HHBCV09 402 17 68 S **SUPERIOR COURT**

STATE OF CONNECTICUT **J.D. OF NEW BRITAIN**
OFFICE OF THE ATTORNEY GENERAL

VS	:	**AT NEW BRITAIN**
FREEDOM OF INFORMATION COMMISSION	:	**JANUARY 18, 2011**

MEMORANDUM OF DECISION

The appellant, the State of Connecticut Office of the Attorney General (OAG), appeals from the decision of the appellee, the Freedom of Information Commission (the Commission), ordering the OAG to release certain records to the other appellee, Andrew N. Matthews. The OAG is the custodian of these records and maintains that they should be exempt from disclosure pursuant to General Statutes §§ 1-210 (b) (1), 1-210 (b) (4), 1-210 (b) (10) and 52-146r, and 1-210 (b) (13) and 4-61dd.

On June 22, 2008, Matthews filed a Freedom of Information Act (FOIA) request with the OAG consisting of ninety-nine separate requests for documents. Between July 1, 2008 and December 1, 2008, the OAG provided Matthews with over 1,600 documents responsive to this request, but did not provide responsive documents that the OAG contended were exempt from disclosure. On August 8, 2008 Matthews appealed to the FOIC, claiming that the OAG had violated the FOIA by failing to fully comply with the request. An appeal was docketed by the

Commission as *Andrew N. Matthews* v. *State of Connecticut, Office of the Attorney General*, Docket No. FIC 2008-524, and hearings were held by the Commission between December 4, 2008 and May 14, 2009. During the hearings, the OAG submitted 1101 pages of records to the Commission for in camera review. The OAG considered these records exempt from disclosure pursuant to various statutory exemptions, including the attorney-client privilege, General Statutes §§ 1-210 (b) (10) and 52-146r; strategy-in-negotiations, General Statutes §§ 1-210 (b) (4); and preliminary notes and drafts, General Statutes § 1-210 (b) (1). In addition to the records reviewed in camera, the OAG withheld records relating to whistleblower investigations as set forth in General Statutes §§ 1-210 (b) (13) and 4-61dd, which the OAG also invited the Commission to review. The Commission adopted a Final Decision on July 22, 2009 that found 137 of the in camera records were exempt from disclosure under General Statutes § 1-210 (b) (4), but that none of the remaining in camera records or the whistleblower investigation records were exempt from disclosure. The Commission ordered the OAG to disclose all non-exempt records.

On August 12, 2009, the OAG filed this appeal of the Final Decision on the grounds that the Commission's decision is in violation of constitutional and statutory provisions, in excess of the Commission's statutory authority, affected by errors of law, clearly erroneous in view of the record, and arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion. The appeal was accompanied by a supporting memorandum of law, an application for order to show cause and an application to stay final decision. The court (*Cohn, J.*) issued an order to show cause on August 12, 2009 and granted a stay of the

final decision on September 18, 2009. On November 13, 2009, the Commission filed an answer denying that the OAG is entitled to any of its requested relief. The OAG filed a brief on March 1, 2010, and the defendants filed a responsive brief on September 3, 2010. Oral arguments were heard on September 24, 2010.

"[A]ppellate jurisdiction in administrative appeals is created only by statute and can be acquired and exercised only in the manner prescribed by statute." *Munhall* v. *Inland Wetlands Commission*, 221 Conn. 46, 50, 602 A.2d 566 (1992). "Any party aggrieved by the decision of [the freedom of information] commission may appeal therefrom, in accordance with the provisions of [General Statutes §] 4-183." General Statutes § 1-206 (d). "A person who has exhausted all administrative remedies available within the agency and who is aggrieved by a final decision may appeal to the Superior Court as provided in this section . . . ." General Statutes § 4-183 (a). "A person may appeal a preliminary, procedural or intermediate agency action or ruling to the Superior Court if (1) it appears likely that the person will otherwise qualify under this chapter to appeal from the final agency action or ruling and (2) postponement of the appeal would result in an inadequate remedy." General Statutes § 4-183 (b).

