DOCKET NO.: HHB-CV20-6060495-S	:	SUPERIOR COURT
CHIEF, POLICE DEPT., CITY OF BRIDGEPORT; POLICE DEPT., CITY OF BRIDGEPORT; AND CITY OF BRIDGEPORT	:	JUDICIAL DISTRICT OF NEW NEW BRITAIN
v.	:	
FREEDOM OF INFORMATION COMMISSION	:	JANUARY 12, 2021

MEMORANDUM OF DECISION

The plaintiffs appeal the defendant Freedom of Information Commission's ("Commission") final decision and order directing them to disclose certain video and audio recordings of witness interviews and a sexually explicit cellphone video. These public records are evidence in a highly publicized case involving the arrest and conviction of a former college student for falsely reporting that she was the victim of a sexual assault.

As they did before the Commission, the plaintiffs argue that the records are exempt from disclosure under the state Freedom of Information Act ("FOIA"). More specifically, the audio and video recordings of witnesses are allegedly "signed statements of witnesses" within the meaning of General Statutes § 1-210 (b) (3) (C).[1] Alternatively, the recordings constitute "uncorroborated allegations subject to destruction pursuant to section 1-216," which are also

[1] Because the court refers to § 1-210 (b) (3) and several of its subsections repeatedly throughout this opinion, the court sets for the relevant parts of the section: "Records of law enforcement agencies not otherwise available to the public which records were compiled in connection with the detection or investigation of crime, if the disclosure of said records would not be in the public interest because it would result in the disclosure of (A) the identity of informants not otherwise known or the identity of witnesses not otherwise known whose safety would be endangered or who would be subject to threat or intimidation if their identity was made known . . . (C) signed statements of witnesses . . . (G) the name and address of the victim of a sexual assault under section 53a-70, 53a-70a, 53a-71, 53a-72a, 53a-72b or 53a-73a, voyeurism under section 53a-189a, or injury or risk of injury, or impairing of morals under section 53-21, or of an attempt thereof, or (H) uncorroborated allegations subject to destruction pursuant to section 1-216." General Statutes § 1-210 (b) (3).

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exempt from disclosure under § 1-210(b) (3) (H). The plaintiffs also argue that the cellphone video is exempt based on General Statutes §§ 53a-189a and 53a-189b, which make voyeurism and the dissemination of voyeuristic material a crime. Lastly, the plaintiffs raise certain constitutional objections to disclosure.

For the following reasons, the court affirms the Commission's decision with respect to the audio and video witness recordings, but not as to the cellphone video.

I

FACTUAL AND PROCEDURAL BACKGROUND

On August 7, 2018, Rachel de Leon ("Intervenor"), a staff journalist at The Center for Investigative Reporting, submitted a FOIA request to the Bridgeport Police Department ("Department" or "plaintiffs"). She asked to inspect (not copy) certain records in a case involving the arrest and conviction of a former Sacred Heart University student, Nikki Yovino ("Yovino") for falsely reporting that she was sexually assaulted. See Compl., Ex. A, Final Decision of the Freedom of Information Commission (dated March 11, 2020) ("Final Dec."), ¶ 2. Yovino reported the alleged assault to the Department in 2016. Subsequent investigation revealed that Yovino had lied about the assault. The case garnered nation-wide attention and engendered discussion about sexual assaults on college campuses and how to address the false reporting of such assaults.

The records the Intervenor wanted to inspect included three video recordings of Department officers interviewing the student and two other witnesses, two audio recordings of witnesses, and a cellphone video taken in a bathroom and showing Yovino and another person engaged in a sexually explicit act (collective, the "Recordings"). See Final Dec., ¶ 2.

The Department acknowledged the Intervenor's request on August 7, 2018. See Final Dec., ¶ 3. Not until February 19, 2019, however, did the Department inform the Intervenor that the Recordings were exempt from disclosure, citing General Statutes § 1-210 (b) (3) (A) (identity of informants or witnesses), § 1-210 (b) (3) (G) (name and address of victim of voyeurism under § 53a-189a) and § 1-210 (b) (3) (H) (uncorroborated allegations subject to destruction under § 1-216). See Final Dec., ¶ 4.

