CV 17 6039096 S		SUPERIOR COURT
COMMISSIONER, DEPT. OF INS.	:	JUDICIAL DISTRICT
V.	:	OF NEW BRITAIN
FREEDOM OF INFORMATION COMMISSION	:	JUNE 12, 2019

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MEMORANDUM OF DECISION ON ADMINISTRATIVE APPEAL

This administrative appeal, brought pursuant to the Uniform Administrative Procedure Act (UAPA), General Statutes § 4-183, was filed by the Connecticut Insurance Department (the department) and the Commissioner of the Department of Insurance (the commissioner) against the appellees, the Freedom of Information Commission (the commission) and the Connecticut Campaign for Consumer Choice (the campaign), following the commission's determination that certain information in the department's possession concerning a proposed insurance company merger was subject to public disclosure under Connecticut's Freedom of Information Act,

Electronic notice sent to all counsel of record.
Mailed to Official Reporter of Judicial Decisions.
agordanpark, Ct Affier 6-12-19

(9096 #124)
(9097 #117)

General Statutes § 1-200 et seq.[1] The appellants contend that the commission erred in its determination that the information at issue was not statutorily protected from public disclosure, that the commission erred in ordering that the department produce said information to the commission for in camera review, and that the commission abused its discretion in levying a $500 fine against the commissioner for failure to comply with the commission's order for in camera review.

The following relevant facts are set forth in the appellants' complaint and, as stated by the commission in its brief, are not in dispute. Entry No. 121, p. 2. In 2016, the campaign requested, pursuant to the Freedom of Information Act, certain information in the department's possession as a result of a contemplated acquisition in the insurance sector.[2] Specifically, the campaign sought "[a]ny and all documentation or communication submitted to, sent from, or in possession of [the department], relative to the proposed acquisition, including but not limited to . . . [t]he preacquisition notification filing made pursuant to [General Statutes] § 38a-131 (c) ('Form E') . . . [and] [c]orrespondence between [the department] and any party relative to the proposed acquisition . . . ." Compl., ¶ 4. The campaign further requested "[a]ny and all market share analysis or competitive impact examination done by [the department] or any third party in

[1] The present appeal has been consolidated with a related matter, *Commissioner, Dept. of Ins.* v. *Freedom of Information Commission*, Superior Court, judicial district of New Britain, Docket No. CV-17-6039097-S, which presents the same legal issues as the present appeal, with the exception of a $500 civil penalty which was not levied in that matter and thus is not at issue.
[2] Namely, the proposed acquisition of Aetna Inc. by Humana Inc. The companion case concerns a request for information pertaining to the proposed merger between the insurers Anthem Inc. and Cigna Corp.

connection with the proposed acquisition; and . . . [a]ny and all orders or other documents granting approval of the proposed acquisition and/or demonstrating [the department's] acceptance or lack of objection to the proposed acquisition." Id.

In response to the campaign's request, the department produced certain responsive documents but refused to disclose others, relying on the confidentiality protections provided for such information pursuant to multiple state statutes. Relevant to the present appeal, the department argued in part that the protections set forth in § 38a-131 (c) and General Statutes § 38a-137 shielded the withheld information from disclosure.

Following the department's response, the campaign filed a complaint with the commission, alleging that the department's failure to disclose certain information, with the exception of the Form E filing itself, violated the Freedom of Information Act. The commission subsequently held hearings on the parties' contentions and ordered the submission of the disputed information for in camera review. The department objected to the commission's request for in camera review of certain documents, arguing that the relevant confidentiality protections applied to shield the information from such a review, the request for which the department characterized as an "investigatory subpoena duces tecum . . . ." Compl., ¶ 13. In addition, the department filed an appeal with the Superior Court, which was ultimately dismissed following the court's finding that the department had failed to exhaust its administrative remedies and could not, at that point, appeal the commission's decision concerning the information at issue. See *Dept. of Ins.* v. *Freedom of Information Commission*,

Superior Court, judicial district of New Britain, Docket No. CV-17-6036748-S (June 26, 2017, *Huddleston, J.*) (64 Conn. L. Rptr. 702).

On June 28, 2017, the commission issued a final decision, finding that all records requested by the campaign were public records subject to disclosure under the Freedom of Information Act. The commission further found that the department's refusal to submit the requested information for in camera review "was without basis and frivolous." Compl., ¶ 31. As remedies, the commission, inter alia, assessed a $500 civil penalty against the commissioner and ordered the department to produce to the campaign all records responsive to the campaign's request, with the exception of the Form E filing itself, information already provided by the department to the campaign, and records already posted on the department's website. Compl., ¶¶ 41, 43. The present appeal followed.

