

NO. CV 07 4015438S ✓ : SUPERIOR COURT

COMMISSIONER, DEPT. OF CORRECTION,
HARRY SOUCY, STEVEN PETRACCA,
LOCAL 387 AFSCME COUNCIL 4 : JUDICIAL DISTRICT OF

V. : NEW BRITAIN

FREEDOM OF INFORMATION
COMMISSION AND DAVID P. TAYLOR : NOVEMBER 3, 2008

NO. CV 08 4016766S : SUPERIOR COURT

THERESA LANTZ, COMMISSIONER
DEPARTMENT OF CORRECTION : JUDICIAL DISTRICT OF

V. : NEW BRITAIN

FREEDOM OF INFORMATION
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MEMORANDUM OF DECISION

The Connecticut department of correction (DOC) has appealed from two final decisions of the freedom of information commission (FOIC) resulting from complaints brought by David Taylor, incarcerated at a DOC facility.¹

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A third appeal by DOC from an FOIC ruling (Docket No. CV 4015649, defendant Quint) was heard at the same time as these appeals, but during oral argument, the court requested additional information from the assistant attorney general representing DOC. Therefore a decision in that matter will be issued separately at a later date.

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SUPERIOR COURT
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The record in the first matter may be summarized as follows. As part of a dispute that he is having with DOC over his work assignment, Taylor asked DOC to supply him with the disciplinary record of two industrial supervisors, employees of DOC. DOC gave notice to these employees pursuant to General Statutes § 1-214 (b), and they objected to the release of the records. Thereafter, DOC wrote to Taylor stating that, based on the employees' objections, Taylor's request for records was denied. Taylor complained on September 27, 2006 to the FOIC based on the denial by DOC and the two employees intervened.

A hearing was held at the FOIC regarding the denial on May 4, 2007. At the hearing, DOC objected to the release of information, as did an attorney representing the employees. DOC claimed that the records were exempt from disclosure under the following two provisions.² Under § 1-210 (c), "[w]henver a public agency receives a request from any person confined in a correctional institution . . . for disclosure of any public record under the Freedom of Information Act, the public agency shall promptly

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DOC also claimed an exemption under § 1-210 (b) (2), regarding requests for personnel, medical or similar files. The FOIC rejected this claim and it has not been appealed to the court by DOC. To the extent that this exemption has been raised by the intervenors, the court agrees with the FOIC final decision, finding 19: "In this regard, the Commission notes that the respondent did not offer the records for in camera inspection, and neither party offered evidence concerning the specific content of the requested records." See *Town of Middlebury Police Commission v. Freedom of Information Commission*, Superior Court, judicial district of New Britain, Docket No. 07 4013780 (January 16, 2008, *Cohn, J.*)

notify the Commissioner of Correction . . . of such request . . . before complying with the request as required by the Freedom of Information Act. If the commissioner believes the requested record is exempt from disclosure pursuant to subdivision (18) of subsection (b) of this section, the commissioner may withhold such record from such person when the record is delivered to the person's correctional institution”

As referred to in the previous section, § 1-210 (b) (18) provides: “Nothing in the Freedom of Information Act shall be construed to require disclosure of . . . [r]ecords, the disclosure of which the Commissioner of Correction . . . has reasonable grounds to believe may result in a safety risk, including the risk of harm to any person or the risk of escape from, or a disorder in, a correctional institution. . . . [The remainder of the section sets forth “such records” that are subject to exemption, but the section specifically adds that the records so listed are not exclusive.]”

DOC called a witness that supervised FOIA disclosures for the agency. She stated that under the union contract a record of oral warnings was withdrawn after one year, while a written warning was withdrawn within two years.³ She could find nothing in the file that would respond to Taylor's request.

DOC next called Deputy Commissioner Brian Murphy, who had been employed by DOC for twenty years. He stated that he was concerned that disclosure of the records

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A subsequent DOC witness, who had more knowledge of the union contract, stated that written warnings are withdrawn within 18 months.

would violate the DOC rule that a correction officer avoid “undue familiarity” with inmates. Just as the correction officer should not engage in undue familiarity, because such a relationship would lead to possible intimidation or manipulation by a inmate, the disclosure to Taylor would lead to the same result. (Return of Record, ROR, pp. 98-99).

He went beyond “undue familiarity” analogy, however, in testifying as follows:

“Well, inmates, in general . . . are gathering intelligence and information on staff and . . . [i]f an inmate were to know, for instance, that a staff member was disciplined for a particular reason, let’s say he did an inappropriate shake-down, and the information be known to the inmate that that officer had been disciplined for doing an inappropriate shake-down, the next time that inmates get shaken down and we may find a stinger, may find drugs, may find a weapon, and the inmate could say . . . weren’t you disciplined once for doing an inappropriate shake-down? You know, I think I’m going to report you. You’ve already been disciplined for this. And who are they going to believe? You’ve got a history. . . . [S]o it could be used and can be used and probably has been used to coerce staff into not doing their jobs correctly which, in turn, would jeopardize the safety and security of that facility.” (ROR, p. 100).