A. Aggrievement

"The concept of standing as presented . . . by the question of aggrievement is a practical and functional one designed to assure that only those with a genuine and legitimate interest can appeal an order." *Beckish* v. *Manafort*, 175 Conn. 415, 419, 399 A.2d 1274 (1978). "It is well

settled that pleading and proof of aggrievement [within the meaning of the statute] are prerequisites to a trial court's jurisdiction over the subject matter of an administrative appeal." (Internal quotation marks omitted.) *Bongiorno Supermarket, Inc.* v. *Zoning Board of Appeals*, 266 Conn. 531, 537-38, 833 A.2d 883 (2003). "Aggrievement presents a question of fact for the trial court and the party alleging aggrievement bears the burden of proving in." Id., 538-39. "[A] plaintiff may prove aggrievement by relying on facts established in the record as a whole, including the administrative record." *State Library* v. *Freedom of Information Commission*, 240 Conn. 824, 832, 694 A.2d 1235 (1997). A plaintiff may prove aggrievement by testimony at the time of trial; *Winchester Woods Associates* v. *Planning and Zoning Commission*, 219 Conn. 303, 308, 592 A.2d 953 (1991); or "by the production of the original documents or certified copies from the record." (Internal quotation marks omitted.) *Quarry Knoll II Corp.* v. *Planning & Zoning Commission*, 256 Conn. 674, 703, 780 A.2d 1 (2001).

"Aggrievement is established if there is some possibility, as distinguished from a certainty, that some legally protected interest . . . has been adversely affected." (Internal quotation marks omitted.) *State Library* v. *Freedom of Information Commission*, supra, 240 Conn. 834. "In appeals pursuant to the Freedom of Information Act, aggrievement is determined in accordance with a twofold test. . . . This test requires a showing of: (1) a specific personal and legal interest in the subject matter of the [commission's] decision; and (2) a special and injurious effect on this specific interest." (Citations omitted; internal quotation marks omitted.) Id., 833; *Williams* v. *Freedom of Information Commission*, Superior Court, Docket No. CV 05 4008040 (October 30, 2006, *Owens, J.T.R.*).

The OAG has alleged in its appeal that it was aggrieved by the Commission's Final Decision because it ordered the release of certain records over which the OAG acts as custodian, and that those records should be exempt from disclosure pursuant to General Statutes §§ 1-210 (b) (1), 1-210 (b) (10), 1-210 (b) (13) and 52-146r. The court finds that the OAG is aggrieved by the Commission's decision. The Commission has ruled against the OAG and compelled it to produce documents that it claims there is no legally duty to disclose, and to do so would undermine state laws enacted to protect whistleblowers. This shows a specific personal and legal interest in the subject matter of the Commission's decision; and a special and injurious effect on this specific interest of the OAG.

B. Timeliness and Service of Process

General Statutes § 1-206 provides in relevant part: "Any party aggrieved by the decision of [the freedom of information] commission may appeal therefrom, in accordance with the provisions of [General Statutes §] 4-183." General Statutes § 1-206 (d). Section 4-183 (c) provides: "Within forty-five days after mailing of the final decision under section 4-180 or, if there is no mailing, within forty-five days after personal delivery of the final decision under said section, a person appealing as provided in this section shall serve a copy of the appeal on the agency that rendered the final decision at its office or at the office of the Attorney General in Hartford and file the appeal with the clerk of the superior court for the judicial district of New Britain or for the judicial district wherein the person appealing resides . . . . Within that time, the person appealing shall also serve a copy of the appeal on each party listed in the final decision at the address shown in the decision, provided failure to make such service within

forty-five days on parties other than the agency that rendered the final decision shall not deprive the court of jurisdiction over the appeal. Service of the appeal shall be made by . . . United States mail, certified or registered, postage prepaid, return receipt requested, without the use of a state marshal or other officer . . . If service of the appeal is made by mail, service shall be effective upon deposit of the appeal in the mail."

The Commission provided the OAG with notice of its Final Decisions on July 30, 2009. On August 12, 2009, the OAG served the Commission and Matthews, as stated in the OAG's affidavit of service, filed August 25, 2009. Because the appeal was served on the Commission and Matthews within forty-five days of the mailing of the Final Decision to the OAG, the court finds that the OAG has filed a timely appeal and made proper service upon the parties.