The parties' disagreement centers on the extent of the confidentiality protections provided for in §§ 38a-131 (c) and 38a-137. In particular, the department argues that the confidentiality protections set forth by statute apply to "the Form E regulatory file, including communications between the insurers and [the department]." Companion Case, Entry No. 113, p. 3. The commission, meanwhile, takes a more limited view of the extent of confidentiality provided by the statute, having previously found that "any record of preacquisition notification or additional information or material requested"; (emphasis omitted) id., p. 24; was to be kept confidential, but that "the communications of the Insurance Commissioner and her staff regarding the Form E filing, both internal and sent to any insurer . . . may be disclosed under

[the Freedom of Information Act] after redaction of granular data appearing on the Form E submitted by the insurer." Id. The department further argues that various statutory prohibitions prevent it from disclosing any of the information at issue to the commission even for in camera review. Finally, the department argues that the commission erred in issuing the $500 civil penalty against the commissioner.[3]

DISCUSSION

The court's standard of review is governed by General Statutes § 4-183 (j), which provides in relevant part: "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 . . . (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. If the court finds such prejudice, it shall sustain the appeal and, if appropriate, may render a judgment . . . or remand the case for further proceedings." Put differently, "[u]nder the UAPA, it is [not] the function . . . of this court to retry the case or to substitute its judgment for that of the administrative agency. . . . Even for conclusions of law,

[3] The department also argues that the commission's decision to order the release of the information in question is not supported by substantial evidence. Nevertheless, the court need not address the merits of this argument given the disposition of the present appeal.

[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. . . . [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." (Internal quotation marks omitted.) *Commissioner of Emergency Services & Public Protection* v. *Freedom of Information Commission*, 330 Conn. 372, 379, 194 A.3d 759 (2018).

Notwithstanding the general deference to agency decisions afforded under the UAPA, it is equally true that "[w]hen 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 . . . ." (Internal quotation marks omitted.) *Commissioner of Emergency Services & Public Protection* v. *Freedom of Information Commission*, supra, 330 Conn. 379-80. Additionally, "[e]ven if time-tested, we will defer to an agency's interpretation of a statute only if it is 'reasonable'; that reasonableness is determined by [application of] our established rules of statutory construction." (Internal quotation marks omitted.) *Freedom of Information Officer, Dept. of Mental Health & Addiction Services* v. *Freedom of Information Commission*, 318 Conn. 769, 781, 122 A.3d 1217 (2015).

This appeal presents two questions of law—specifically, 1) whether the confidentiality protections codified in § 31a-131 (c) shield preacquisition information to the extent suggested by the department and 2) whether the restrictions on the transmission of confidential materials set forth in § 38a-137 bar the commission from reviewing the contested materials in camera. Neither question has previously been subject to judicial scrutiny. The court's search for prior Connecticut case law addressing § 38a-131 revealed only the aforementioned decision issued by the Superior Court as part of the present administrative appeal and that did not determine any of the legal issues now in question. See *Dept. of Ins.* v. *Freedom of Information Commission*, supra, Docket No. CV-17-6036748-S. A similar dearth of case law exists with regard to the question of whether a request for in camera review from the commission constitutes an investigatory subpoena or a request for testimony for purposes of § 38a-137. Further, no evidence exists to suggest that either statute has been subject to a time-tested interpretation. Accordingly, the court will accord no deference to the department's interpretation of these statutes and will instead undertake its review de novo.[4]

[4] The commission seems to suggest that the court should instead defer to its interpretation of the questions presently at issue, given the existing legal precedent surrounding the language in the Freedom of Information Act excepting information from disclosure "as otherwise provided by . . . state statute . . . ." General Statutes § 1-210 (a). Nevertheless, the core of the present appeal is not the commission's interpretation of the Freedom of Information Act itself, but rather the parties' differing interpretations of specific insurance statutes. Therefore, deference to the commission's determination is similarly unwarranted.

I. Statutory Analysis

"When construing a statute, [o]ur fundamental objective is to ascertain and give effect to the apparent intent of the legislature. . . . 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." (Internal quotation marks omitted.) *Commissioner of Emergency Services & Public Protection* v. *Freedom of Information Commission*, supra, 330 Conn. 380. General Statutes § 1-1 (a) gives guidance for the textual analysis of a statute, and provides: "In the construction of the statutes, words and phrases shall be construed according to the commonly approved usage of the language; and technical words and phrases, and such as have acquired a peculiar and appropriate meaning in the law, shall be construed and understood accordingly." Importantly, "[w]e may find evidence of [commonly approved] usage, and technical meaning, in dictionary definitions, as well as by reading the statutory language within the context of the broader legislative scheme." *State* v. *Menditto*, 315 Conn. 861, 865, 110 A.3d 410 (2015).

