

**DOCKET NOs. HHB-CV-09-4020325S
HHB-CV-09-4020326S**

**DIVISION OF CRIMINAL JUSTICE, : SUPERIOR COURT
JOHN ROSE, CORPORATION COUNSEL :
and EDDIE PEREZ, MAYOR, CITY OF : J.D. OF NEW BRITAIN
HARTFORD :
V. : AT NEW BRITAIN**

**FREEDOM OF INFORMATION COMMISSION,
JEFFREY COHEN, THE HARTFORD COURANT : AUGUST 7, 2009**

BRIEF IN SUPPORT OF PLAINTIFFS' APPEALS

The Plaintiffs, Division of Criminal Justice ("DCJ"), and John Rose, Corporation Counsel of the City of Hartford, and Eddie Perez, Mayor of the City of Hartford ("City Plaintiffs") appeal from the Final Decisions of the Defendant Freedom of Information Commission ("Defendant FOIC") in the above-captioned matters, ordering the City Plaintiffs to disclose to Jeffrey Cohen and the Hartford Courant ("Courant Defendants") copies of grand jury subpoenas and documents turned over by the City Plaintiffs in response to those subpoenas. See Conn. Gen. Stat. § 4-183(g).

In Docket No. HHB-CV-09-4020325S, the Plaintiffs are appealing the Final Decision of the Defendant FOIC ordering the City Plaintiffs to provide the Courant Defendants with copies of grand jury subpoenas directed to Diggs Construction, a company doing business with the City of Hartford, and copies of documents produced by Diggs in response thereto. In HHB-CV-09-4020326S, the Plaintiffs are appealing the

Final Decision of the Defendant FOIC ordering the City Plaintiffs to provide the Courant Defendants with copies of subpoenas directed to City employees, and copies of documents produced by the City in response thereto. The Plaintiffs request that this Court consider the two cases together, because the issue on appeal - whether the Freedom of Information Act ("FOIA") provides access to documents that reveal matters before an sitting grand jury - is the same in both cases.

The Plaintiffs are seeking reversal of the Final Decisions of the Defendant FOIC because the FOIC has failed to conduct a proper statutory analysis, has misconstrued the grand jury statutory scheme, and has applied FOIA in a manner that leads to an irrational result. Plaintiffs also argue that disclosure should have been denied because the documents were requested in a manner that contravenes the statutory secrecy afforded to an ongoing grand jury engaged in a criminal investigation, and the statutorily mandated procedures for access to grand jury information.

Moreover, disclosure pursuant to FOIA would also undermine the Plaintiff DCJ's ability to assist the grand jury in performing its obligation to ensure an accused's right to a fair trial, the prevention of flight by potential criminal defendants to avoid prosecution, the prevention of witness tampering and subornation of perjury, and the protection of the lives and reputations of individuals who may be witnesses, victims or possible suspects who are eventually cleared of any wrongdoing. See State v. Rivera, 250 Conn. 188, 202-03 (1999); In Re Final Grand Jury Report Concerning the Torrington Police Department, 197 Conn. 698, 709-10 (1985) (hereinafter "In Re Torrington Grand Jury").

I. FACTS AND PROCEDURAL HISTORY

In Docket No. HHB-CV-09-3020325S, the Courant Defendants made a FOIA request, dated July 8, 2008, to the City Plaintiffs for copies of the following records:

- 1). All requests for information or subpoenas for information/records sent to or made of Diggs Construction by law enforcement agencies on or after January 1, 2006 to the present;
- 2). All subpoenas for Diggs Construction employees or officials to appear made of the Diggs Construction by law enforcement agencies on or after January 1, 2006 to the present; and
- 3). All documents including all e-mails and other electronic documents, turned over to such law enforcement agencies by Diggs Construction from January 1, 2006 to the present in response to such subpoenas or requests for information.

Record in 325S at 5.¹

In Docket No. HHB-CV-09-4020326S, the Courant Defendants made a FOIA request, dated July 8, 2008, to the City Plaintiffs for copies of the following records:

- 1). All requests for information or subpoenas for information/records sent to or made of the city by law enforcement agencies on or after January 1, 2006 to the present;
- 2). All requests for information or subpoenas or officials to appear made of the city by law enforcement agencies on or after January 1, 2006 to the present; and
- 3). All documents including all e-mails and other electronic documents, turned over to such law enforcement agencies by the city from January 1, 2006 to the present in response to any such subpoenas or requests for information.

R. in 326S at 5.

¹ By virtue of the size of a certain contract awarded to Diggs Construction by the City of Hartford for construction management services, the company is considered a "public agency" for FOIA purposes with respect to that contract. See Conn. Gen. Stat. § 1-218.