"Ordinarily, [o]ur resolution of [administrative appeals] is guided by the limited scope of judicial review afforded by the Uniform Administrative Procedure Act; General Statutes § 4-166 et seq.; to the determinations made by an administrative agency. [W]e must decide, in view of all the evidence, whether the agency, in issuing its order, acted unreasonably, arbitrarily or illegally, or abused its discretion. . . . Conclusions 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. . . .

"A reviewing court, however, is not required to defer to an improper application of the

law. . . . It is the function of the courts to expound and apply governing principles of law. . . . Questions of law [invoke] a broader standard of review than is ordinarily involved in deciding whether, in light of the evidence, the agency has acted unreasonably, arbitrarily, illegally or in abuse of its discretion. . . . [When a] case forces us to examine a question of law . . . our review is de novo." (Internal quotation marks omitted.) *Lash* v. *Freedom of Information Commission*, 116 Conn. App. 171, 177-78, 976 A.2d 739 (2009).

I. Statutory exemptions under §§ 1-210 (b) (13) and 4-61dd (a)

The OAG argues that the Commission reached two erroneous legal conclusions in its decision ordering the OAG to various disclose records. First, it argues that the Commission improperly determined that the final sentence of § 4-61dd (a) requires that records of a whistleblower investigation be disclosed after the conclusion of the investigation. Specifically, the OAG claims that this interpretation is contrary to the statute's plain language, the legislative intent and policy behind § 1-210 (b) (13) and § 4-61dd, which together protect whistleblower investigations from public disclosure. Second, the OAG argues that the Commission improperly found that the OAG did not provide evidence that the whistleblower investigations at issue were pending at the time the complainant made his request.

The court begins its analysis by reviewing the language of General Statutes §§ 1-210 (b) (13) and 4-61dd (a). Because the interpretation of a statutory provision is a question of law, the court's review of the issue is de novo. *Lash* v. *Freedom of Information Commission*, supra, 116 Conn. App. 178. In examining these statutes, the court is guided by our longstanding

principles of statutory construction.

"The principles that govern statutory construction are well established. 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. . . . 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.) *Friezo* v. *Friezo*, 281 Conn. 166, 181-82, 914 A.2d 533 (2007).

"[W]e must, if possible, construe two statutes in a manner that gives effect to both, eschewing an interpretation that would render either ineffective. In construing two seemingly conflicting statutes, we are guided by the principle that the legislature is always presumed to have created a harmonious and consistent body of law. . . . Accordingly, [i]f two statutes appear to be in conflict but can be construed as consistent with each other, then the court

should give effect to both. . . . If a court can by any fair interpretation find a reasonable field of operation for two allegedly inconsistent statutes, without destroying or preventing their evident meaning and intent, it is the duty of the court to do so. . . . Therefore, [w]e must, if possible, read the two statutes together and construe each to leave room for the meaningful operation of the other. . . . In addition, [i]f two constructions of a statute are possible, we will adopt the one that makes the statute effective and workable . . . ." (Internal quotation marks omitted.) *Rainforest Cafe* v. *Dept. of Revenue Services*, 293 Conn. 363, 377-78, 977 A.2d 650 (2009).

General Statutes § 1-210 governs access to public records and exemptions thereto under the Freedom of Information Act (FOIA), General Statutes § 1-200 et seq. The exemption found in subsection (b) (13) provides that "[n]othing in the Freedom of Information Act shall be construed to require disclosure of . . . (13) [r]ecords of an investigation or the name of an employee providing information under the provisions of section 4-61dd . . . ." The unambiguous language of § 1-210 (b) (13), therefore, provides two exemptions from disclosure for "records of an investigation" and "the name of an employee providing information" under § 4-61dd.