"If, after examining [the statutory] text and considering [the statute's] relationship [to other statutes], 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." General Statutes § 1-2z. "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 . . . ." (Internal quotation marks omitted.) *Commissioner of Emergency Services & Public Protection* v. *Freedom of Information Commission*, supra, 330 Conn. 380.

Finally, where a question of statutory interpretation involves the Freedom of Information Act, "[the] question . . . must be resolved in light of certain general principles governing the act. First, we have often recognized the long-standing legislative policy of the [act] favoring the open conduct of government and free public access to government records. . . . We consistently have held that this policy requires us to construe the provisions of the [act] to favor disclosure and to read narrowly that act's exceptions to disclosure." (Citations omitted; internal quotation marks omitted.) *Chief of Police* v. *Freedom of Information Commission*, 252 Conn. 377, 387, 746 A.2d 1264 (2000). Moreover, it is well established that "the burden of proving the applicability of an exception [to disclosure under the act] rests upon the party claiming it." (Internal quotation marks omitted.) *Director, Dept. of Information Technology* v. *Freedom of Information Commission*, 274 Conn. 179, 187, 874 A.2d 785 (2005).

a) Extent of the § 38a-131 (c) Exemption

Here, the parties agree that § 38a-131 (c) provides some level of confidentiality to information[5] in the department's possession as a result of the preacquisition notification process, but disagree as to the extent of this protection. Section 38a-131 (c) provides: "For an acquisition

[5] The general use of the term "information" outside of the court's statutory analysis should not be taken as instructive on the meaning of that term as it is used within the statutes presently at issue.

not exempt under subsection (b) of this section, the acquiring party shall file a preacquisition notification in accordance with this section and the acquired party may file a preacquisition notification. The commissioner shall treat any information filed under this subsection as confidential in the same manner as provided under section 38a-137." Section 38a-137 (a), meanwhile, provides in relevant part: "All information, documents, materials and copies thereof obtained by or disclosed to the commissioner or any other person in the course of an examination or investigation made pursuant to [General Statutes] section 38a-14a and all information reported, furnished or filed pursuant to [General Statutes] sections 38a-135 and 38a-136 shall . . . not be subject to disclosure under section 1-210 . . . ."

The parties' disagreement centers on two intersecting issues: 1) the meaning of the phrases "any information filed" and "in the same manner" in § 38a-131 (c) and 2) the effect of the statutory language in § 38a-137 concerning information acquired by the department pursuant to §§ 38a-14a, 38a-135, and 38a-136. Specifically, the commission contends that by limiting the confidentiality protections in § 38a-131 (c) to "any information filed," the legislature intended to shield a more limited category of information acquired under that statute from disclosure than that acquired under the statutes enumerated in § 38a-137. As support, the commission points to the common usage of the word "file" as well as the extent of the statutory protections provided in § 38a-137 to things obtained by the department pursuant to other statutes, namely "[a]ll *information, documents, materials and copies thereof* obtained by or disclosed to . . . in the course of an examination or investigation made pursuant to section 38a-

14a and all information *reported, furnished or filed* pursuant to sections 38a-135 and 38a-136 . . . ." (Emphasis added.) General Statutes § 38a-137 (a). The department, meanwhile, relies on the phrase "in the same manner as provided under section 38a-137"; General Statutes § 38a-131 (c); to argue that the legislature intended to shield anything received by the department as part of the preacquisition notification process to the same extent as information received as a result of §§ 38a-14a, 38a-135, and 38a-136.

In determining the extent of the confidentiality protections in § 38a-131 (c), we look first to the common usage of the categories specified as confidential in each statute. "Information" is commonly defined as "knowledge obtained from investigation, study, or instruction"; "intelligence, news"; or "facts, data." Merriam-Webster's Collegiate Dictionary (10th Ed. 1998). A "document," meanwhile, is defined in part as either "an original or official paper relied on as the basis, proof, or support of something" or "a writing conveying information"; id.; while "material" is defined in part as "something (as data) that may be worked into a more finished form." Id. The notions that a "document" is a tangible thing and that "material" is something short of a finished product are echoed in the legal context as well, with "document" defined as "[s]omething tangible on which words, symbols, or marks are recorded" (taken to include both physical media, i.e., paper, as well as electronic); Black's Law Dictionary (10th Ed. 2014); and "material" defined in part as "[i]nformation, ideas, data, documents, or other things that are used in reports, books, films, studies, etc." Id.

