NO. CV 09 4020071S	:	SUPERIOR COURT
COMMISSIONER, STATE OF CONNECTICUT, DEPARTMENT OF PUBLIC SAFETY	:	JUDICIAL DISTRICT OF
v.	:	NEW BRITAIN
FREEDOM OF INFORMATION COMMISSION ET AL.	:	APRIL 21, 2010

MEMORANDUM OF DECISION

The plaintiff, department of public safety (DPS), appeals from a March 6, 2009 final decision of the defendant freedom of information commission (FOIC) requiring the DPS to release documents to its complainant, a news reporter for the defendant New Haven Register (the Register).[1]

The record developed before the FOIC shows as follows: By letter dated March 18, 2008, the Register requested that, pursuant to the Freedom of Information Act, the DPS provide it with access to the police report of an incident on March 15, 2008 in Derby on Route 8. This request pertained to the arrest of an individual who was allegedly charged with first-degree assault on an elderly person and criminal attempt to commit murder. (Return of Record, ROR, pp. 4, 97)

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[1] The DPS is aggrieved as required by General Statutes § 4-183 (a), as it has been ordered by the FOIC to release documents to the Register.

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By letter dated April 29, 2008, the DPS responded to the Register that the entire report was exempt from disclosure pursuant to Connecticut General Statutes § 1-215. In an enclosure to the April 29, 2008 letter, however, DPS provided the Register with a copy of the official DPS press release pertaining to the incident which was the subject of their inquiry. (ROR, , pp. 58-59).

Following a hearing, a decision by a hearing officer, and a proceeding before the full commission, the FOIC issued a Final Decision dated March 6, 2009, concluding:

* * *

18. It is concluded that § 1-215, G.S., does not exempt records from public disclosure under the FOI Act, but rather mandates that, at a minimum, certain arrest records must be disclosed. In instances where a public agency seeks to withhold other records not mandated to be disclosed pursuant to § 1-215, G.S., such public agency must prove that an exemption applies to such other records.

19. It is found that the respondents did make available to the complainants a press release concerning the arrest of [T.N.], which included the name and address of [T.N.], the date, time and place of his arrest and the offense for which he was arrested.

20. It is concluded that the respondents provided the "record of arrest" within the meaning of § 1-215, G.S. (ROR, p. 100)

The final decision, based on an *in camera* inspection, next concluded that certain records sought by the Register were eligible for redaction pursuant to § 1-210 (b) (3). FOIC then issued the following order:

1. Forthwith the respondents shall provide to the complainants copies of the *in camera* records other than the portions described in paragraphs 16, 25, 38 and 39 of the findings, above.

2. Consistent with Commission precedent, the respondents may redact social security numbers from the records ordered released. (ROR, p.104)

On March 12, 2010, the FOIC informed this court that the criminal defendant had entered a guilty plea, thus completing his criminal matter in Ansonia/Milford Superior Court. This information was received as well by the DPS. All relevant documents in the DPS file were then made available to the Register. The court asked the parties to consider whether this appeal had been rendered moot by the release of the documents to the Register. The parties jointly replied that the issue of the availability of the exception to the FOIA provided by § 1-215 was "capable of repetition, yet evading review."[2] The court agrees with the parties and therefore undertakes to resolve this issue as raised.

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The fact that criminal cases most often settle before the FOIC may resolve the right of the complainant to have access to the records sought satisfies the "evading review" prong. The likelihood that a complainant will again request a copy of an arrest record from the police satisfies the "capable of repetition" prong. Also this is an issue of public importance. See *Loisel* v. *Rowe*, 233 Conn. 370,660 A.2d 323 (1995).

The court must decide the statutory meaning of § 1-215 as a matter of law.[3] "When construing a statute, [o]ur fundamental objective is to ascertain and give effect to the apparent intent of the legislature. . . . In other words, we seek to determine, in a reasoned manner, the meaning of the statutory language as applied to the facts of [the] case, including the question of whether the language actually does apply. . . . In seeking to determine that meaning, General Statutes § 1-2z directs us first to consider the text of the statute itself and its relationship to other statutes. If, after examining such text and considering such relationship, the meaning of such text is plain and unambiguous and does not yield absurd or unworkable results, extratextual evidence of the meaning of the statute shall not be considered. . . . The test to determine ambiguity is whether the statute, when read in context, is susceptible to more than one reasonable interpretation." (Citations omitted.) *Fairchild Heights, Inc.* v. *Amaro*, 293 Conn. 1, 8-9, 976 A.2d 668 (2009).