General Statutes § 4-61dd[1] is the Connecticut whistleblower statute. At issue here is

[1] General Statutes § 4-61dd (a) provides: "Any person having knowledge of any matter involving corruption, unethical practices, violation of state laws or regulations, mismanagement, gross waste of funds, abuse of authority or danger to the public safety occurring in any state department or agency or any quasi-public agency, as defined in section 1-120, or any person having knowledge of any matter involving corruption, violation of state or federal laws or regulations, gross waste of funds, abuse of authority or danger to the public safety occurring in any large state contract, may transmit all facts and information in such person's possession concerning such matter to the

the final sentence of § 4-61dd (a), which provides: "In addition to the exempt records provision of section 1-210, the Auditors of Public Accounts and the Attorney General shall not, after receipt of any information from a person under the provisions of this section or sections 17b-301c to 17b-301g, inclusive, disclose the identity of such person without such person's consent unless the Auditors of Public Accounts or the Attorney General determines that such disclosure is unavoidable, and may withhold records of such investigation, during the pendency of the investigation."

The court finds that the plain language of § 4-61dd (a) does not state that the records of an investigation must be disclosed after the conclusion of the investigation. In addition, interpreting § 4-61dd (a) as requiring the disclosure of investigation records would render the parallel exemption in § 1-210 (b) (13) ineffective or meaningless. Accordingly, the court finds that the Commission's interpretation of § 4-61dd (a) is not "plain and unambiguous" based on

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Auditors of Public Accounts. The Auditors of Public Accounts shall review such matter and report their findings and any recommendations to the Attorney General. Upon receiving such a report, the Attorney General shall make such investigation as the Attorney General deems proper regarding such report and any other information that may be reasonably derived from such report. Prior to conducting an investigation of any information that may be reasonably derived from such report, the Attorney General shall consult with the Auditors of Public Accounts concerning the relationship of such additional information to the report that has been issued pursuant to this subsection. Any such subsequent investigation deemed appropriate by the Attorney General shall only be conducted with the concurrence and assistance of the Auditors of Public Accounts. At the request of the Attorney General or on their own initiative, the auditors shall assist in the investigation. The Attorney General shall have power to summon witnesses, require the production of any necessary books, papers or other documents and administer oaths to witnesses, where necessary, for the purpose of an investigation pursuant to this section or for the purpose of investigating a suspected violation of subsection (a) of section 17b-301b [[prohibited acts re medical assistance]] until such time as the Attorney General files a civil action pursuant to section 17b-301c. Upon the conclusion of the investigation, the Attorney General shall where necessary, report any findings to the Governor, or in matters involving criminal activity, to the Chief State's Attorney. In addition to the exempt records provision of section 1-210, the Auditors of Public Accounts and the Attorney General shall not, after receipt of any information from a person under the provisions of this section or sections 17b-301c to 17b-301g, inclusive, disclose the identity of such person without such person's consent unless the Auditors of Public Accounts or the Attorney General determines that such disclosure is unavoidable, and may withhold records of such investigation, during the pendency of the investigation.

"the text of the statute and its relationship to other statutes." See *Friezo* v. *Friezo*, supra, 281 Conn. 182.

There is a more appropriate interpretation of § 4-61dd (a), also based on its text and its relationship to § 1-210 (b) (13), that allows these provisions to be read in harmony with one another. Section 1-210 (b) provided the original exemptions from FOIA records requests and should be viewed as a rule of general application with regard to this type of exemption. Section 4-61dd (a) adds exemptions from disclosure that are "in addition to" those set forth in § 1-210 (b) (13). In contrast to the exemptions in § 1-210 (b) (13), which are controlled by the permissive language "nothing . . . shall be construed to require disclosure of," the exemption in the first part of § 4-61dd (a) adds a mandatory prohibition that persons providing information "shall not" be disclosed "during the pendency of the investigation." This mandatory language strengthens the exemption for records of such persons by removing any permissive discretion that existed under § 1-210 (b) (13), but only in a particular context. This context, "during the pendency of the investigation," allows § 4-61dd (a) and § 1-210 (b) (13) to exist in harmony without one rendering the other ineffective or meaningless. See *Rainforest Cafe* v. *Dept. of Revenue Services*, supra, 293 Conn. 378 ("[i]f two statutes appear to be in conflict but can be construed as consistent with each other, then the court should give effect to both").

