chief of Police* as a case in which federal law was used to make "individualized and possibly hypothetical determinations" as to whether certain documents are discoverable under federal discovery rules. (Internal citations omitted.) In contrast, the Copyright Act "by its terms, shields a certain class of documents from the public's unconditional right under the act to copy public records . . . ." Id., 677.

limited exceptions, must file an inventory with the clerk of the court.[8]

In the case of stolen property, § 54-36a (b) (2) provides that the court "shall order the return of the property within thirty days of the date of filing such return request by the owner, except that for good cause shown, the court may order retention of the property for a period to be determined by the court."[9] In the case of unlawfully seized property, the person aggrieved by the

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[8]Section 54-36a (b) (1) provides in full: "Whenever property is seized in connection with a criminal arrest or seized pursuant to a search warrant without an arrest, the law enforcement agency seizing such property shall file, on forms provided for this purpose by the Office of the Chief Court Administrator, an inventory of the property seized. The inventory, together with the uniform arrest report, in the case of an arrest, shall be filed with the clerk of the court for the geographical area in which the criminal offense is alleged to have been committed; except, when the property is stolen property and, in the opinion of the law enforcement officer, does not exceed one thousand dollars in value, or when an attempt was made to steal the property but the property at all times remained on the premises in a sealed container, the filing of an inventory shall not be required and such property may be returned to the owner. In the case of property seized in connection with a search warrant without an arrest, the inventory shall be attached to the warrant and shall be filed with the clerk of the court for the geographical area in which the search warrant was issued. If any criminal proceeding is transferred to another court location, then the clerk with whom the inventory is filed shall transfer such inventory to the clerk of the court location to which such action is transferred."

[9]Section 54-36a (b) (2) provides in full: "If the seized property is stolen property, within ten days of the seizure, the law enforcement agency seizing the property shall notify the owner of the property if known, or, if the owner of the property is unknown at the time of seizure, such agency shall within ten days of any subsequent ascertainment of the owner notify such owner, and, on a form prescribed by the Office of the Chief Court Administrator, advise the owner of such owner's rights concerning the property and the location of the property. Such written notice shall include a request form for the return of the property. The owner may request the return of the property by filing such request form with such law enforcement agency, and upon receipt of such request, the law enforcement agency shall forward it to the clerk of the court for the geographical area in which the criminal offense is alleged to have been committed. The clerk of the court shall notify the defendant or defendants of the request to return the property. The court shall order the return of the property within thirty days of the date of filing such return request by the owner, except that for good cause shown, the court may order retention of the property for a period to be determined by the court. Any secondary evidence of the identity, description or value of such property shall be admissible in evidence against such defendant in the trial of such case. The fact that the evidence is secondary in nature may be shown to affect the weight of such evidence, but not to affect its admissibility. If the stolen property is a motor vehicle, a photograph

search may move, in the court that has jurisdiction of such person's case, for return of the property and to suppress its use as evidence at trial. General Statutes § 54-33f (a). See *State v. Marsala*, 216 Conn. 150, 155-59, 579 A.2d 58 (1990) (§ 54-33f and parallel provision in Practice Book, now § 41-12, provide a procedural mechanism for a criminal defendant to bring a motion to suppress). If the court grants the motion, the property "shall be restored unless otherwise subject to lawful detention" and it shall not be admissible in evidence during the trial. General Statutes § 54-33f (c).[10] In the case of lawfully seized property, and assuming the property is not stolen property subject to § 54-36a (b), contraband, or a nuisance, the court "shall, at the final disposition of the criminal action or as soon thereafter as is practical, or, if there is no criminal action, at any time upon motion of the prosecuting official of such court, order the return of such property to its owner within six months upon proper claim therefor."[11] Any order made under

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of the motor vehicle and a sworn affidavit attesting to the vehicle identification number of such motor vehicle shall be sufficient evidence of the identity of the motor vehicle. For the purposes of this subdivision, "motor vehicle" means a passenger or commercial motor vehicle or a motorcycle, as defined in section 14-1, and includes construction equipment, agricultural tractors and farm implements.

[10]Section 54-33f (c) provides in full: "The court shall receive evidence on any issue of fact necessary to the decision of the motion. If the motion is granted, the property shall be restored unless otherwise subject to lawful detention and it shall not be admissible in evidence at any hearing or trial."

[11]Section 54-36a (c) provides in full: "Unless such seized property is stolen property and is ordered returned pursuant to subsection (b) of this section or unless such seized property is adjudicated a nuisance in accordance with section 54-33g, or unless the court finds that such property shall be forfeited or is contraband, or finds that such property is a controlled drug, a controlled substance or drug paraphernalia as defined in subdivision (8), (9) or (20) of section 21a-240, it shall, at the final disposition of the criminal action or as soon thereafter as is practical, or, if there is no criminal action, at any time upon motion of the prosecuting official of such court, order the return of such property to its owner within six months upon proper claim therefor.