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[3] The construction of a statute is a legal matter for the court to decide. See *Livingston* v. *Dept. of Consumer Protection*, 120 Conn. App. 92, 97, __ A.2d __ (2010). In the issue presented, there has been no judicial scrutiny of § 1-125 as amended, nor has the issue been sufficiently time-tested before the FOIC. Therefore, the court will not defer to the FOIC's interpretation of § 1-215. *Board of Selectmen* v. *Freedom of Information Commission*, 294 Conn. 438, 446, 984 A.2d 748 (2010).

Here, the parties have demonstrated to the court that there is more than one reasonable interpretation of § 1-215. Extratextual legislative history must be consulted. See *Achillion Pharmaceuticals, Inc.* v. *Law*, 291 Conn. 525, 970 A.2d 57 (2009).

The legislative history must be understood in light of *Gifford* v. *Freedom of Information Commission*, 227 Conn. 641, 631 A.2d 252 (1993). The Court in *Gifford* considered the provisions of § 1-20b, the statute in place before § 1-215. Section 1-20b provided: "RECORD OF AN ARREST AS PUBLIC RECORD. Notwithstanding any provision of the general statutes to the contrary, any record of the arrest of any person, other than a juvenile, except a record erased pursuant to chapter 961a, shall be a public record from the time of such arrest and shall be disclosed in accordance with the provisions of section 1-15 and subsection (a) of section 1-19. For the purposes of this section, 'record of the arrest' means the name and address of the person arrested, the date, time and place of the arrest and the offense for which the person was arrested."

In *Gifford*, the Supreme Court held that there was no reference to what is now § 1-210 (b) (3) in the statute, thus removing police reports from the FOIA exemption section. See *Gifford* v. *Freedom of Information Commission*, supra, 227 Conn. 654, n.14. Also, the Supreme Court concluded: "We read this [legislative] history, therefore, as strong evidence that the legislature intended by the enactment of § 1-20b to ensure that certain minimal information regarding arrests be disclosed by the police, but, at the same time, to

ensure that the disclosure requirement did not include the entire arrest report. In sum, we read § 1-20b as a salient example of the maxim of statutory construction that specific language covering the given subject matter, namely, the disclosure requirements for arrest reports, will prevail over general language of the same or another statute that might otherwise prove controlling." Id., 661.

After *Gifford*, the legislature took up amending the FOIA based on the Supreme Court's *Gifford* holding. Senate Amendment A to H.B. 5789, 1994 Session, added a reference to § 1-19 (b) (3), now § 1-210 (b) (3), regarding the disclosure of the arrest report. But House Amendment B modified the Senate Amendment by allowing for, not only the name, address, date and time of arrest, but also "at least one of the following, designated by the law enforcement agency: The arrest record, incident report, news release **or** other similar report of the arrest of a person."

The debate in the Senate and House of Representatives also confirms this conclusion. On April 28, 1994, referring to Senate Amendment A, Senator Jepson stated: "This bill very simply restores - - well, it overturns the so-called Gifford case in which arrest records - - the full content of the arrest records of any individual in any event is left to the discretion of the local police and makes arrest records subject to FOI as existed prior to the Gifford case. If inadequate steps have been taken to meet the objection that witnesses – the identity of witnesses who would be endangered by this process would be

– that their identity would be divulged by allowing the limitation by police to limit disclosure of relevant witnesses. (Senate session , April 28, 1994, p. 1936) . . .

"I strongly support Freedom of Information. I think that we do a tremendous disservice to the people of this state if we allow arrest records, which ought to be open to public scrutiny immediately and completely be restricted." (Id., p. 1967)

Senate Amendment A was opposed by Senator DiBella as follows: "Our police chief has expressed in the Police Chiefs Association, opposition to an amendment to open this up and restrict from the restrictions that they have because what happens is in the course of an investigation, we find, a case in point. Hartford, where we have these gang murders and gang driveby shootings when the release of information of witnesses and people involved in the process, the gangs are able to find the name and intimidate these people so that these people are not interested in participating in the criminal justice system by virtue of being either witnesses or providing information to the police in these cases. (Id., p. 1962)

"I think to remove this would create a major hardship to the police department and to the police department in the process of their investigation. It would hinder the criminal justice system, just at a time when that criminal justice system is under tremendous pressure by virtue of what's happening in our urban areas and our urban cities." (Id. p., 1963)

While H.B. 5789 passed with the Senate Amendment, it met with substantial opposition in the House. Members reported the opposition of John Bailey, then chief state's attorney. (See House session, May 3, 1994, pp. 7390, 7394).