Likewise, when the phrase "during the pendency of the investigation" is construed as the context within which the exemptions of § 4-61dd (a) operate, the phrase "may withhold

records of investigation" may be read simply as a clarification that echoes and reaffirms the exemption for investigations in § 1-210 (b) (13). The use of the term "may," as applied to the unmodified exemption on investigations, stands in contrast to "shall not," which strengthens the exemption for persons providing information. The phrase helps to clarify that only the exemption relating to persons is being modified within the specific context set forth under § 4-61dd (a).

For the foregoing reasons, the court finds that by its plain language and its relationship to § 1-210 (b) (13), § 4-61dd (a) does not require the Attorney General to release records of a whistleblower investigation pursuant to a FOIA request upon the conclusion of an investigation[2] and that the Commission's interpretation of General Statutes § 4-61dd (a) is in error as a matter of law. Accordingly, the Commission's Final Decision is remanded in its entirety for reconsideration based on this court's interpretation of § 4-61dd.

II. Exemptions claimed for records reviewed in camera

The remaining arguments raised by the OAG on appeal relate to the applicability of several statutory exemptions to disclosure for some or all of 1101 pages of records that were

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[2] Although the court need not reach this issue, the legislative history and circumstances surrounding the addition of the phrase "may withhold records of such investigation" support the court's interpretation of these provisions. This language was added as part of Public Act 05-287, in which the amendments to § 4-61dd largely addressed subsection (b), which involves the procedures under which a whistleblower could bring a complaint for employer retaliation before the Chief Human Rights Referee. Prior to this amendment, whistleblowers had to wait until the conclusion of the Attorney General's investigation before filing such a complaint. Public Act 05-287 allowed such complaints to be brought while the investigation was ongoing and would have caused whistleblowers to seek the records of Attorney General investigations before the conclusion of the investigation. From this perspective, the language at issue in § 4-61dd (a) can be seen as a clarification that records of an investigation need not be disclosed, but still could be revealed where the Attorney General deemed it appropriate.

submitted to the Commission for in camera review. The specific exemptions claimed are based on the attorney-client privilege, General Statutes §§ 1-210 (b) (10) and 52-146r; for preliminary drafts and notes, General Statutes § 1-210 (b) (1); and for strategy and negotiations in pending claims, General Statutes § 1-210 (b) (4). The Commission's findings shall be discussed with respect to each of these exemptions below.

As a preliminary matter, the court notes that the Commission only considered the applicability of these exemptions after determining that the in camera records were not exempt under General Statutes §§ 1-210 (b) (13) and 4-61dd. The court's interpretation of §§ 1-210 (b) (13) and 4-61dd in Part I of this opinion, combined with several findings by the Commission that characterize the in camera records as generally relating to whistleblower investigations, discussed below, require this matter to be remanded in its entirety so that the Commission may consider the applicability of §§ 1-210 (b) (13) and 4-61dd to all of the records at issue. Such a review must be conducted regardless of the applicability of any of the other exemptions from disclosure claimed in Part II of this decision. Be that as it may, the court will address certain aspects of the exemptions claimed in Part II where it believes doing so may aid in the Commission's review of these issues.

A. Statutory exemptions under §§ 1-210 (b) (10) and 52-146r

The OAG argues that the Commission erred when it found that the Attorney General

is not protected by the attorney-client privilege under General Statutes §§ 1-210 (b) (10)[3] and § 52-146r[4] when it performs its whistleblower duties. The Commission, in its Final Decision, determined that this exemption did not apply because invoking the attorney-client privilege in the context of a whistleblower investigation does not involve a traditional "client" and the Attorney General "cannot be a client of his staff." The OAG argues that this finding ignores the express language of General Statutes § 52-146r, which provides for privileged communications between government attorneys and public officials, including the Attorney General. The OAG further argues that the Commission's finding harms both the OAG and the public because depriving the Attorney General of the protections of privileged communications would impede the OAG's ability to carry out its statutory duties and could result in the disclosure of confidential information. The OAG has invoked the exemption under § 52-146r with respect to "all 1101 of the in camera records, with the exception of IC 2008-524-0003, IC 2008-524-0022, IC 2008-524-0023, and IC 2008-524-0077." R. at 1245; Final Decision ¶ 41.