The foregoing definitions do not conclusively answer whether the terms "information," "documents," and "materials" are each distinct for purposes of the present analysis. While it seems clear that "document" refers to a medium for the conveyance or storage of knowledge rather than the actual knowledge contained therein, this definition is not exclusive of the term "information"—quite the contrary, the term "information" is included within one of the common definitions of the word "document." Merriam-Webster's Collegiate Dictionary, supra ("a writing conveying information"). In addition, the relationship between "information" and "material" remains unclear. The word "data" appears in the dictionary definitions of both "information" ("facts, data") and "material" ("something (as data) that may be worked into a more finished form"); id.; thus suggesting that the terms "material" and "information" are not necessarily exclusive of one another. The technical, legal definition of "material," meanwhile, suggests that "information" can be a component of "material." Black's Law Dictionary, supra ("[i]nformation . . . used in reports, books, films, studies, etc."). While these definitions suggest that "material" and "information" are not necessarily distinct from one another, the proper definitions of the three terms at issue cannot be ascertained without analyzing them in context of the legislative scheme in which they appear.

Turning to the usage of the terms "documents," "materials," and "information" within Connecticut's insurance statutes, § 38a-131 (c) (1) provides in relevant part: "The commissioner may require [as part of the preacquisition notification] additional material *and* information the commissioner deems necessary . . . ." (Emphasis added.) While this language suggests that

"material" and "information" may be two separate categories, language elsewhere in the same legislative scheme suggests instead that "information" is a broad term encompassing both "documents" and "materials." See, e.g., General Statutes §§ 38a-720c (e) ("[t]o assist the commissioner in the performance of the commissioner's duties, the commissioner may: (1) Share documents, materials or *other information*" [emphasis added]), 38a-142 (h) (1) ("[a]ll documents, materials or *other information* . . . in the possession or control of the Insurance Department . . . shall be confidential by law and privileged" [emphasis added]); 38a-962c (a) ("[n]otwithstanding any other provision of law and except as set forth in this section, proceedings, hearings, notices, correspondence, reports, records and *other information* in the possession of the commissioner . . . are confidential" [emphasis added]).

The commission, observing the difference in language between § 38a-131 (c) and § 38a-137 (a), suggests that by applying the confidentiality protections in § 38a-131 (c) only to "information" rather than to "materials" or documents," the legislature evinced an intent to shield a narrower range of items from public disclosure than would be in the department's possession pursuant to § 38a-14a. Notwithstanding this argument, the suggestion that "information" presents a narrower category than does "information, documents, [and] materials" contradicts both the common and technical understandings of these words and the concept, put forth in several Connecticut insurance statutes, that the term "information" is in fact inclusive of "documents" and "materials" rather than distinct from them. Additionally, adopting this argument would create an illogical result whereby an insurer submitting

"information" pursuant to the commissioner's request under § 38a-131 (c) (1) would have its submission shielded from disclosure, whereas the same insurer submitting "material" would have that submission subject to public access. Although the commission invokes the canon of expressio unius est exclusio alterius (the expression of one thing is the exclusion of another) to argue that the legislature, by referring to "information, documents, [and] materials" in § 38a-137 but not in § 38a-131 (c), demonstrated an intent that these two provisions have separate meanings, it is axiomatic that canons of statutory construction "are . . . merely guides drawn from experience, to be employed or not to be employed carefully and judiciously, depending on the circumstances. . . . To permit them to displace the conclusions that careful interpretation yields . . . would be a disservice to the legislative process, as well as to the judicial exercise of interpreting legislative language based upon the premise that the legislature intends to enact reasonable public policies." (Citations omitted; internal quotation marks omitted.) *Small* v. *Going Forward, Inc.*, 281 Conn. 417, 425 n.4, 915 A.2d 298 (2007). Thus, based on the foregoing analysis, the term "information" as used in § 38a-131 (c) is found to be inclusive rather than exclusive, encompassing any "documents," "materials," or other knowledge in the department's possession as a result of the preacquisition notification process.