The Intervenor appealed the denial of her request to the Commission on March 19, 2019. See Final Dec., ¶ 5. The Commission heard the matter as a contested case on July 16, 2019. See Final Dec., p. 1. The Intervenor and the Department appeared, stipulated to certain facts and presented evidence, testimony and argument. See Final Dec., p. 1. Following the hearing the Department submitted the Recordings for in camera review. See Final Dec., p. 1.

At the July 16 hearing the Department withdrew its argument that the Recordings were exempt from disclosure under § 1-210 (b) (3) (A), concerning the identity of witnesses, because the arrest warrant for Yovino was publicly available and identified the witnesses. See Final Dec., ¶ 13. However, in a post-hearing brief submitted on August 23, 2019, the Department raised a new argument, namely, that the Recordings constituted "signed witness statements" exempt from disclosure under § 1-210 (b) (3) (C). See Final Dec., ¶ 18.

The Commission issued a proposed final decision on October 23, 2019. The proposed decision rejected each of the Department's claimed exemptions and ordered disclosure of the Recordings. Before the Commission adopted the proposed decision, the Department moved for, and was granted, permission to supplement the administrative record. The Department submitted a transcript of the deposition of Dhameer Bradley from a civil action involving the individuals

who appear in the video. See Final Dec., 1.[2] Bradley allegedly made the cellphone video. He testified in his deposition that he took the cellphone video without Yovino's knowledge or permission. See Plaintiffs' Brief (dated Sept. 30, 2020) ("Pl. Br."), p. 4.

The Commission issued a new proposed final decision on January 22, 2020, which was in substance the same as the October 23 proposed decision. The Department again moved for, and was granted, permission to supplement the record with two additional documents. See Final Dec., p. 1.

The Commission issued its third proposed final decision on February 14, 2020. The full Commission adopted the proposed decision at its meeting on March 11, 2020. Except where otherwise stated, substantial evidence in the administrative record supports the Commission's findings of fact, which are summarized here.

The Commission found that the Recordings were public records within the meaning of §§ 1-200 (5), 1-210 (a) and 1-212 (a). See Final Dec., ¶ 9. They were originally created or seized by the Department as part of its investigation into Yovino's alleged sexual assault. However, the investigation revealed that Yovino had not been truthful in her original report of the incident. The Department then used the Recordings as evidence to establish probable cause to arrest Yovino for the crime of falsely reporting a sexual assault. Yovino was convicted and sentenced to prison for that crime. See Final Dec., ¶ 10.

The Commission further found that the Recordings constituted "records of a law enforcement agency not otherwise available to the public which were compiled in connection with the detection or investigation of a crime" within the meaning of § 1-210 (b) (3). See Final

[2] The referenced civil action is *Bradley* v. *Yovino*, Superior Court, judicial district of Fairfield, Docket No. CV-18-6079609-S.

Dec., ¶ 15. The Commission then considered the applicability of the specific exemptions the Department claimed under § 1-210 (b) (3).

First, the Commission rejected the argument that the Recordings were "uncorroborated allegations subject to destruction under § 1-216." Instead, it found that the Recordings "constitute evidence of the crime of falsely reporting an incident in the second degree . . . a crime for which a suspect was arrested, convicted and incarcerated. The incident that was found to be falsely reported was a sexual assault. In order for such records to be deemed uncorroborated allegations of criminal activity and thus exempt from disclosure under the [FOIA], such records must be *subject to destruction* pursuant to § 1-216. The [Department] failed to present any witnesses to testify as to whether such allegations were subject to destruction. Additionally, it is found that the allegations of sexual assault, as well as the identities of the individuals accused in that matter, have been reported by news organizations and such information has been published in publicly available documents. In Bona v. Freedom of Information Commission, 44 Conn. App. 622[, 633, 691 A.2d 1] (1997), the court wrote, 'We agree with the trial court that it would be an "illogical interpretation" to provide for the destruction of uncorroborated records after they had been made public.' Accordingly, it is found that [the Recordings] are not exempt from disclosure as uncorroborated allegations of criminal activity pursuant to § 1-210 (b) (3) (H), as contended by the [Department]." (Emphasis in original.) Final Dec., ¶ 17.

Second, relying on *Sedensky* v. *Freedom of Information Commission*, Superior Court, judicial district of New Britain, Docket No. CV-13-6022849-S (November 26, 2013, *Prescott, J.*), which held that 911 recordings are not signed witness statements under § 1-210 (b) (3) (C), the Commission found that the Recordings were not signed witness statements. See Final Dec., ¶ 20.