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[3] General Statutes § 1-210 (b) (10) provides: "Nothing in the Freedom of Information Act shall be construed to require the disclosure of . . . (10) Records, tax returns, reports and statements exempted by federal law or state statutes or communications privileged by the attorney-client relationship . . . ."

[4] General Statutes § 52-146r provides: "(a) As used in this section: (1) 'Authorized representative' means an individual empowered by a public agency to assert the confidentiality of communications that are privileged under this section; (2) 'Confidential communications' means all oral and written communications transmitted in confidence between a public official or employee of a public agency acting in the performance of his or her duties or within the scope of his or her employment and a government attorney relating to legal advice sought by the public agency or a public official or employee of such public agency from that attorney, and all records prepared by the government attorney in furtherance of the rendition of such legal advice; (3) 'Government attorney' means a person admitted to the bar of this state and employed by a public agency or retained by a public agency or public official to provide legal advice to the public agency or a public official or employee of such public agency; and (4) 'Public agency' means 'public agency' as defined in section 1-200.

"(b) In any civil or criminal case or proceeding or in any legislative or administrative proceeding, all confidential communications shall be privileged and a government attorney shall not disclose any such communications unless an authorized representative of the public agency consents to waive the privilege and allow such disclosure."

In its Final Decision, the Commission found that the 1101 pages of records reviewed by the Commission in camera "consist generally of emails between, and among, assistant and associate attorneys general, letters, notes, drafts, and memos, *relating, generally, to whistleblower investigations and investigations of complaints of retaliation*." (Emphasis added.) R. at 1243; Final Decision ¶ 29.

The Final Decision's discussion of the exemption specifically claimed under § 52-146r further states: "It is found that the in camera records consist of emails, between and among assistant attorneys general, in which they consulted with one another regarding whistleblower investigations and complaints of retaliation, and proposed changes to internal policies of the respondent relating to the conduct of whistleblower investigations. *It is found that the majority of such records relate to the respondent's duty under § 4-61dd, G.S. to investigate whistleblower and whistleblower retaliation complaints*, rather than to its duty to represent a state agency client, under §§ 3-125 and 5-141d (b), G.S. To the extent that any in camera records consist of communications between outside counsel or a client, and assistant/associate attorneys general, or to the respondent's duties under §§ 3-125 and 5-141d (b), G.S., it is found that the respondent failed to prove that such communications relate to legal advice sought by or on behalf of the agency from such attorney, or that such legal advice was sought in confidence." (Emphasis added.) R. at 1246; Final Decision ¶ 47.

The Commission's findings, that the majority of the 1101 in camera records "relate to" the Attorney General's duty to conduct whistleblower investigations, present the question of

whether these records should be exempt from disclosure under the whistleblower records exemption, General Statutes §§ 1-210 (b) (13) and 4-61dd. Because a determination on the applicability of this exemption may resolve this issue, the court need not address the attorney-client privilege at this time. Accordingly, the Final Decision is remanded so that the Commission may determine whether the documents at issue fall under the whistleblower records exemption as set forth in Part I of this decision. The court reserves the issue of the applicability of the attorney-client privilege under §§ 1-210 (b) (10) and 52-146r in the context of the Attorney General's whistleblower duties pending the Commission's review.

B. Exemptions claimed under General Statutes § 1-210 (b) (1)

The OAG argues that the Commission improperly determined that it failed to establish statutory exemptions from disclosure for preliminary drafts and notes for fifty one of the 1101 in camera records. Specifically, the OAG argues that the Commission incorrectly found that it did not conduct the balancing test that is required to properly invoke the exemption for preliminary drafts and notes under § 1-210 (b) (1).[5]

"Although [General Statutes § 1-19 (b) (1), the precursor to § 1-210 (b) (1)] places the responsibility for making that determination on the public agency involved, the statute's language strongly suggests that the agency may not abuse its discretion in making the decision to withhold disclosure." *Van Norstrand* v. *Freedom of Information Commission*, 211 Conn.

[5] General Statutes § 1-210 (b) (1) provides: "Nothing in the Freedom of Information Act shall be construed to require the disclosure of (1) Preliminary drafts or notes provided the public agency has determined that the public interest in withholding such documents clearly outweighs the public interest in disclosure . . . ."