We now turn to the second argument, specifically that the application of § 38a-131 (c) to "any information filed under this subsection" versus the application of § 38a-137 (a) to "all information reported, furnished or filed pursuant to sections 38a-135 and 38a-136" demonstrates the legislature's intent to keep confidential a more limited category of information

under the former than the latter. Again, the first step in this analysis requires a review of the common and technical meanings of the terms at issue. The verb "file," is defined in common parlance as "to place among official records as prescribed by law" or "to place items in a file." Merriam-Webster's Collegiate Dictionary, supra. "File" is further defined in the legal context as meaning "[t]o deliver a legal document to the court clerk or record custodian for placement into the official record . . . ." Black's Law Dictionary, supra. "Report," meanwhile, is commonly defined in part as "to give an account of" or "to make a written record or summary of"; Merriam-Webster's Collegiate Dictionary, supra; and "furnish" as "supply, give." Id.

An analysis of the common and technical usages of these three terms suggests that "report" and "furnish" apply to a broader range of methods for supplying information than does "file." While information that is "filed" is placed into official records pursuant to a legal requirement (or, at minimum, placed into a defined file), information that is "reported" or "furnished" is merely transmitted from one party to another, irrespective of any official processes or the place in which the information is ultimately stored. This meaning of "filed" also comports with the different processes set forth by §§ 38a-131 (c), 38a-135, and 38a-136. Section 38a-131 (c) mandates as part of the preacquisition notification process the "filing" of a preacquisition notification containing certain specified information, plus any additional information that the commissioner may require. Section 38a-135, meanwhile, requires the "filing" of an annual registration statement with the commissioner but also, inter alia, that the company "report" to the commissioner any dividends issued within a statutorily defined

timeframe after their issuance. Section 38a-136 contains similar requirements that insurers merely "report" information to the commissioner upon the occurrence of certain events. Thus, as the statutes referenced in § 38a-137 show, information that is "filed" with the department is generally transmitted either within or alongside some sort of "official record" (i.e., Form E or an annual registration statement) as part of a statutorily defined legal process, while information "reported" to the department is generally transmitted on a more ongoing basis without the need for an accompanying official record. Therefore, information "filed" under § 38a-131 (c) is information that is either included in or transmitted in a manner related to the Form E filing during the preacquisition notification process.

A related issue raised by the department concerns the party to whom the verb "file" is applicable in the context of § 38a-131 (c). The department conceptualizes the information shielded from disclosure by § 38a-131 (c) as any information put into a defined "regulatory file" as part of the preacquisition notification process. See, e.g., Entry No. 113, p. 1 As the commission observed in its brief, this interpretation would make the department, rather than specific insurers, the "filer" under § 38a-131 (c), as it is the department who would make the ultimate determination on which items go into the "regulatory file." The department's interpretation does find some support in the common usage of the verb "file," specifically the second definition previously mentioned: "to place items in a file." Merriam-Webster's Collegiate Dictionary, supra.

Nevertheless, a review of the department's argument in the context of § 38a-131 (c) makes clear that it is untenable. In particular, § 38a-131 (c) (2) provides in relevant part: "There shall be a waiting period after the *acquiring party* files the preacquisition notification." (Emphasis added.) Similarly, the regulations associated with § 38a-131 (c) suggest that the verb "file" as it pertains to the preacquisition notification process connotes the submission of items to the department by an insurer. See Regs., Conn. State Agencies § 38a-138-4 ("[t]he *person filing* [several types of forms, including Form E] may also *file* such exhibits as it may desire in addition to those expressly required" [emphasis added]). Adopting the department's view of the term "filed" would also contradict the technical definition of the term as "[t]o *deliver a legal document to* the . . . record custodian for placement into the official record . . . ." (Emphasis added.) Black's Law Dictionary, supra. Further, the department's proposed definition of "filed" would potentially lead to the illogical result where it could waive confidentiality on any information submitted by an insurer pursuant to the preacquisition notification process simply by refusing to include it in the confidential Form E file. Accordingly, under § 38a-131 (c), it is the insurers, rather than the department, to whom the verb "file" is applicable.

Finally, the department contends that the phrase "in the same manner as provided under section 38a-137"; General Statutes § 38a-131 (c); refers to the *type* of information to be kept confidential as part of the preacquisition notification process in addition to the *ways* in which said information should be kept confidential. Accordingly, the department argues that § 38a-131 (c) should encompass the same breadth of information "reported, furnished or filed" to the

department as part of the preacquisition notification process as would be transmitted to the department pursuant to §§ 38a-135 and 38a-136.