Third, the Commission addressed the Department's argument that disclosure of the cellphone video would violate § 53a-189b, which makes it a criminal offense to disseminate voyeuristic material. Significantly, the Commission did not make a finding whether the video satisfied the statutory criteria for voyeuristic material under § 53a-189a. Instead, the Commission stated, "[s]ections 53a-189a and 53a-189b . . . are statutes in the penal code which make criminal malicious dissemination of voyeuristic materials, provided several statutory requirements are met, but which do not specifically address confidentiality of public records. . . . Moreover, it is concluded that a public agency's compliance with a lawful Commission order cannot be construed as unlawful dissemination as contemplated by § 53a-189b . . . . Accordingly, it is concluded that [the cellphone video] is not exempt from mandatory disclosure pursuant to 53a-189a and 53a-189b . . . ." Final Dec., ¶ 24.

On the basis of these findings, the Commission concluded that the Recordings were not exempt from disclosure and, therefore, that the Department violated the FOIA by failing to allow the Intervenor to inspect them as she had requested. See Final Dec., ¶ 25. The Commission ordered the Department to provide copies of the Recordings to the Intervenor. See Final Dec., p. 6.

The Department timely appealed the Commission's final decision under General Statutes § 4-183. The Recordings were lodged with the court pursuant to Practice Book § 7-4C and subsequently sealed pending the court's final decision on the merits of the appeal. The parties submitted briefs and appeared before the court for oral argument on December 7, 2020.

II

DISCUSSION

The plaintiffs contend that the Commission's findings and conclusions are unreasonable, arbitrary and capricious, an abuse of discretion, based on erroneous interpretations of statutory authority and common law, and are "blatantly unreasonable in view of the reliable, probative, and substantial evidence contained in the administrative record." Pl. Br., p. 1. In short, the plaintiffs argue that the court should reverse the Commission's final decision and order for just about every reason listed in General Statutes § 4-183 (j).[3]

Fairly summarized, however, the plaintiffs mainly disagree with the Commission's interpretation of several statutory provisions and its failure to make certain factual findings that the plaintiffs believe substantial evidence not only support, by require.

Specifically, the plaintiffs assert that the exemption for "signed witness statements," properly interpreted, includes digital audio and video recordings of witnesses providing information to a law enforcement officer. Such recordings are the "functional equivalent" of signed written statements. Pl. Br., pp.17-19. Accordingly, the plaintiffs argue that the recordings are "deserving of just as much protection from public disclosure as a written witness statement,

[3] Section 4-183 (j) provides: "The court shall not substitute its judgment for that of the agency as to the weight of the evidence on questions of fact. The court shall affirm the decision of the agency unless the court finds that substantial rights of the person appealing have been prejudiced because the administrative findings, inferences, conclusions, or decisions are: (1) In violation of constitutional or statutory provisions; (2) in excess of the statutory authority of the agency; (3) made upon unlawful procedure; (4) affected by other error of law; (5) clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record; or (6) arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion. If the court finds such prejudice, it shall sustain the appeal and, if appropriate, may render a judgment under subsection (k) of this section or remand the case for further proceedings. For purposes of this section, a remand is a final judgment." General Statutes § 4-183 (j).

simply due to the fact that they are treated as the same type of record by law enforcement agencies." Pl. Br., p. 18.

The plaintiffs also challenge the Commission's interpretation and application of the "uncorroborated allegations" exemption under § 1-210 (b) (3) (H). The plaintiffs argue that because the Recordings were "originally compiled in response to the investigation of [the student's] claim she was sexually assaulted"—an allegation which ultimately proved to be false and led to [the student's] arrest and conviction for falsely reporting a sexual assault—the Recordings necessarily contain uncorroborated allegations. Pl. Br., p. 20. As for the part of the exemption that requires a record of an uncorroborated allegations to be "subject to destruction pursuant to § 1-216"—a statutory requirement not satisfied in this case—the plaintiffs argue "[t]he fact that the records resulted in the arrest of [the student], and therefore must be retained in connection with her arrest and conviction, does not change the character of the requested records as those describing uncorroborated allegations." Pl. Br., 22.