339, 345, 559 A.2d 200 (1989), citing *Wilson* v. *Freedom of Information Commission*, 181 Conn. 324, 339, 435 A.2d 353 (1980).

"In conducting the balancing test, the agency may not abuse its discretion in making the decision to withhold disclosure. The agency must, therefore, indicate the reasons for its determination to withhold disclosure and those reasons must not be frivolous or patently unfounded." (Internal quotation marks omitted.) *Shew* v. *Freedom of Information Commission*, 245 Conn. 149, 167 n.22, 714 A.2d 664 (1998).

The Commission's Final Decision found, with respect to the evidence submitted by the OAG on the preliminary drafts and notes exception, that "the respondent offered *no evidence* at the hearing in this matter that it had conducted the required balancing test, and determined that the public interest in withholding the in camera records at issue clearly outweighed the public interest in disclosure of such records." (Emphasis added.) R. at 1245; Final Decision ¶ 39.

Based on its review of the applicable legal standards and the administrative record, the court finds that the Commission employed the incorrect legal standard when it denied the exemption claimed by the OAG under General Statutes § 1-210 (b) (1). The Commission appears not to have considered *any* reasons indicated by the OAG for its nondisclosure, stating that it had offered "no evidence" to support its determination. The record indicates that the OAG set forth at least one reason for withholding the documents at issue, namely that these

documents involved a proposed change in policy that was never enacted. R. at 246-48. By failing to take this testimony into account, the Commission incorrectly presumed that the OAG had not engaged in the required balancing test. This constitutes reversible error. As noted above, our Supreme Court has indicated that the agency, and not the commission, is the party that makes the determination on whether to disclose. *Van Norstrand* v. *Freedom of Information Commission*, supra, 211 Conn. 345. The role of the Commission is to determine whether, after reviewing the stated reasons for disclosure, the agency abused its discretion in withholding disclosure because such reasons were "frivolous or patently unfounded"; *Shew* v. *Freedom of Information Commission*, supra, 245 Conn. 167 n.22; and made a "good faith consideration of the effect upon disclosure" once the underlying material was identified as a preliminary draft or note. *Van Norstrand* v. *Freedom of Information Commission*, supra, 211 Conn. 345. For the foregoing reasons the Final Decision is remanded for the Commission to reconsider whether OAG engaged in the proper balancing test necessary to claim an exemption from disclosure under General Statutes § 1-210 (b) (1).

C. General Statutes § 1-210 (b) (4)

The OAG contests the Commission's finding that it failed to establish the statutory exemption from disclosure for strategy and negotiation in pending claims for certain in camerarecords under General Statutes § 1-210 (b) (4).[6] Specifically, the Commission found that the OAG had not provided sufficient evidence to support the exemption because many of

[6] General Statutes § 1-210 (b) (4) provides: "Nothing in the Freedom of Information Act shall be construed to require disclosure of . . . (4) Records pertaining to strategy and negotiations with respect to pending claims or pending litigation to which the public agency is a party until such litigation or claim has been finally adjudicated or otherwise settled . . . ."

the claims at issue were no longer "pending."

While the Commission, in its Final Decision, found that numerous records were exempt from disclosure under the General Statutes § 1-210 (b) (4), it noted that many of the remaining records "relate to the investigation of the complainant's whistleblower and whistleblower retaliation complaints, which were completed and therefore no longer pending, and to the complainant's retaliation complaint." R. at 1244; Final Decision ¶ 34.

Based on the court's preceding discussion on the proper interpretation of General Statutes §§ 4-61dd and 1-210 (b) (13) in Part I of this decision, those parts of the Final Decision that relate to records of whistleblower investigations are remanded so the Commission may determine whether they fall within the disclosure exemption for whistleblower records. The court reserves the issue of the applicability of General Statutes § 1-210 (b) (4) until the Commission has reviewed these records under the standards set forth above.

For the foregoing reasons, the Commission's Final Decision is remanded in its entirety for reconsideration of the claimed statutory exemptions discussed herein.

OWENS, J.T.R.