Representative Scalettar then introduced House Amendment B. The following exchange occurred relative to this amendment: "Rep. Wollenberg: (21st) Thank you. Representative Scalettar. Then, and we can end this. My question is – does – do the police have an option over whether in the second amendment [House B] they give an arrest report, and incident report, a news release or other similar report of the arrest of the person. Can they give one of those and satisfy this bill, through you, Mr. Speaker? Rep. Scalettar: (114th): Through you, Mr. Speaker, yes." (Id., p. 7398).

Representative Scalettar summarized House Amendment B as follows: "We have . . . changed the definition of record of arrest so that it now includes news releases in addition to the information that had been included before, and it makes explicit that the law enforcement agency can designate which of the reports it releases, and it may release any number of the reports, but at least one of them.

"This is intended to clarify the statute, and the requirement that something more than the minimal information be given that some narrative be provided at the time of the arrest. I move adoption, Mr. Speaker. Thank you." (Id., p. 7546). The Bill, H.B. 5789, passed as amended by Senate A and House B.

The Office of Legislative Research summary also states: "Under prior law, the police were required to disclose only the name and address of the person arrested; the date, time and place of the arrest; and the offense for which the person was arrested. The act expands this to require the agency to release at least (1) the arrest report, (2) the incident report, or (3) a news release or similar report of the arrest." (1994 OLR Summary, p. 201).

The court's conclusion from this legislative history agrees with the DPS' position-- that while *Gifford* had restricted disclosure to mere nominal information, the legislative revision had compromised on increasing the mandatory disclosure by police departments of arrest information by requiring the police department to disclose at least *one* of the four items listed in § 1-215 (b). Thus, the DPS here satisfied the FOIA by choosing to provide the Register with the news release, and was not obligated to make either a full or redacted police report available.

The court cannot agree with the FOIC's interpretation which may be summarized as follows: Because of the legislature remedied footnote 14 in *Gifford* by adding a reference to § 1-210 (b) (3) in § 1-215 (a), the legislation now required one of the four items of § 1-215 (b) to be disclosed; but if the police department merely disclosed a press release, it must also disclose the police report, subject to the redactions of § 1-210 (b) (3). Such an interpretation would effectively make meaningless § 1-215 (b); the court would

have to ignore the legislative intent, as shown in the Wollenberg-Scalletar interchange, quoted above, that only *one* document need be provided.

The case relied on by the FOIC, for its interpretation of the post-*Gifford* legislation, *Dept. of Public Safety* v. *Freedom of Information Commission*, 51 Conn. App. 100, 720 A.2d 268 (1998), is not on point. The Appellate Court did not have to consider the legislative history of House Amendment B to § 1-20b, now § 1-215. The case arose from a FOI request by a newspaper reporter for a full investigative report. The trial judge sustained the DPS' administrative appeal, finding that the DPS had met its burden to show prejudice under the § 1-210 (b) (3) exemption.[4] In reversing, the Appellate Court differed with the trial judge on whether the DPS had satisfied § 1-210 (b) (3). It did not involve the situation, as here, where the DPS had denied disclosure of the police report and disclosed only a press release.

The court agrees with the FOIC that *if* a police department chooses to provide the police report, it may also attempt to claim the exemption of § 1-210 (b) (3). Under the court's interpretation of § 1-215, a police department is not required, however, to provide the police report, but may elect to provide "a news report or other similar report of the arrest of a person."

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Dept. of Public Safety v. *Freedom of Information Commission*, Superior Court, judicial district of Hartford, Docket No. 96561555 (July 23, 1997, *Beach, J.*).

Having reached the conclusion that the FOIC erred in its final decision regarding § 1-215, the court, pursuant to § 4-183 (j), sustains the appeal of the DPS.

Henry S. Cohn, Judge