As for the cellphone video, the plaintiffs argue that the evidence concerning its voyeuristic nature is overwhelming.

The Commission and the Intervenor disagree with these arguments. The court shares their view of the law and the evidence as to the audio and video recordings of witnesses speaking to law enforcement officers. The court shares the plaintiffs' position as to the sexually explicit cellphone video.

A

The Recordings Are Not Signed Witness Statements

Since at least 1890, when law partners Samuel Warren and Louis Brandeis (later a U.S. Supreme Court justice) wrote their influential article about the right to privacy, the legal world

has understood that the law must evolve to address technological developments. See Samuel D. Warren and Louis D. Brandeis, *The Right to Privacy*, 4 Harvard Law Rev. 193, 195 (1890) ("Recent inventions and business methods call attention to the next step which must be taken [in the development of the law] for the protection of the person, and for securing to the individual what Judge Cooley calls the 'right to be let alone.'"). Sometimes judges are responsible for the evolution of the law, particularly when the common law or constitutional law is at issue.[4] But in our country's increasingly statutory legal regime, it is more often the case that Congress and state legislatures, not the courts, are the branch of government to which arguments for updating the law in light of new technologies must be addressed. This is one of those cases.

The General Assembly enacted the FOIA in 1975. The statute included what is now § 1-210 (b) (3), which sets forth several exemptions applicable to "[r]ecords of law enforcement agencies not otherwise available to the public which records were compiled in connection with the detection or investigation of crime." The legislature amended the law in 1994 to include an additional exemption in § 1-210 (b) (3) for signed statements of witnesses. Although video and audio recording devices were available to law enforcement and the general public in 1975, and more so in 1994, they were not as ubiquitous and inexpensive as they are today.

Following the plain meaning rule of statutory interpretation, the court determines that this statutory language is clear and unambiguous. It refers to statements of a witness *that the witness has signed*, i.e., that bear the witness's signature. The eleventh edition of Merriam-Webster's Collegiate Dictionary defines sign (in its verb form) as "to affix a signature to," "to affix one's name to" or "to write down (one's name"). See Merriam Webster's Collegiate Dictionary (11th

[4] See, e.g., *Katz* v. *United States*, 389 U.S. 347, 88 S. Ct. 507, 19 L. Ed. 2d 576 (1967) (overruling *Olmstead* v. *United States*, 277 U.S. 438, 48 S. Ct. 564, 72 L. Ed. 944 (1928) and holding that wiretapping constitutes a Fourth Amendment search).

Ed. 2011). With a gentle judge, the statute could be read to include electronic signatures.[5] Nevertheless, the statutory text still requires a witness who has given a statement to undertake the formal act of affixing an identifying name or other mark to a document, by hand or electronically. A witness who states his name on a video or audio recording is not signing a statement within the plain meaning of the statute. This interpretation also accords with Commission's interpretation in cases involving similar issues. See Brief of the Freedom of Information Commission (dated Oct. 30, 2020) ("FOIC Br."), p. 9 (citing FIC Docket No. 2013-031; FIC Docket No. 2010-166; FIC Docket No. 2001-403).

In its final decision, although not in its brief in this appeal, the Commission relied on *Sedensky* v. *Freedom of Information Commission*, supra, Superior Court, Docket No. CV-13-6022849-S, to conclude that the Recordings are not signed statements of witnesses under § 1-210 (b) (3) (C). See Final Dec., ¶ 20. The Intervenor also relies on *Sedensky*. See Intervenor Rachel De Leon's Brief (dated Oct. 30, 2020) ("Intervenor Br."), pp. 8-9. The issue in *Sedensky* was whether the 911 recordings related to the Sandy Hook Elementary School shootings were exempt from disclosure under § 1-210 (b) (3) (C). The court held that "[a]udio recordings are not 'signed

[5] Cf. *Wells Fargo Bank, N.A.* v. *Edwards*, Superior Court, judicial district of Stamford-Norwalk, Housing Session at Norwalk, Docket No. NWH-CV-196004732-S (July 11, 2019, *Spader, J.*). "Technology has changed the common definition of a 'signature.' It is no longer necessary to put pen to paper to create an enforceable contract with the advent of e-signatures. As noted recently in a federal contract dispute, "[p]laintiff's argument that she should not be bound by the arbitration agreement simply because she did not sign a physical paper contract is as archaic today as the notion that James Joyce is unlawfully obscene . . . . 'Signatures' today are done through PDFs, through fingerprints, through smartphone scribbles, and, as found on this specific Motion to Dismiss, through a blank space over counsel's name because counsel is entering his juris number on a computer screen when filing the paperwork later." (Citations omitted.) Id.

statements of witnesses' under § 1-210 (b) (3) (B)," and described the argument that they were as "border[ing] on the frivolous." *Sedensky* v. *Freedom of Information Commission*, supra, Superior Court, Docket No. CV-13-6022849-S.