"Manner" is commonly defined as "a mode of procedure or way of acting." Merriam-Webster's Collegiate Dictionary, supra. In defining the phrase "manner of service," Black's Law Dictionary described it as "[t]he *way or means* by which service of process was made." (Emphasis added.) Black's Law Dictionary, supra. Further, a review of additional Connecticut insurance statutes similarly supports the conclusion that "manner" refers to the way in which something is done rather than the subject or subjects to which it is applied. See General Statutes § 38a-818 (permitting the commissioner to conduct a hearing concerning allegedly unfair or deceptive practices "in the same manner as the hearings provided for in [General Statutes] section 38a-817," which in turn enumerates the procedures by which such a hearing is to be commenced, conducted, and (if necessary) appealed). Accordingly, given the common usage of the term "manner" as well as its use in the context of Connecticut's broader legislative scheme surrounding insurance, it is apparent that the phrase "in the same manner as provided under section 38a-137" as found in § 38a-131 (c) applies to the methods of confidentiality described in § 38a-137 rather than the objects of confidentiality therein.

The foregoing analysis thus provides an unambiguous definition for "any information filed" as the phrase is used in § 38a-131 (c). Specifically, the statute extends confidentiality protection to any information (taken to be an inclusive term) formally submitted by an insurer to the department as part of the preacquisition notification process. This definition encompasses

not only the Form E filing itself, but also any "additional material and information the commissioner deems necessary"; General Statutes § 38a-131 (c) (1); as part of the original Form E filing as well as any "additional needed information relevant to the proposed acquisition"; General Statutes § 38a-131 (c) (2); requested by the commissioner during the waiting period following submission of the original filing. Additionally, the statute's confidentiality extends to any information voluntarily submitted by an insurer to the department to supplement the Form E filing pursuant to Section 38a-138-4 of the Regulations of Connecticut State Agencies.[6] This information is to be kept confidential in the same manner as set forth in § 38-137, namely: "(1) . . . confidential by law and privileged, (2) not . . . subject to disclosure under section 1-210, (3) not . . . subject to subpoena, and (4) not . . . subject to discovery or admissible in evidence in any civil action." General Statutes § 38a-137 (a).

As it relates to the present matter, then, the actual Form E filings submitted to the department regarding the two proposed mergers at issue are statutorily exempt from disclosure pursuant to § 38a-137. In addition, any supporting information submitted by the insurers, either alongside their Form E filings or during the waiting period set forth in § 38a-131 (c) (2), is also exempt from disclosure. The latter exemption applies irrespective of whether the insurers

[6] Although the court finds the terms at issue to be unambiguous in light of the foregoing statutory analysis, it should also be noted that this interpretation accords with the legislative history of § 38a-131 (c), which demonstrates an intent to ensure that information submitted to regulators by insurers contemplating a merger remained confidential. See, e.g., Testimony of Insurance Commission Thomas B. Leonardi concerning Raised Bill No. 411 entitled "An Act Concerning the Insurance Holding Company System Regulatory Act" (March 13, 2012) ("[§ 38a-131] requires that the information submitted remain confidential").

submitted the information at the department's request or on their own volition. By contrast, the "emails and notes" generated as part of the preacquisition notification process are not entitled to confidentiality under § 38a-131 (c).[7]

b) In Camera Inspection

The department further argues that § 38a-137 prevents it from disclosing any information made confidential by § 38a-131 (c) to the commission even for the limited purpose of in camera inspection. The department contends that any request for in camera inspection by the commission constitutes an investigatory subpoena and would require testimony by an individual affiliated with the department, both of which are impermissible under § 38a-137. In addition, the department argues that the submission of information for in camera review would require the creation of an index, which would then be subject to public disclosure.

The department's argument relies on two specific provisions in § 38a-137. Section 38a-137 (a), in enumerating the ways in which information is kept confidential under the statute,

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[7] Contrary to the department's arguments that disclosure of this information will, at minimum, reveal the confidential information that the insurers were planning to merge, the court notes that the commission retains the ability to redact the contents of any publicly released information pertaining to the preacquisition process so as to avoid the disclosure of information filed pursuant to § 38a-131 (c), including, presumably, the identities of the insurers planning to merge. See *Pictometry International Corp.* v. *Freedom of Information Commission*, 307 Conn. 648, 663, 59 A.3d 172 (2013) ("[w]e agree with the proposition that, under some circumstances, the commission has the discretion to redact exempt information from otherwise public records requested pursuant to the act"). Nevertheless, as the question of redaction is not presently before the court, it will not be addressed further. Additionally, the fact that this information is not confidential under § 38a-131 (c) does not foreclose the possibility that it may still be confidential under one of the other exemptions set forth in the Freedom of Information Act.

provides in relevant part that "[Information shall] not be subject to subpoena . . . ." Section 38a-137 (b), meanwhile, provides: "Neither the commissioner nor any person who receives information, documents, materials or copies as set forth in subsection (a) of this section or with whom such information, documents, materials or copies are shared, while acting under the authority of the commissioner, shall testify or be required to testify in any civil action concerning such information, documents, materials or copies."