The City Plaintiffs had sought the advice of DCJ's Chief State's Attorney, Kevin Kane, regarding an earlier request by the Courant Defendants for disclosure of similar documents. R. in 325S at 84-88; 326S at 88-91. By letter dated March 14, 2008, Attorney Kane had counseled Attorney John Rose, Corporation Counsel of the City of Hartford, that the unauthorized disclosure of any part of the record and/or the course of an ongoing grand jury investigation is prohibited by law and would be prejudicial to an ongoing criminal investigation. R. in 325S at 18, 85, 150; 326S at 18, 89, 154. Thereafter the City denied the earlier request for disclosure of the similar documents. Again relying on the advice of the Chief State's Attorney, the City Plaintiffs denied the Courant Defendants' July 8, 2008 requests for disclosure. R. in 325S at 9, 151; 326S at 8, 155.

On August 13, 2008, the Courant Defendants filed complaints with the Defendant FOIC. Both Records at 5. At the request of the Courant Defendants, the Defendant FOIC consolidated the cases. R. in 325S at 6, 19; 326S at 6, 23. The Plaintiff DCJ filed a petition to intervene in both matters. Both Records at 14-17.

On December 3, 2008, the Defendant FOIC conducted a hearing on the Courant Defendants' consolidated complaints. R. in 325S at 34-131; 326S at 38-135. Hearing Officer Victor Perpetua granted Plaintiff DCJ Intervenor status, then heard evidence and legal argument on the contested matter. Id. Mr. Perpetua declined to review the requested documents in camera. R. in 325S at 81-85, 129; 326S at 84-188, 133.

Attorney John Rose testified at the hearing that he denied the July 8th requests for disclosure based on the advice of the Chief State's Attorney, Kevin Kane. R. in 325S at 56-57; in 326S at 60-61. Attorney Rose further testified that he had a large

box of documents relating to the criminal investigations, some of which had been turned over as early as 2007 to inspectors from the Chief State's Attorney's Office who were conducting a criminal investigation prior to the appointment of the grand jury, and other documents that had been produced in response to grand jury subpoenas, but that he had not made any distinction between those investigations, so that the documents were commingled. R. 325S at 60-61; 326S at 64-65.² Diggs Construction was prepared to submit a four-inch thick file of responsive documents for in camera review by the Hearing Officer. R. 325S at 45, 102; 326S at 49, 106. Attorney Rose emphasized that he denied both requests for disclosure in reliance on the advice of the Chief State's Attorney. R. 325S at 84-88; 326S at 88-92.

After hearing legal argument by the parties and the intervenor DCJ, Hearing Officer Perpetua observed that the essential difficulty was that the documents were in two different places; and that no one could obtain the documents if they requested them directly from the grand jury panel. R. 325S at 127; 326S at 131. He directed the parties and the intervenor DCJ to submit briefs for his consideration.

On February 10, 2009, Hearing Officer Perpetua issued his amended proposed final decisions, ruling in favor of the Courant Defendants in both cases. R. 325S at 217-24; 326S at 220-27. At a hearing on March 11, 2009, the full FOIC granted the Plaintiff DCJ full party status in both cases, then adopted the Hearing Officer's

² Attorney Rose testified he was aware that perhaps fifty to sixty City employees had been subpoenaed, but that the City was in possession only of subpoenas served on employees who had submitted them to the City to obtain indemnification for legal representation. R. in 326S at 61-62, 65. There was no testimony regarding the contents of the Diggs documents.

proposed final decisions. R. 325S at 232, 249; 326S at 236, 253. On March 18, 2009, the Defendant FOIC issued its Final Decisions in both cases. R. 325S at 252-61; 326S at _____. Thereafter the Plaintiffs timely filed these appeals.

II. ARGUMENT: THE COURT SHOULD REVERSE THE FINAL DECISIONS OF THE FOIC AND HOLD THAT THE SUBPOENAS AND DOCUMENTS WERE NOT SUBJECT TO DISCLOSURE IN THE FORM REQUESTED

A. Applicable Standard of Review

An appeal from the decision of an administrative agency is governed by the provisions of General Statutes § 4-183. A party who is aggrieved by a final decision of an administrative agency may file an appeal with the superior court. Conn. Gen. Stat. § 4-183(a). Section 4-183 provides in relevant part:

The court hearing the appeal may not substitute its judgment for that of the agency as to the weight of the evidence on a question 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; [or] (2) in excess of the statutory authority of the agency . . . If the court finds such prejudice, it shall sustain the appeal and, if appropriate, render a judgment . . . or remand the case for further proceedings. . . .

Conn. Gen. Stat. § 4-183(j). This court's review of the Defendant FOIC's final decision is plenary because it requires a statutory construction analysis of the FOIA and the grand jury statutory scheme, and therefore is a question of law.

. . . . [T]he construction and interpretation of a statute is a question of law for the courts, where the administrative decision is not entitled to special deference. . . . 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. . . . Because this case forces us to examine a question of law, namely, the construction and interpretation of [statutes] as well as the standard to be applied, our review is de novo." (Citations omitted; internal quotation marks omitted.) Director, Retirement & Benefits Services Division v. Freedom of Information Commission, 256 Conn. 764, 770-72, 775 A.2d 981 (2001). In other words, the issue before us is one of

statutory construction.