The *Sedensky* court's blanket statement that audio recordings are not signed witness statements must be read in the context of the decision as a whole, which concerned 911 recordings. While it would not be unreasonable to interpret the court's statement broadly to include all audio recordings, this court views *Sedensky* as holding that 911 audio recordings are not signed witness statements. The court did not consider—because it was not required to—whether a video or audio recording of a law enforcement officer interviewing a witness in a formal setting could constitute a signed witness statement.

In short, *Sedensky* does not control the outcome of this case, although it certainly points in a particular direction. Thus, the court must consider the plaintiffs' other arguments why the Commission erred in concluding that the Recordings are not signed witness statements. As noted, the plaintiffs argue that video and audio recordings of a witnesses giving a statement to the police are the "functional equivalent" of a written statement bearing a witnesses signature, and that "the practical reality [is] that audio, video, and written witness statements are treated as functionally the same by law enforcement agencies . . . ." Pl. Br., p. 19. The plaintiffs further argue that "based on the rapid development of technology, the drafters of the [FOIA] may not have contemplated the fact that, in the future, witness statements might be maintained in a number of different forms based on the technology available." Pl. Br., p. 38.

There is merit to the plaintiffs' functional equivalence argument. The court agrees that there is little practical difference between a traditional signed witness statement and a video recording of a witness giving a formal statement to a police officer. The plaintiffs' normative

argument that such recordings *should* be exempt, just like traditional signed witness statements, is powerful. But when the relevant statutory language is plain and unambiguous and cannot bear the plaintiffs' desired interpretation, arguments about why the law should evolve to adapt to new technological developments must be addressed to the legislature. The English language is malleable, but not infinitely so, except perhaps for Humpty Dumpty.[6]

Notably, the legislature was well aware of the "functional equivalence" concept when it drafted the FOIA. Section 1-200 (1) (B) defines "a public agency" to include "[a]ny person to the extent such person is deemed to be the *functional equivalent* of a public agency pursuant to law." (Emphasis added). If the legislature wanted the functional equivalence test to apply to other provisions of the FOIA, such as signed statements of witnesses, it could have said so. That it did not counsels against the court using that test to broaden the scope of an FOIA exemption. The court is also mindful of the state Supreme Court's injunction that FOIA exemptions must be narrowly construed. See, e.g., *Pictometry International Corp.* v. *Freedom of Information Commission,* 307 Conn. 648, 672, 59 A.3d 172 (2013) ("Our construction of the [act] must be guided by the policy favoring disclosure and exceptions to disclosure must be narrowly construed" [internal quotation marks omitted]).

The plaintiffs point to § 1-200 (5) to support their functional equivalence argument. Pl. Br., p. 41. The section states, "'Public records or files' means any recorded data or information relating to the conduct of the public's business prepared, owned, used, received or retained by a public agency, or to which a public agency is entitled to receive a copy by law or contract under

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[6] "'When I use a word,' Humpty Dumpty said in rather a scornful tone, 'it means just what I choose it to mean, neither more nor less.' 'The question is,' said Alice, 'whether you can make words mean so many different things.' 'The question is,' said Humpty Dumpty, 'which is to be master – that's all.'" Lewis Carroll, *Through the Looking Glass*, in The Complete Works of Lewis Carroll 196 (1939).

section 1-218, whether such data or information be handwritten, typed, tape-recorded, printed, photostated, photographed or recorded by any other method." This provision cannot sustain the weight the plaintiffs place on it. The provision makes clear that the particular *format* in which a record is maintained does not change its character as a "public record or file." If the question before the court was whether a video or audio recording was a public record, § 1-200 (5) would provide a clear answer. But that is not the question. The plaintiffs might fare better with their § 1-200 (5) argument if the exemption in § 1-210 (b) (3) (C) referred only to witness statements, not to *signed* witness statements. As much as the plaintiffs would like, the court cannot write the word "signed" out of the statute.[7]

In sum, the court agrees that video and audio recordings of witnesses giving statements about their knowledge of a particular event under investigation are witness statements. But they are not signed witness statements under § 1-210 (b) (3) (C).