54-36a "shall upon notification from the clerk, be complied with by the person or department having custody or possession of such property." General Statutes § 54-36a (h).[12]

These provisions establish that, after property is seized pursuant to a warrant, the department seizing it maintains custody of it until ordered to dispose of it by a court. The disposition provisions, all of which use the term "shall," make it mandatory that the court return seized property, other than contraband and the like, to an aggrieved criminal defendant in the event of an unlawful seizure or to any owner by the time of the final disposition of the criminal case. See *Wiseman v. Armstrong*, 295 Conn. 94, 101, 989 A.2d 1027 (2010) ("shall" ordinarily expresses a legislative mandate).

The act conflicts with these provisions by providing for public disclosure of documents that were private property before seizure by the police and that a court would ordinarily order returned to the rightful owner by the end of a criminal case. It is true that, in many cases, the state will disclose documents seized by the police to the defendant during the criminal discovery process or in open court at the criminal trial and, at that point, they will probably fall into the public domain. However, that disclosure flows from the state's constitutional duty to disclose

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[12]In the event that the court orders seized property returned to the owner and the owner fails to claim it within six months, as conceivably could occur in the present case due to the undisputed fact that the shooter and the shooter's mother are dead, the court has a variety of options. Section 54-36a (d) provides as follows: "When the court orders the return of the seized property to the owner, the order shall provide that if the seized property is not claimed by the owner within six months, the property shall be destroyed or be given to a charitable or educational institution or to a governmental agency or institution, except that (1) if such property is money it shall be remitted to the state and shall be deposited in the general fund or (2) if such property is a valuable prize it shall be disposed of by public auction or private sale in which case the proceeds shall become the property of the state and shall be deposited in the general fund; provided any person who has a bona fide mortgage, assignment of lease or rent, lien or security interest in such property shall have the same right to the proceeds as he had in the property prior to the sale."

certain evidence to the defendant; see, e.g., *Brady v. Maryland,* 373 U.S. 83 (1963); or from its statutory duty to "prosecute all crimes and offenses against the laws of the state . . . ." General Statutes § 51-277 (b). In these situations, the owner of the property must cede some of his or her ownership rights to the state in order to allow it to prosecute crime and, ultimately, keep society safe and secure. There will be no issue under the act in these cases because the documents will already be available to the public.

But there are a myriad of other circumstances in which the state will not disclose any particular item of seized evidence. It is precisely in these circumstances that a person will request disclosure under the act based on the commission's interpretation. These circumstances include cases in which the state decides not to prosecute, cases in which the defendant enters a diversionary program, cases that the state does prosecute but does not need to disclose the evidence to the defendant or introduce it at trial, or cases in which there is no trial at all because of a guilty plea, as is commonly the case. In this context, the court, despite the commission's interpretation, ultimately has a mandatory, statutory duty to return the seized property, unless it is contraband or otherwise unlawful to possess, to the owner before anyone from the public will have an opportunity to see it. In these situations, the seizure statutes act as a shield from public disclosure.

Disclosure to the public under the act in such cases is in direct conflict with the ownership rights protected by the seizure statutes. This fact may be difficult to see in this case because no one has claimed ownership of the documents requested by the Courant. See note 13 supra. But this case presents unusual circumstances. In virtually all cases, a seizure by warrant represents an involuntary taking of private property – one justified by the fourth amendment, but

involuntary nonetheless. *See State v. Jackson,* 304 Conn. 383, 394, 40 A.3d 290 (2012) ("A seizure of property occurs when there is some meaningful interference with an individual's possessory interests in that property. . . .") [Internal quotation marks omitted.] Future cases will undoubtedly involve this sort of involuntary seizure of a victim's diary or other personal notes, a person's phone records, computer or email communications, bank records, medical records, business records, and other items. See General Statutes § 54-33a (a) ("As used in sections 54-33a to 54-33g, inclusive, 'property [subject to seizure]' includes but is not limited to, documents, books, papers, films, recordings, records, data and any other tangible thing . . . ."). Exposure of these items to the public when the state has not seen a need to do so in the criminal case entails a significant invasion of the owner's privacy and interference with his or her property rights. Indeed, "[i]t is fundamental to the integrity of the criminal justice process that property involved in the proceeding, against which no Government claim lies, be returned promptly to its rightful owner." (Internal quotation marks omitted.) *United States v. Wright,* 610 F.2d 930, 934 (D.C. Cir. 1979). Further, public release of such items renders meaningless the court's statutory obligation under Title 54 to return these items to the rightful owner. Such an interpretation of the search and seizure statutes is in direct contravention of our rules of statutory construction. See *State v. Gibbs,* 254 Conn. 578, 602, 758 A.2d 327 (2000). ("It is a basic tenet of statutory construction that the legislature did not intend to enact meaningless provisions. . . .")