He further testified that the information gives the inmate a degree of power. It could also be used by an inmate to barter with another inmate. (ROR, p. 107). There had to be a distinction made between disclosure to the public and disclosure to an inmate, where there was a safety issue. (ROR, p. 110).

One of the employees who objected to the release of the files testified in part as follows: "When working inside the facility with these inmates on a daily basis, it is a huge security issue and what you're going to do there . . . if you give them this opportunity, is give them immense fire power against staff, to utilize this against us. You're giving them . . . [a] weapon beyond what we could even afford to do or bring in or utilize ourselves and that's a weapon of . . . our personnel files. . . . [A] quick example, disciplinary issue out in the marker shop. Again, there's only a couple of us there. There's a lot of hidden corners. . . . But if something does happen out there, and I have to perform some kind of . . . sanctions . . . that's going to interfere with how that's going . . . down, and credibility as far as it goes with other inmates." (ROR, pp. 132-33).

The hearing officer issued his decision on August 27, 2007. He held the records exempt from disclosure under § 1-210 (b) (18)⁴, and that therefore DOC did not violate FOIA, §§ 1-210 (a) and 1-212 (a).⁵ He made the following findings to support his

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Findings 30-31 of the hearing officer indicated that while disciplinary records were not specifically listed in § 1-210 (b) (18), this list was not exclusive and extended to personal information about correction officers that pose a security or safety threat. The proponent of the exemption, Rep. Alex Knopp, sought to "protect security personnel at our prisons." (42 H.R. Proc, Pt. 9, 1999 Sess., p. 3107.)

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He also indicated that "nothing in this decision shall be construed to conclude that disciplinary records of correction officers are exempt from disclosure to the general public." The basis of the decision was that the legislature had imposed additional restrictions under § 1-210 (b) (18) on disclosure to inmates.

conclusion:

24. It is found that inmates constantly seek to acquire personal information about correction officers.
25. It is found that [DOC] strictly prohibits “undue familiarity” between correction officers and inmates, and that correction officers are trained not to disclose personal information about themselves to inmates.
26. It is found that disclosure by a correction officer of his or her own disciplinary history to an inmate is a clear violation of the [DOC’s] prohibition against undue familiarity.
27. It is found that the purpose of the policy against undue familiarity is to prevent information about correction officers being used by inmates to manipulate or coerce correction officers.
28. It is found that an inmate may use information about a correction officer to ingratiate himself with the correction officer by expressing sympathy, with the intention of later interfering with the officer’s discipline or control of the inmate, or with the intention of seeking escalating favors from the officer.
29. It is found that inmates may barter personal information about correction officers to obtain power, weapons or drugs.

As required by § 4-179, the FOIC considered the hearing officer’s proposed final decision on September 12, 2007. The chairman stated (ROR, p. 193) that the burden was on DOC to establish that an exemption to disclosure applied. His review of the evidence indicated that DOC’s witnesses proved nothing. “A bald statement that the

Commissioner thinks that there will be a risk of harm is not evidence. That's a conclusion." (ROR, p. 194). The employees of DOC expecting that there were safety issues was not acceptable. "You know, people in the prison are manipulative. People in the justice system can be manipulative, that is sufficient [for you]. [But] [t]he issue is are there reasonable grounds to believe." He also took the position that the FOIC had a role in determining whether the commissioner of DOC had made a reasonable decision. The DOC took the position at this meeting that "all disciplinary records of correctional officers when requested by a prisoner and are going to be introduced into a prison pose an unreasonable . . . risk to safety, security and order." (ROR, p. 210).

Based upon this discussion, the FOIC voted to alter the proposed final decision, and it was issued as a final decision on September 12, 2007. The final decision ordered the requested records to be disclosed, finding in paragraph 26 that "[DOC] failed to prove that there are reasonable grounds to believe that disclosure of a correction officer's disciplinary record to an inmate may result in a risk of harm, including a risk of disorder in a correctional institution, and thus that the requested records are exempt under § 1-210 (b) (18), G.S." DOC and the intervening employees thereafter appealed from the final decision.⁶

The court decides the issues raised in this appeal under the limited scope of

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The plaintiffs are aggrieved by the order of the FOIC. *State Library v. Freedom of Information Commission*, 240 Conn. 824, 694 A.2d 1235 (1997).

judicial review afforded by the Uniform Administrative Procedure Act. The court must decide “in view of all of the evidence, whether the agency, in issuing its order, acted unreasonably, arbitrarily or illegally, or abused its discretion.” *Lewin v. Freedom of Information Commission*, 91 Conn. App. 521, 525, 881 A.2d 519, cert. denied, 276 Conn. 921, 888 A.2d 88 (2005). The test with regards to facts found is whether the FOIC’s final decision is clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record. *Rocque v. Freedom of Information Commission*, 255 Conn. 651, 658-59, 774 A.2d 957 (2001).