The court must acknowledge a consequence of this interpretation: video and audio recordings of witnesses giving formal statements to the police—statements which in the past would have been reduced to a signed writing and would thus be exempt from disclosure under the FOIA—are not exempt under § 1-210 (b) (3) (C). Whether that is good or bad is, like beauty, in the eyes of the beholder. Because the witness recordings in this case formed the basis of the arrest and conviction of a college student for falsely reporting a sexual assault, the public interest in the disclosure of the recordings seems obvious to this court. The public has a compelling interest in understanding the evidence supporting arrests and convictions. Moreover, this is not a case in which the release of the recordings might prejudice a pending or prospective law

[7] Section 1-200 (5) is not entirely irrelevant. Once a witness statement is reduced to written form and signed, it is exempt from disclosure even if its original form is subsequently transformed, e.g., the statement is photocopied, photographed, digitally scanned and stored, etc.

enforcement action. However, if the plaintiffs and other law enforcement agencies view this interpretation of § 1-210 (b) (3) (C) as problematic, their remedy lies with the General Assembly, which writes the laws, not this court, which interprets them.[8]

B

The Recordings Are Not Uncorroborated Allegations Subject To Destruction Under § 1-216.

General Statutes § 1-210 (b) (3) (H) exempts certain law enforcement records from disclosure if their release would result in the disclosure of "uncorroborated allegations subject to destruction pursuant to section 1-216." Thus, a record is not exempt from disclosure merely because it contains uncorroborated allegations of criminal activity; a party invoking the exemption also bears the burden of proving that the record is subject to destruction under § 1-216.[9]

The Commission found that the plaintiffs "failed to produce any witness to testify as to whether such allegations were subject to destruction." Final Dec., ¶ 17. Moreover, the plaintiffs conceded at oral argument that the Recordings are not subject to destruction under § 1-216. To the contrary, because they are evidence supporting an arrest and conviction for falsely reporting a sexual assault, they must be retained for a minimum of ten years. See FOIC Br., p. 12 n.3 (citing Municipal Record Retention Schedule M7-450).

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[8] This case does not require the court to decide whether a video or audio recording of a witness statement qualifies as a signed witness statement under § 1-210 (b) (3) (C) if it has been recorded on a tangible medium (e.g., CD, videotape, external USB "thumb" drive, etc.) and if the witness has affixed his signature to the medium.

[9] Section 1-216 states: "*Except for records the retention of which is otherwise controlled by law or regulation*, records of law enforcement agencies consisting of uncorroborated allegations that an individual has engaged in criminal activity shall be reviewed by the law enforcement agency one year after the creation of such records. If the existence of the alleged criminal activity cannot be corroborated within ninety days of the commencement of such review, the law enforcement agency shall destroy such records." (Emphasis added.) General Statutes § 1-216.

The plaintiffs struggle mightily to overcome this weakness in their § 1-210 (b) (3) (H) exemption argument. Distilled to its essence, the plaintiffs' argument appears to be: (1) because Yovino falsely reported that she had been sexually assaulted, the sexual assault allegations she made are, by definition, uncorroborated; and (2) the Recordings containing those allegations would have been destroyed but for the student's arrest on the false report charge. This strikes the court as an odd, even bizarre, interpretation of § 1-210 (b) (3) (H). The purpose of this provision is protect the reputation of a person who has been accused, but *not* convicted, of a crime. *Bona* v. *Freedom of Information Commission*, supra, 44 Conn. App. 631. Here, Yovino's false allegations form the factual basis of her arrest and conviction.

Yet, even if the court accepts the dual premises of the plaintiffs' argument, the plaintiffs did not—and cannot—meet their statutory burden of proving that any allegations of criminal conduct contained in the Recordings, even if uncorroborated, are not subject to destruction. The Commission properly rejected the plaintiffs' argument that the Recordings are exempt under § 1-210 (b) (3) (H).