As support for its argument that a request for in camera review constitutes an investigatory subpoena, the department looks to General Statutes § 1-205 (d), which empowers the commission to issue subpoenas and provides in relevant part: "Said commission shall . . . have the power to subpoena witnesses under procedural rules adopted by the commission to compel attendance and to require the production for examination of any books and papers which the commission deems relevant in any matter under investigation or in question." The department also looks to the corresponding agency regulation, which provides in relevant part: "At any hearing, the commission or the presiding officer may subpoena witnesses and require the production of records, documents and other evidence pertinent to such inquiry." Regs., Conn. State Agencies § 1-21j-36 (b). In addition, the department's argument that in camera review would require testimony seemingly relies on the language in Section 1-21j-37 (f) (5) of the Regulations of Connecticut State Agencies, which provides: "It shall be the responsibility of the party submitting records for in camera inspection to certify that the copies of the records so submitted are true copies of the records at issue in the contested case. It shall also be the

responsibility of such party to make available for examination and cross-examination at a commission hearing on the matter the official who issued the certification."

The department's argument rests on a misapprehension of the statutes and regulations at issue. In arguing that § 1-205 (d) and its corresponding regulation imply that the commission issues a subpoena whenever it requests information for in camera review, the department reads together two clauses that should instead be read separately. Specifically, § 1-205 (d) empowers the commission, in relevant part: "*to subpoena* witnesses . . . to compel attendance and *to require the production* for examination of any books and papers . . . ." (Emphasis added.) Had the legislature meant for a request for in camera inspection to constitute a subpoena, it could easily have written the statute to empower the commission "to subpoena witnesses, books, and papers." Because "[a statute] must be construed, if possible, such that no clause, sentence or word shall be superfluous, void or insignificant"; (internal quotation marks omitted) *Lopa* v. *Brinker International, Inc.*, 296 Conn. 426, 433, 994 A.2d 1265 (2010); we must therefore assume that the legislature intended to separate these two clauses. Thus, reading § 1-205 (d) in its entirety leads to the conclusion that it provides for two separate methods by which the commission can procure desired information: 1) through a subpoena ad testificandum to obtain testimony from a live witness, and 2) through requiring the production of books and records for examination, without the need for issuance of a subpoena.

The department also argues that inasmuch as the in camera order is effectively a subpoena, the commission was required to seek judicial enforcement of its production order. As

previously addressed by Judge Huddleston: "[w]hether an order to submit documents for in camera review is effectively a subpoena is a question that the court need not decide, because the language of the provisions on which the department relies is purely permissive. While the commission has the authority under these provisions to seek judicial enforcement of an order to produce documents that a respondent refuses to obey, nothing in the provisions requires it to do so." *Dept. of Ins.* v. *Freedom of Information Commission*, supra, Superior Court, Docket No. CV-17-6036748-S. There is nothing in the evidence to suggest that the plaintiffs sought a court order to quash what they characterize as an investigatory subpoena.

The department's suggestion that the prohibition on testimony in § 38a-137 (b) forbids the type of testimony required by the regulations governing in camera review is similarly erroneous. Section 38a-137 (b) forbids the commissioner or any individual acting under the commissioner's authority from "testify[ing] or [being] required to testify in any civil action concerning such information, documents, materials or copies." An in camera review pursuant to a contested freedom of information request, meanwhile, is not a "civil action." *Director of Health Affairs Policy Planning* v. *Freedom of Information Commission*, 293 Conn. 164, 177, 977 A.2d 148 (2009) ("the legislature did not intend to use the phrase 'civil action' to include proceedings before the commission"), overruled on other grounds by *Commissioner of Public Health* v. *Freedom of Information Commission*, 311 Conn. 262, 86 A.3d 1044 (2014). Rather, a dispute over a freedom of information request before the commission constitutes a "contested case." See, e.g., Regs., Conn. State Agencies § 1-21j-27. Accordingly, the prohibition in § 38a-

137 (b) on testimony in a "civil action" has no bearing on the commission's ability to request in camera review.