With regard to deference to the FOIC’s interpretation of § 1-210 (b) (18), the Appellate Court has stated in similar circumstances that deference is only warranted when the FOIC’s interpretation “has been formally articulated and applied for an extended period of time, and that interpretation is reasonable.” *Williams v. Freedom of Information Commission*, 108 Conn. App. 471, 477, 948 A.2d 1058 (2008). There is no contention by any party that the FOIC met that standard here. Therefore, the court reviews the statute under the usual approach to statutory interpretation, looking to the words of the statute itself, to the legislative history and circumstances surrounding its enactment, to the legislative policy it was designed to implement, and to existing legislation and common law principles. *Chambers v. Electric Boat Corp.*, 283 Conn.

840, 845, 930 A.2d 653 (2007).⁷

DOC first argues that the FOIC had no authority to modify the proposed final decision at its September 12, 2007 meeting. The FOIC followed § 4-179 in holding a meeting to consider the issuance of the final decision, and Taylor's objections, as its members had not conducted the hearing in the matter. The FOIC did not make any new findings of fact. In addition, it did not raise any additional issues that had not been fully raised at the hearing. Therefore, the FOIC had the authority to change the conclusions in the decision as rendered by the hearing officer. *New England Rehabilitation Hospital v. Comm. on Hospitals & Health Care*, 42 Conn. Sup. 413, 422, 622 A.2d 1067 (1992). Section 4-179, based on Uniform Administrative Procedure Act § 11, contemplates that agency members play an oversight role and listen to objections before the issuance of the final decision.

The crucial question presented here is the relationship between DOC and the FOIC with regard to § 1-120 (b) (18). The statutory scheme begins with § 1-210 (c) that provides that "if the *commissioner* [of DOC] believes the requested record is exempt from disclosure pursuant to subdivision (18) . . . the commissioner may withhold such record" (Emphasis added.) Under § 210 (b) (18), it is the commissioner of DOC who determines whether disclosing the records "may result in a safety risk, including the

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Legislative history is appropriate here as the text is not plain and unambiguous. § 1-2z.

risk of harm to any person”

It is true that the commissioner of DOC must have “reasonable grounds to believe” that the risk exists. Section 210 (b) (18) as initially proposed would have created an exemption only on the certification of the DOC commissioner that disclosure of the records would amount to a security risk. As adopted, however, the provision allows the FOIC to provide a review function so that an inmate denied records would have an avenue of appeal. As Representative Knopp stated: “The purpose of the amendment was to adopt an objective standard that provided *some basis* for review in court in the event that an inmate wishes to appeal the denial of a public record. And therefore, the commissioner needs to make an affirmative finding that there are reasonable grounds to believe that disclosure of the public record may result in a safety risk. . . .” (42 H.R. Proc., Pt. 9, 1999 Sess., p. 3125.) (Emphasis added.)

The court concludes therefore that DOC has the right to declare that the exemption applies, and must state its reasons for doing so. The FOIC may, on an appeal by an inmate, decide whether the DOC had “reasonable grounds” to claim the exemption. As with other FOIA exemptions, see, e.g. *Rocque v. Freedom of Information Commission*, supra 255 Conn. 659, there is no blanket result that applies in every situation⁸. Thus the court disagrees with DOC’s contention, made at the September 12,

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The evidence presented by DOC to the FOIC must set forth in detail the reasonable safety risk; only where the requested documents establish this risk by themselves is there need

2007 FOIC meeting that the mere fact that the inmate has requested the disciplinary records of a corrections officer is sufficient to allow the exemption.

On the other hand, the commissioner of DOC and his staff certainly have the experience to know when a particular request will result in a safety risk. Having received the reasons given by the DOC for declining to make the record available, the FOIC is not free to reject DOC's reasons because they are "hypothetical" and not based on actual events. (See contentions in FOIC brief at 19-20). The FOIC's role is to determine whether the DOC's reasons were pretextual and not bona fide, or irrational.⁹

Having set forth the scope of the exemption under § 1-210 (b) (18), the court now turns to the reasons given by DOC. The final decision concludes that DOC "failed to prove that there are reasonable grounds to believe" that the disclosure of the disciplinary records in this instance amounted to a safety risk. The record does not support this conclusion.