Groton Police Department v. FOIC et. al, 104 Conn. App. 150, 156 (2007). As General Statutes § 1-2z directs, "The meaning of a statute shall, in the first instance, be ascertained from the text of the statute itself and its relationship to other statutes." In construing statutes, the courts seek to arrive at a rational and sensible interpretation, and to avoid bizarre, absurd or nonsensical results. State v. Rivera, 250 Conn. at 200; In Re Judicial Inquiry No. 2005-02, 104 Conn. App. 398, 411, cert. granted, 285 Conn. 905 (2007) (decision pending).

When considering a statutory scheme that has gaps or inconsistencies, a reviewing court will look to extratextual evidence, including legislative history and common law principles governing the same subject matter. In Re Judicial Inquiry, 104 Conn. App. at 407-08.

Our Supreme and Appellate Courts have construed the relevant provisions of the FOIA statutes and the grand jury statutes regarding secrecy and disclosure. See, e.g., Wilson v. Freedom of Information Commission, 181 Conn. 324, 329 (1980) ("exceptions to FOIA's general rule of disclosure "will be narrowly construed"); State v. Rivera, 250 Conn. at 216 (Peters, J. dissenting) ("[W]e have applied the principle of strict construction whenever the legislature has sought to diminish the traditional common-law secrecy of grand jury proceedings"); State v. Canady, 187 Conn. 281, 287 (1992) (statutes in derogation of common law grand jury secrecy must be narrowly construed).

Applying the foregoing standards of review to the Defendant FOIC's statutory construction of the FOIA and the grand jury statutes, this Court should sustain these appeals because the Final Decisions of the Defendant FOIC are based on an error of

law; contravene applicable constitutional and statutory provisions; and are in excess of the agency's statutory authority.

B. The Defendant FOIC's Final Decision Should Be Reviewed in the Context of the Time It Was Issued, i.e., During the Pendency of an Ongoing Grand Jury Investigation

The Defendants may argue that this appeal is moot, because the grand jury investigation at issue in this case has concluded, and the grand juror has released a part of his finding to the public. See Exhibit A.³ This circumstance, however, does not diminish the legitimacy of the Plaintiffs' appeals in the present cases, which focus on disclosure during the investigation, not after its conclusion.

The Plaintiffs urge this Court to reject a mootness argument, because this is an issue "capable of repetition, yet evading review." State v. Boyle, 287 Conn. 478, 487 n.3 (2008). Specifically, an otherwise moot question may qualify for review under the "capable of repetition, yet evading review" exception to the mootness doctrine if it meets three requirements: (1) the challenged action must be of a limited duration, giving rise to a strong likelihood that the substantial majority of cases raising a question about its validity will become moot before appellate litigation can be concluded; (2) there must be a reasonable likelihood that the question at issue will arise again in the future, and will

³ The grand juror also concluded that a significant portion of his finding should be sealed. See Exhibit A. The grand juror's decision to disclose only part of its finding to the public underscores the Plaintiffs' arguments in these appeals that confidentiality is essential to the proper functioning of the grand jury; and that the grand jury statutory scheme prohibits premature disclosure of information during a pending investigation. State v. Rivera, 250 Conn. at 202-03.

The Hartford Courant's petition for review challenging the grand juror's decision to seal a portion of his report is now pending before the Connecticut Supreme Court. See In Re Grand Jury Investigation #2007-04.

affect the same complainant or a similar group for whom the complainant may act as a surrogate; and (3) the issue must be one of public importance. Id. Here, all three elements are present.

The duration of an appointed grand jury's investigation is limited to six months, although up to two extensions of time may be granted, not to exceed six months each. Section 54-47d (b) and (c). Thus the total time period during which a plaintiff's challenge to release of information during a pending grand jury can be "alive" is no longer than eighteen months.⁴ In this case, that eighteen-month time period has passed.

There is a strong likelihood that the question at issue in this case - FOIA disclosure during an ongoing investigation - will arise in future grand jury investigations into public corruption, which by definition will involve public agencies subject to FOIA. The Plaintiff DCJ will invariably seek to intervene in the consideration of such cases before the FOIC and will be aggrieved by FOIC rulings like those in the present cases.⁵ Given the statutorily-mandated short duration of a grand jury investigation, it is almost certain that in a substantial majority of these cases, if not all, the public access question will arise and become moot before it ever receives full review in the courts, thus depriving the Plaintiff DCJ of a remedy.

⁴ The grand jury statutory scheme requires that the investigation be conducted in private. See Section 54-47e; and Section C.2 of this brief.

⁵ Applications for the appointment of a grand jury may be filed by a judge or by a state's attorney. See § 54-47c(a). In practice, it is almost always a state's attorney, who is constitutionally responsible for the investigation and prosecution of crime, who files such an application.