The commission responds by claiming that the act already contains exemptions that will adequately protect a victim or owner's privacy. This point does not withstand close analysis. To begin with, the provision in the § 1-210 (b) (3) law enforcement exception most likely to apply to seized property – which exempts "information to be used in a prospective law enforcement

action if prejudicial to such action" – literally applies only when a prosecution is "prospective." General Statutes § 1-210 (b) (3) (D).[13] Once the case is over, or if the state decides that it will not prosecute, as in the present case, this portion of the (b) (3) exception would not apply. (ROR, p. 307, para. 24.)[14] There are other exceptions in the act for "[p]ersonnel or medical files and similar files the disclosure of which would constitute an invasion of personal privacy;" General Statutes § 1-210 (b) (2); or for "[c]ommercial or financial information given in confidence, not required by statute. . . ." General Statutes § 1-210 (b) (5) (B). But none of these carefully-worded exceptions would seem to insulate a victim's diary, a customer's personal bank records, a

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[13]The other subparts of § 1-210 (b) (3) are not as likely to apply to personal property seized under a search warrant. Section 1-210 (b) (3) provides in full: "(b) Nothing in the Freedom of Information Act shall be construed to require disclosure of . . .(3) Records of law enforcement agencies not otherwise available to the public which records were compiled in connection with the detection or investigation of crime, if the disclosure of said records would not be in the public interest because it would result in the disclosure of (A) the identity of informants not otherwise known or the identity of witnesses not otherwise known whose safety would be endangered or who would be subject to threat or intimidation if their identity was made known, (B) the identity of minor witnesses, (C) signed statements of witnesses, (D) information to be used in a prospective law enforcement action if prejudicial to such action, (E) investigatory techniques not otherwise known to the general public, (F) arrest records of a juvenile, which shall also include any investigatory files, concerning the arrest of such juvenile, compiled for law enforcement purposes, (G) the name and address of the victim of a sexual assault under section 53a-70, 53a-70a, 53a-71, 53a-72a, 53a-72b or 53a-73a, voyeurism under section 53a-189a, or injury or risk of injury, or impairing of morals under section 53-21, or of an attempt thereof, or (H) uncorroborated allegations subject to destruction pursuant to section 1-216. . . ."

[14]The law enforcement exception also applies to the "name and address of the victim of a sexual assault . . . ." General Statutes § 1-210 (b) (3) (G); note 13 supra. But it would not, for example, apply to specific entries in a sexual assault victim's diary that did not come into evidence. See *State v. Brisco,* 84 Conn. App. 120, 135-39, 852 A.2d 746, cert. denied, 271 Conn. 944, 861 A.2d 1178 (2004).

witness's phone records, or a businessperson's own financial records.[15] Further, all of these exceptions must be narrowly construed by the court. See *Director, Dept. of Information Technology v. Freedom of Information Commission,* supra, 274 Conn. 187. In short, the § 1-210 (b) exceptions from the act's rule of disclosure do not extend to the diverse types of documentary evidence that the state can seize involuntarily from the owner with a search warrant.

The commission ultimately proposes a statutory scheme that seems too illogical for the legislature to have contemplated. Under the commission's approach, the lawful owner of nondocumentary property, such as clothing, money, or other evidence, seized by the police but not used in a criminal prosecution will have an absolute right under Title 54 to return of his or her property at the conclusion of the prosecution. However, if that evidence takes documentary form, the owner loses that right and the public, in the commission's view, will have a right to copy and read it under the act. There does not seem to be a logical reason for this distinction in the treatment of seized private property.

The better view is that the seizure statutes in Title 54 act as a shield from public disclosure of all seized property not used in a criminal prosecution. As the Court has stated in this situation, "it is presumed that the legislature, in enacting a statute, acts with the knowledge of existing relative statutes and with the intention of creating one consistent body of law."

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[15]For example, the first requirement of the § 1-210 (b) (2) exemption for "[p]ersonnel or medical files and similar files the disclosure of which would constitute an invasion of personal privacy" is that "the files in question are within the categories of files protected by the exemption, that is, personnel, medical or 'similar' files." (Internal quotation marks omitted.) *Perkins v. Freedom of Information Commission,* 228 Conn. 158, 168, 635 A.2d 783 (1993). This requirement usually involves files held by governmental agencies, not privately-created documents. See *Tompkins v. Freedom of Information Commission*, 136 Conn. App. 496, 46 A.3d 291 (2012) (police department internal affairs investigation); *Almeida v. Freedom of Information Commission,* 39 Conn. App. 154, 664 A.2d 322 (1995) (school investigative file).

Commissioner v. Freedom of Information Commission, supra, 204 Conn. 609, 621. Thus, "to the extent that the application of the act conflicts with applicable [state] law, the act does not apply." See *Pictometry International Corp. v. Freedom of Information Commission,* supra, 307 Conn. 673-74. In that way, there will be a consistent statutory scheme that does not render the state seizure statutes ineffective or meaningless.

V

The court sustains the appeal and reverses the commission's decision.

It is so ordered.

Schuman, J.

Carl J. Schuman
Judge, Superior Court