The court agrees with the FOIC that the existence of the "undue familiarity" rule

for an in camera inspection by the FOIC. See *Wilson v. Freedom of Information Commission*, 181 Conn. 324, 435 A.2d 353 (1980); *Town Council v. Freedom of Information Commission*, 20 Conn. App. 671, 675, 569 A.2d 353 (1980)(when nature of documents in dispute, in camera inspection required).

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In light of this statutory interpretation, it is unnecessary for the court to consider whether the FOIC was bound to accept the DOC witnesses as "experts" on the correctional system, under such cases as *Tanner v. Conservation Commission*, 15 Conn. App. 336, 544 a.2d 258 (1988).

does not alone provide DOC a rationale for the exemption.¹⁰ The rule, however, does illustrate the concern that DOC has in restricting the free exchange of information between an inmate and security personnel in a prison. The DOC reasoning was also based on an awareness that the disclosure of these records could lead to a possible refusal to obey orders of personnel and misuse of the information to obtain power, weapons or drugs. Finally, one of the employees testified that discipline in his marker shop would be threatened if his personnel record was opened to inmates.

The court holds that, based on these circumstances, the FOIC erred in finding that the commissioner of DOC failed to prove that it had reasonable grounds that a safety risk may exist, so that the exemption of § 1-210 (b) (18) would not apply. The record establishes otherwise, and therefore the appeal from the FOIC order, that the records of the two employees be furnished to Taylor, is sustained.

The second appeal considers three later requests made by Taylor: (1) A request of January 10, 2007 for the “full details of the disciplinary action taken against staff in the marker shop as discussed between Warden Martin, Commissioner Lantz and Jacqueline

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The court fails to understand why the “undue familiarity” rule is at the forefront of the reasoning of DOC. While the rule has some relevancy as indicated in this opinion, there is no direct connection between a rule that prohibits correctional officers from exceeding their boundaries and the FOIA exemption that allows the Commissioner of DOC to deny documents when concerned over safety issues.

Greenlaw, British Vice Consul, at a meeting in February or March of 2006;”¹¹ (2) A request of January 11, 2007 for disciplinary records of an employee of DOC¹² and the correctional industries manager at Cheshire; and (3) A January 16, 2007 request for records of a fire at the marker shop in November 2005.¹³

DOC presented correction officer training lieutenant Angelakopoulous who discussed the “undue familiarity” rule. It also had testimony from the correctional industries manager who asked that the exemption of § 1-210 (b) (18) apply because “any personal information received by Inmate Taylor would be uncontrolled and available to other inmates including inmate workers currently supervised and working with us in the correctional enterprising shops.” (ROR, p. 138). Finally, District Commissioner Strange testified that there were reasonable grounds for a safety risk. There are situations where there is one correction officer in charge of a room or area where there are numerous inmates. The disclosure of information to inmates would compromise security. (ROR,

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This request is vague. It could either refer to specific disciplinary *records* that were discussed at a meeting with the Vice Consul, or it could refer to the *details* of the discipline discussed at the meeting, which details were reduced to a memorandum. The final decision does not resolve this ambiguity.

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The record shows that no disciplinary records exist for this employee. This was represented by DOC at the hearing in this matter on October 7, 2008, and no other party disagreed.

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The final decision indicates in paragraph 11 that these records do not exist.

pp. 198-99).

The hearing officer issued a proposed final decision on November 29, 2007, and this was adopted without change by the full commission on January 23, 2008. Once again the FOIC rejected DOC's two claimed exemptions, §§ 1-210 (b) (2)¹⁴ and (b) (18) and this appeal followed.

The FOIC has ordered the disciplinary records of the correctional industries manager released.¹⁵ The court, for the reasons stated in the first appeal, finds that the FOIC has incorrectly interpreted § 1-210 (b) (18). The testimony of the manager and the district administrator set forth reasonable grounds for finding a safety risk. The appeal is therefore sustained as to the order that relates to paragraph 3.

The FOIC also ordered the release of the materials from the meeting with the Vice Consul. To the extent that these records are identical to the disciplinary records sought in either of the appeals in this case, the exemption of § 1-210 (b) (18) applies, and the appeal is sustained.

It may be, however, that these records are merely a summary of the discussion with the Vice Consul (see footnote 11, supra). If that is the case, then the exemption

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This section has not been made part of the brief of DOC on this appeal.

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The order states that the records set forth in paragraph 3 be released to Taylor. Paragraph 3 relates to a request for two records—one of which does not exist. Therefore, the order only applies to the records of the corrections industries manager.

would not apply. Through redaction, a summary given to Taylor need not reveal the names of disciplined personnel. Since under this circumstance, the record would not support finding a safety risk, a copy (if it exists) should be made available to Taylor.

So ordered.

A handwritten signature in black ink, appearing to read 'HSCohn', written over a horizontal line.

Henry S. Cohn, Judge