The issue is one of public importance because it involves balancing the public interest in disclosure under FOIA with the public interest in the confidentiality of the grand jury system. See State v. Rivera, 250 Conn. at 203-206; Wilson v. Freedom of Information Commission, 181 Conn. 324, 328-29 (1980); and Section C.2 of the brief, infra. Moreover, the fact that the grand jury at issue in this case was investigating municipal corruption in the City of Hartford is of special concern, as it has drawn a great deal of attention from the media, especially the Courant Defendants, whose readership presumably consists in large part of citizens of that municipality and its environs and who are interested in the affairs of Hartford's municipal government. The public is also entitled, however, to have confidence that its criminal justice system is properly investigating allegations of crime in accordance with the time-honored confidentiality afforded such investigations until substantiated criminal conduct can be made public. In these circumstances, it is imperative that this Court decide these appeals on the merits.

C. The Defendant FOIC Erroneously Construed Conn. Gen. Stat. §§ 1-210(a) and 54-47b et seq.

In its Final Decisions, the Defendant FOIC performed a cursory analysis of the grand jury statutory scheme, disregarded the established case law construing the grand jury statutes, and broadly construed the FOIA disclosure provisions to obviate the statutory mandate requiring grand jury secrecy during an ongoing criminal investigation. Record at 256-59. Therefore this Court should perform plenary review, properly construe the relevant statutes, and reverse the Final Decisions.

The plaintiffs hereby provide an overview of the two statutory schemes at issue.

1. The Freedom of Information Act

The purpose of FOIA is to “open [public] agency action to the light of public scrutiny . . . [to effectuate] the citizens’ right to be informed about what their government is up to.” U.S. Department of Justice v. Reporters Committee, 489 U.S. 749, 772-73 (1989) (internal quotation marks and citations omitted)(construing federal FOIA). Our state FOIA embodies a legislative policy seeking to balance governmental and private needs for confidentiality with the public’s right to know. Wilson v. FOIC, 181 Conn. at 328-29; Groton Police Department v. FOIC, 104 Conn. App. 150, 155 (2007). Courts reviewing a final decision of the FOIC will accommodate these competing interests. Id. at 328-29. Exemptions from the FOIA are narrowly construed. Wilson v. FOIC, 181 Conn. at 328-29. The burden of demonstrating the applicability of an exemption rests on the party claiming it. Id. at 325.

The FOIA itself contains various exemptions from the general rule of disclosure.⁶ For purposes of this appeal, § 1-210(a) is especially germane, as the Defendant FOIC construed it in a manner that Plaintiffs contend is erroneous. Specifically, § 1-210(a) provides in relevant part, “Except as otherwise provided by any federal law or state statute, all records maintained or kept on file by any public agency” are subject to disclosure (emphasis added).

⁶ See, e. g., §1-201(DCJ not a public agency subject to disclosure requirements except as to its administrative functions); and §1-210(b)(3) (limits on disclosure of law enforcement agency information).

There are several state statutes that clearly fall within the emphasized exception clause of §1-210(a) because they contain express exemptions from or limitations on disclosure. See, e.g., Conn. Gen. Stat. §§5-225 and 5-237 (limited disclosure of personnel records of candidates for a public position); §10-151c (records of teacher evaluation and performance not public records); §17a-101k (information regarding child abuse to be confidential).

Other statutes that do not expressly provide for exemption from the FOIA may also be held to preclude or limit disclosure. For example, in Commissioner, Department of Public Safety v. Freedom of Information Commission, 204 Conn. 609 (1987) (hereinafter "Commissioner, DPS v. FOIC"), the Supreme Court analyzed the then-versions of Conn. Gen. Stat. §§ 29-170 and 171, which governed disclosure of documents maintained by the Statewide Organized Crime Task Force (SOCITF). Even though the relevant statutes contained no express exemption from FOIA, the Court determined that the statutory scheme then governing SOCITF "plainly reflected a policy of conditional, rather than unfettered disclosure" of that agency's records. 204 Conn. at 621. Therefore, the Court held that § 29-170 provided SOCITF's records with an exemption from FOIA's disclosure requirements. Id. at 619-21.

A similar case is Healy v. Freedom of Information Commission, 18 Conn. App. 212 (1989). That case involved Conn. Gen. Stat. §1-83, which required certain state employees, including sheriffs, to file annual financial statements with the Ethics Commission. The high sheriff of New Haven had directed his deputies to compile and file monthly financial statements with him, in anticipation of complying with the statutory

annual filing requirements. The FOIC found that the deputies' monthly statements were public records and ordered disclosure. The Appellate Court upheld the trial court's ruling that §1-83 exempts from FOIA disclosure monthly statements compiled by employees in anticipation of preparing the annual statements.

Section 1-83 required different levels of disclosure for different categories of state employees. The statute limited the filing obligation of sheriffs to a simple statement of annual income. Elsewhere, §1-83 expressly provided that the annual statements were "a matter of public information," but that names of clients, customers and creditors "shall be sealed and confidential" unless the Ethics Commission determined otherwise. The Appellate Court concluded that the legislature intended §1-83 to be "a specific and self-contained system of disclosure and nondisclosure."