Finally, where the legislature has seen fit to prohibit the disclosure of information even for in camera review, it has done so explicitly. See General Statutes § 52-146e ("no person may disclose or transmit any communications and records or the substance or any part or any resume thereof which identify a patient to any person, corporation or governmental agency without the consent of the patient or his authorized representative"); *Freedom of Information Officer* v. *Freedom of Information Commission*, supra, 318 Conn. 791 ("[t]he broad sweep of [§ 52-146e] covers not only disclosure to a defendant or his counsel, but also disclosure to a court even for the limited purpose of an in camera examination" [internal quotation marks omitted]). Absent such a prohibition, the extensive protections given to information submitted to the commission for in camera review make clear that the information will not be subject to public disclosure. See Regs., Conn. State Agencies § 1-21j-37 (f).[8] As further support for this proposition, the United States District Court for the District of Columbia, in interpreting § 38a-137 in the context of confidential information communicated under a protective order, held explicitly that such transmission was not public disclosure such that would violate the statute. See *MetLife,*

[8] With respect to the department's argument that the index submitted pursuant to the commission's in camera review process; see Regs., Conn. State Agencies § 1-21j-37 (f) (4); would itself require disclosure of confidential information, nothing in the regulations suggests that this index need reveal any of the information previously found confidential pursuant to § 38a-131 (c). Further, to the extent that any confidential information was disclosed through the index, the commission would be free to exercise its discretion to redact that information and prevent it from becoming public.

Inc. v. *Financial Stability Oversight Council*, United States District Court, Docket No. 15-0045 (RMC) (D. D.C. December 8, 2015) ("the information will be disclosed under the Court's protective order and thus not 'ma[d]e public'"). Accordingly, § 38a-137 does not bar the commission from receiving the information presently in question for the purpose of in camera review.

II. Propriety of $500 Fine

Finally, the department argues that the commission abused its discretion in levying a $500 fine against the commissioner for failure to submit the requested information for in camera review. General Statutes § 1-206 (b) (2) provides in relevant part: "[U]pon the finding that a denial of any right created by the Freedom of Information Act was without reasonable grounds and after the custodian or other official directly responsible for the denial has been given an opportunity to be heard . . . the commission may, in its discretion, impose against the custodian or other official a civil penalty of not less than twenty dollars nor more than one thousand dollars."

In contrast to the standard of review applied to the previously discussed questions of law, the court in evaluating the commission's decision to impose a fine on the commissioner need only determine whether "the commission acted arbitrarily, capriciously or in abuse of its discretion . . . ." *Lash* v. *Freedom of Information Commission*, 116 Conn. App. 171, 181, 976 A.2d 739 (2009), rev'd on other grounds, 300 Conn. 511, 14 A.3d 998 (2011). In her earlier decision in the present matter, Judge Huddleston succinctly explained that "[t]he department's

construction of [§§ 38a-131 (c) and 38a-137 (a) – (b)] is not wholly implausible, but it is not inevitable, either." *Dept. of Ins.* v. *Freedom of Information Commission*, supra, Docket No. CV-17-6036748-S. Likewise in the present appeal, although the department's construction of the statutory provisions at issue was ultimately mistaken, the department nonetheless relied in good faith on their interpretation of these statutes in refusing to submit the requested information for in camera inspection. Cf. *Smith* v. *Freedom of Information Commission*, Superior Court, judicial district of New Britain, Docket No. CV-11-5015510-S (August 30, 2012, *Cohn, J.*) (53 Conn. L. Rptr. 614) (holding that there existed no legal basis for a fine by the commission where "it cannot be concluded that the complainant was acting frivolously, without reasonable grounds . . . but he could be seen as acting in good faith"). Accordingly, because reasonable grounds existed for the department's decision to withhold the requested information from the commission, the commission's decision to assess a $500 fine against the commissioner was an abuse of discretion.

CONCLUSION

For the foregoing reasons, the fine assessed by the commission against the commissioner is found to be in error, and the proceedings are otherwise remanded to the commission for further determination not inconsistent with the parameters of § 38a-131 (c) set forth herein. The department is ordered to submit the requested documents to the commission for in camera review in accordance with the provisions set forth in Section 1-21j-37 (f) of the Regulations of

Connecticut State Agencies. Additionally, the department is not foreclosed from asserting any additional statutory or other exemptions to the Freedom of Information Act on remand.

BY THE COURT

LOIS TANZER, J.T.R.