Because §1-83 contains its own mechanism to control the disclosure of information gathered in pursuance of its terms, we conclude that to incorporate into § 1-83 the general disclosure rule of §1-19 [predecessor to §1-210] would defeat the policy of § 1-93 and make its own provisions hopelessly inconsistent.

18 Conn. App. at 217-18 (internal citation and quotations marks omitted).

2. The Grand Jury Statutes

Our state legislature has created a comprehensive statutory scheme governing the initiation of and procedure for conducting an investigatory grand jury. See R. in 325S at 164-70; 326S at 168-74, setting forth text of Conn. Gen. Stat. §§54-47b et seq. Incorporating the legitimate public interest in pursuing such investigations out of the public eye, the grand jury statutes contain certain express prohibitions on disclosure in such investigations. These prohibitions encompass every phase of the grand jury's life,

from its inception to its conclusion. See, e.g., Conn. Gen. Stat. §54-47e (order and application for grand jury "shall be sealed;" grand juror's investigation "shall be conducted in private" unless grand jury panel determines otherwise); §54-47g(a) (no part of record that contains allegations of commission of a crime where grand jury failed to find probable cause shall be disclosed); §54-47g(b) (no part of grand jury's finding that contains allegations of commission of a crime where grand jury failed to find probable cause shall be disclosed).

The statutory scheme also contains limitations on the time and circumstances of disclosure. See, e.g., Conn. Gen. Stat. §54-47e (grand juror's investigation "shall be conducted in private" unless grand jury panel determines it to be in the public interest to conduct it in public); §54-47g(a) (after conclusion of grand jury investigation, any part of record not disclosed with finding "shall be sealed").

In addition, the grand jury statutes provide for procedures whereby members of the public may obtain access to the record and finding of the grand jury after the investigation is concluded. See, e.g., Conn. Gen. Stat. §54-47-g(a) ("any person" may apply to grand jury panel for disclosure of any part of sealed record except allegations of crime for which no probable cause was found); §54-47g(f) (any grand jury witness may apply for copy of his testimony); §54-47g(g) (person accused of crime as result of grand jury investigation may have access to his own testimony).

Connecticut's courts have routinely looked to federal case law in the interpretation of our grand jury statutes. State v. Rivera, 250 Conn. at 206-07. "The decisional authority pertaining to federal grand jury disclosure is persuasive, not

because the Connecticut statutes was patterned on the federal rule, but because both originate from the common law requirement that grand jury testimony be secret" In Re Investigation of the Grand Juror Into Cove Manor Convalescent Center, Inc., 4 Conn. App. 544, 550-51 (1985); see In Re Torrington Grand Jury, 197 Conn. at 712 (reasoning in federal cases is persuasive in state cases because it is premised on functional analysis of how grand juries operate).

The United States Supreme Court has recognized, and our Supreme Court agrees, that the proper functioning of the grand jury system depends on the presumption of secrecy. Douglas Oil Co. v. Petrol Stops Northwest, 441 U.S. 211, 218-21 (1979); In Re Torrington Grand Jury, 197 Conn. at 709-10. The five major purposes of the rule of grand jury secrecy are: (1) to prevent the flight of those whose arrests may be contemplated; (2) to insure freedom to the grand jury in its deliberations, and to preclude individuals who are under suspicion from importuning the grand juror; (3) to prevent subornation of perjury or tampering with grand jury witnesses; (4) to encourage full disclosure by persons who have information about the commission of a crime; and (5) to protect a suspected individual from disclosure of the fact that he is under investigation, before the grand jury has the opportunity to verify his culpability or to clear his name. United States v. Sells Engineering Co., 463 U.S. 418, 424-25 (1983); Douglas Oil Co. v. Petrol Stops Northwest, 441 U.S. at 219; United States v. Procter & Gamble Co., 356 U.S. 677, 681-82 n.6 (1958); accord, State v. Rivera, 250 Conn. at 202-03; In Re Torrington Grand Jury, 197 Conn. at 709-10.

Our Supreme Court has interpreted the grand jury statutory scheme as codifying

the long-standing tradition of grand jury secrecy, a principle that "is well entrenched in the common law [and] older than our Nation itself." State v. Rivera, 250 Conn. 188, 202 n. 13 (1999), quoting Pittsburgh Plate Glass Co. V. United States, 360 U.S. 395, 399 (1959); accord, In Re Grand Jury Investigation by Judge John M. Alexander, 207 Conn. 98, 107 (1988); In Re Investigation of the Grand Juror Into Cove Manor Convalescent Center Inc., 4 Conn. App. 544, 552-56 (1985) (reviewing state's history of and reasons for grand jury secrecy), appeal dismissed, 203 Conn. 1 (1987).

Although the legislature has over the years expanded public access to aspects of the grand jury process, secrecy is still a fundamental consideration. "Public disclosure of grand jury proceedings must be regulated with an eye to the recognized importance of secrecy in the proper functioning of the grand jury system." State v. Rivera, 250 Conn. at 202, quoting In Re Grand Jury investigation by Judge John M. Alexander, 207 Conn. at 107 (internal quotation marks and citation omitted). Such secrecy is utilized "when it is necessary to further the purposes of grand jury confidentiality." State v. Rivera, 250 Conn. at 202.

This confidentiality requirement is of paramount concern during the course of the investigation. State v. Rivera, 250 Conn. at 202-03; In Re Judicial Inquiry No. 2005-02, 104 Conn. App. at 410. "[G]rand jury secrecy is intended to protect against the premature disclosure of information in advance of the completion of the investigation, and to ensure that information gathered during the investigation is not disclosed without sufficient reason." State v. Rivera, 250 Conn. at 203. "As a matter of history, grand jury proceedings have always been presumptively secret." In Re Torrington Grand Jury,

197 Conn. at 710.

The principle of confidentiality protects not only the integrity of the ongoing criminal investigation, but also the reputation and privacy of individuals who do not appear voluntarily, but rather pursuant to a subpoena. These may be fact witnesses, or they may be alleged wrongdoers who may never be arrested if no probable cause is found by the grand jury. The latter are especially vulnerable to public dissemination of their experience as innocent targets of a criminal investigation. See Commissioner, DPS v. FOIC, 204 Conn. at 626-27 (secrecy of criminal investigation protects confidential sources, and ensures cooperation of witnesses and privacy for individuals who are accused but eventually exonerated).⁷

3. The FOIC's Final Decisions misconstrue the grand jury statutory scheme

This Court should reverse the FOIC's Final Decisions, because it erroneously determined that the secrecy afforded to an ongoing grand jury may not withstand application of the disclosure provisions of the FOIA.

⁷ This protection is especially relevant here, where the subpoenas are directed to officials or employees of a governmental entity or a public agency. A public official or employee may be reluctant to cooperate and to divulge relevant information if he/she fears that the cooperation will result in premature publicity, leading to political enmity, harassment, embarrassment, retaliation or intimidation. Moreover, if information is made public that a public official and/or his activities are or were under investigation but no probable cause has been found, or even that they were just called to testify before a grand jury, that information can be irreparably damaging and make it difficult for the individual to perform his public responsibilities effectively. Indeed, § 54-47g(a), (b) and (c) expressly preclude public dissemination of that information. Were the Courant Defendants able to discern from the requested documents and publish information about the grand jury's focus, it would render those statutory protections meaningless.

Considered together, the confidentiality and limited disclosure provisions of the grand jury statutes demonstrate the legislature's intent to create a "specific and self-contained system of disclosure and nondisclosure." Healy v. FOIC, 18 Conn. App. at 217. The statutes balance the dual public interests in disclosure and in confidentiality, and to provide for carefully drawn and limited public access to grand jury information after the conclusion of the grand jury's investigation. It is both illogical and contrary to the principles of statutory construction to conclude, as the FOIC has done, that FOIA may be used to eviscerate this carefully drawn statutory scheme. See Commissioner, DPS v. FOIC, 204 Conn. at 621 (legislature presumed to act with knowledge of existing statutes and with intent to create "one consistent body of law").

The Final Decisions of the Defendant FOIC's wholly fail to accommodate the legislature's confidentiality concerns in the grand jury statutes. The conclusion in the Final Decisions that the FOIA supercedes the legislative policy codified in the grand jury statutes is erroneous and leads to a bizarre and absurd result. If FOIA requires disclosure during an ongoing grand jury investigation of a public agency, an individual could successfully file weekly FOIA requests with the public agency for all subpoenas issued by and documents provided to the grand jury that week. Similarly, a target of a grand jury investigation could, through the use of FOIA, pierce the veil of secrecy to find out how much the investigation is learning about his/her suspected misconduct. There is no question that either of these scenarios would seriously undermine the secrecy with which grand jury investigations must be conducted and thus the quality of its work and the substantive justice it is supposed to render. Yet that is precisely what the Final

Decisions permit.

2. The absence of a gag order on individual grand jury witnesses does not provide a basis for using FOIA to pierce the veil of grand jury secrecy

The Final Decisions rely in part on the fact that, while witnesses summoned before a grand jury are given assurances of confidentiality, they are not sworn to secrecy about their experience there. From this, the Final Decisions erroneously conclude that this fact belies any argument that ongoing grand jury proceedings should remain confidential. R. in 325S at 259; in 326S at 261.

Many witnesses, however, are not eager to publicize or have publicized the fact that they were summoned before a grand jury, when doing so might subject them to embarrassment, intimidation, or worse. The policy of confidentiality in grand jury matters encourages witnesses to testify truthfully, fully and without fear of untoward consequences. For this reason, and in accordance with the statutory mandate for grand jury secrecy, all witnesses who appear before a grand jury are given assurances that their appearance and testimony will be confidential, unless and until it is needed in a criminal prosecution. See R. in 325S at 172-73; in 326S at 176-77.

Some grand jury witnesses may choose to waive the assurance of confidentiality and reveal to others that they were summoned to appear and what they testified about.⁶

⁶ An individual who discloses grand jury material with the intent to obstruct an ongoing investigation may be cited for contempt, or may be prosecuted for obstruction of justice. See In Re Sealed Case No. 98-3077, 151 F.3d 1059, 1075 (D.C. Cir. 1998); United States v. Jeter, 775 F.2d 670, 675-679 (6th Cir. 1985), cert. denied, 475 U.S. 1142 (1986); and United States v. Howard, 569 F.2d 1331, 1334-1335 (5th Cir.), cert. denied, 439 U.S. 834 (1978).

When grand jury witnesses do talk publicly, however, their accounts may be skewed by personal agendas and faulty recollections. Lay witnesses ordinarily do not have the knowledge of or foundation in criminal investigatory procedures to determine the significance of their own testimony, and therefore are not wholly reliable sources of information about the strategy, direction or targets of the grand jury investigation.

The fact that some witnesses may waive anonymity and discuss their testimony should not be held to vest in third parties the right to know the identities of witnesses who wish their appearances and testimony to remain confidential. In this respect, the Final Decisions are particularly unfair to the City employees who provided Attorney Rose with copies of their subpoenas in order to obtain indemnification for legal advice they sought in connection with their being called to testify. The Final Decisions confront public employees with a Hobson's choice - waive your right to confidentiality or your right to indemnification.

While the Courant Defendants may desire to obtain more accurate and detailed information about the investigation than they may have been able to obtain from certain witnesses, they may not use FOIA to do so. Instead, they like all other members of the public, must comply with the procedures for disclosure set forth in the grand jury statutes. See, e.g., Conn. Gen. Stat. §54-47g.

D. The FOIC misapplied Conn. Gen. Stat. §1-210(a) to permit disclosure of records identified by the requester as grand jury documents

The Final Decisions make a distinction between documents in the possession of a grand jury, and documents of a public agency that have been subpoenaed by a grand

jury, ruling categorically that such documents in the possession of the City Plaintiffs were public records subject to disclosure, and the grand jury statutes do not provide an exemption. R. in 325S at 258-59; 326S at 260-61.

The Final Decisions conclude that, because the grand jury subpoenas and copies of documents produced in response thereto are also in the possession of the City of Hartford, their disclosure is required despite the ongoing grand jury investigation. This conclusion permits members of the public to pierce the legislatively enacted veil of secrecy afforded grand jury investigations into public corruption. This result will seriously undermine the effectiveness of a grand jury as an investigative tool and its ability to perform its statutory duty.

The Plaintiffs are not opposed to the disclosure of public records when such records are not exempt and are sought in accordance with FOIA's purpose. The Plaintiffs recognize that the records of a public agency can have an intrinsic value in furthering the public's knowledge and understanding of the business of that agency. Plaintiffs are not arguing that the City's documents would never be disclosable during a grand jury investigation. If such records were sought without reference to the grand jury subpoenas, disclosure would not be an issue. But where, as here, the records sought are clearly identified as grand jury subpoenas and documents produced in response thereto,⁹ they are not being sought as documents of the public agency, but rather as

⁹ Only a sitting superior court and an investigatory grand jury may authorize the issuance of subpoenas. See § 54-82i(b), 54-47f(b). No relevant superior court proceeding was in progress at the time of the FOIA request. The Final Decisions found that, "[T]he only records at issue in this case are grand jury subpoenas . . . And the records produced . . . in response thereto." R. in 325S at 255; 326S at 258.

documents under scrutiny of the grand jury. Identified as such, they are not subject to disclosure during the grand jury's investigation. State v. Rivera, 250 Conn. at 203.

The same reasoning and statutory construction analysis utilized by the Supreme Court in Commissioner, DPS v. FOIC, see Section C. 1, above; when applied to the grand jury statutory scheme at issue in this case, lead to the conclusion here that information about an ongoing investigation is exempt from the disclosure requirements of FOIA.¹⁰ The statutory mandate that grand jury proceedings be private, see Conn. Gen. Stat. §54-47e; and that disclosure be in accordance with strict statutory requirements, see §54-47g; reflects the legislative intent to create "a self-contained system of disclosure and nondisclosure." Healy v. FOIC, 18 Conn. App. at 217.

While Connecticut's FOIA does not derive from other state or federal FOI statutes, Wilson v. FOIC, 181 Conn. at 333; the case law of other jurisdictions may be "interpretively helpful, especially in understanding the necessary accommodation of the competing interests involved." Id. When federal courts consider a request for FOIA disclosure of grand jury information, "the question is whether disclosure would reveal some secret aspect of the grand jury's investigation, such matters as the identities of witnesses . . . [or] the strategy and direction of the investigation." (Internal quotation marks and citation omitted) Lopez v. Department of Justice, 393 F.3d 1345, 1349 (D.C. Cir. 2005). In applying this standard, reviewing courts do not examine every individual

¹⁰ Following the Supreme Court's decision in Commissioner, DPS v. FOIC, the legislature amended § 21-170 to remove the conditional disclosure language and to render SOCITF records subject to FOIA "to the same extent as records of other law enforcement agencies." In light of this, it is noteworthy that the legislature could have, but has not, also removed the confidentiality requirement for grand jury proceedings.

grand jury subpoena. The court stressed that the documents were independent corporate records not created for the grand jury; and, more importantly for purposes of this case, they were subpoenaed directly from the Dresser company without any reference to or mention of the grand jury. 628 F.2d at 1382-83. Therefore, disclosure to the S.E.C. would reveal "only what has occurred in Dresser's foreign operations," not "what has occurred before the grand jury." Id. at 1383.

Unlike the requester S.E.C. in Dresser, the Courant Defendants in the present case did not make a request for documents without any reference to the grand jury. Instead, they expressly sought disclosure of witnesses summoned and documents produced in response to grand jury subpoenas, making it very clear that they were seeking information about the criminal investigation. R. in 325S at 5-7, 219; 326S at 5-7, 223. If disclosed in this form, i.e., identified as witnesses summoned and records sought by the grand jury, the documents would reveal "the inner workings of the grand jury," as the records sought by the S.E.C. in Dresser did not.

By contrast, if the Courant Defendants were to seek disclosure from the City of, for example, "all contracts with Diggs Construction Company" or "all public parking lot contracts" or "all documents related to school building programs," they would presumably be entitled to disclosure, subject to FOIA's well-established exceptions. In this instance, however, because the Courant Defendants did not ask for disclosure of specific City records, the FOIC should have denied the request for disclosure in the form it was made. Instead, the Final Decisions authorize an improper use of FOIA to pierce the statutorily mandated secrecy of a grand jury's ongoing criminal investigation.

E. The FOIC Misapplied FOIA To Require A Showing That Disclosure Would Prejudice the Grand Jury Investigation

The Final Decisions point out that there was no evidence presented to show that the grand jury investigation would be prejudiced by the requested disclosure. R. in 325S at 259; 326S at 262. Nowhere in either FOIA or the grand jury statutory scheme is there a requirement of a showing of prejudice in these circumstances. Moreover, given the secret nature of a grand jury investigation, persons not involved in the grand jury investigation, including the hearing officer and the attorneys representing the parties in this case, do not have access to official information from which specific prejudice could be shown. R. in 325S at 102-04; 326S at 106-08. Moreover, even if such individuals had knowledge, it would be impossible to make a showing of prejudice without a discussion on the record about the substance and focus of the ongoing investigation - precisely what the grand jury statutes prohibit!

F. FOIA Does Not Require Disclosure Of Documents During a Preliminary Stage Of Proceedings

The Defendant FOIC should have denied disclosure in this case because the grand jury investigation was still in progress at the time of the FOIA request and at the time the FOIC issued its Final Decision. Furthermore, the Courant Defendants had proffered no "sufficient reason" to breach the confidentiality of the ongoing investigation. State v. Rivera, 250 Conn. at 203; accord, In Re Judicial Inquiry No. 2005-02, 104 Conn. App. at 410.

The FOIA itself recognizes that the public access to agency records is not unconditional. See In Re Torrington Grand Jury, 197 Conn. at 711 (FOIA recognizes

statutory exceptions to guarantee of open access to public records). Implicit in the FOIA's provision for certain exemptions is the recognition that "good government requires in the predecisional stage uninhibited communication and exchange of opinions, ideas and points of view." Wilson v. FOIC, 181 Conn. at 337. A grand jury investigation is without a doubt a "predecisional stage," an investigation that may or may not result in criminal proceedings at some later point in time. "[T]he grand jury can investigate merely on suspicion that the law is being violated, or even just because it wants assurance that it is not." United States v. Morton Salt Co., 338 U.S. 632, 642-43 (1950). See United States v. Johnson, 319 U.S. 503, 513 (1943) (grand jury secrecy is "as important for the protection of the innocent as for the pursuit of the guilty").

"Grand juries are aids to the criminal justice system." In Re Investigation of the Grand Juror, 4 Conn. App at 555; providing an investigation that may be a prelude to later criminal proceedings. The grand juror's finding, which he issues at the conclusion of his investigation, is not an arrest warrant. It is not a "final" document upon which any prosecutorial or adjudicatory action is taken. If a state's attorney uses the finding as a basis for drawing up an arrest warrant, an independent judge of the superior court must sign it before a suspect may be arrested.

Therefore the grand jury investigation in this case should have been considered a preliminary proceeding not subject to FOIA's disclosure requirements.

III. CONCLUSION

For all of the foregoing reasons, the Final Decisions of the Defendant FOIC should be reversed.

**RESPECTFULLY SUBMITTED,
THE DIVISION OF CRIMINAL JUSTICE**

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