C

The Cellphone Video

The sexually explicit cellphone video is a distinctly different type of record from the video and audio recordings discussed above. Accordingly, the plaintiffs point to different statutory provisions to support their exemption argument: (1) Generally Statutes §§ 53a-189a and 53a-189b, which makes it a crime to disseminate voyeuristic material; and (2) General Statutes § 1-210 (b) (12), which provides that "[n]othing in the Freedom of Information Act shall be construed to require disclosure of . . . [a]ny information obtained by the use of illegal means." The plaintiffs also raise several constitutional privacy claims.

1

Section 53a-189a and 53a-189b

General Statutes §§ 53a-189a[10] and 53a-189b,[11] respectively, make it a crime to engage in voyeurism and to disseminate voyeuristic material. The plaintiffs contend that the cellphone

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[10] Section 53a-189a provides: "Voyeurism: Class D or C felony. (a) A person is guilty of voyeurism when, (1) with malice, such person knowingly photographs, films, videotapes or otherwise records the image of another person (A) without the knowledge and consent of such other person, (B) while such other person is not in plain view, and (C) under circumstances where such other person has a reasonable expectation of privacy, (2) with intent to arouse or satisfy the sexual desire of such person or any other person, such person knowingly photographs, films, videotapes or otherwise records the image of another person (A) without the knowledge and consent of such other person, (B) while such other person is not in plain view, and (C) under circumstances where such other person has a reasonable expectation of privacy, (3) with the intent to arouse or satisfy the sexual desire of such person, commits simple trespass, as provided in section 53a-110a, and observes, in other than a casual or cursory manner, another person (A) without the knowledge or consent of such other person, (B) while such other person is inside a dwelling, as defined in section 53a-100, and not in plain view, and (C) under circumstances where such other person has a reasonable expectation of privacy, or (4) with intent to arouse or satisfy the sexual desire of such person or any other person, such person knowingly photographs, films, videotapes or otherwise records the genitals, pubic area or buttocks of another person or the undergarments or stockings that clothe the genitals, pubic area or buttocks of another person (A) without the knowledge and consent of such other person, and (B) while such genitals, pubic area, buttocks, undergarments or stockings are not in plain view.

(b) Voyeurism is (1) a class D felony for a first offense, except as provided in subdivision (3) of this subsection, (2) a class C felony for any subsequent offense, and (3) a class C felony for a first offense when (A) such person has been previously convicted of an offense enumerated in subsection (f) of section 53a-29, or (B) the intended subject of the offense is a person under sixteen years of age.

(c) Notwithstanding the provisions of section 54-193, no person may be prosecuted for an offense under subdivision (1), (2) or (4) of subsection (a) of this section except within five years from the date of the offense, or within five years from the date the subject of the offense discovers the existence of the photograph, film, videotape or other recording that constitutes a violation of subdivision (1), (2) or (4) of subsection (a) of this section, whichever is later." General Statutes § 53-189a.

[11] Section 53a-189b provides: "Disseminating voyeuristic material: Class D felony. (a) A person is guilty of disseminating voyeuristic material when such person disseminates a photograph, film, videotape or other recorded image of another person without the consent of such other person and knowing that such photograph, film, videotape or image was taken, made or recorded in violation of section 53a-189a. (b) Disseminating voyeuristic material is a class D felony." General Statutes § 53a-189b.

video is voyeuristic material and, further, that they presented overwhelming evidence to the Commission that the video was taken without the knowledge or consent of the student. Accordingly, it should be exempt from disclosure.

Neither of these criminal statutes are express exemptions within the FOIA itself. However, § 1-210 (a) of the FOIA also exempts documents from disclosure "as otherwise provided by any federal or state statute." In other words, § 1-210 (a) acknowledges that other state and federal laws beyond the FOIA itself may preclude the disclosure of a public record. The question is whether §§ 53a-189a and 53a-189b are such laws.

In its final decision, the Commission cited *Commissioner of Emergency Services & Public Protection, et al.* v. *Freedom of Information Commission*, 330 Conn. 372, 194 A.3d 759 (2018) [hereinafter "*Commissioner of Emergency Services*"], the leading Connecticut Supreme Court case on § 1-210 (a). See Final Dec., ¶ 24. By citing this case, the Commission appears to acknowledge the possibility that §§ 53a-189a and 53a-189b could be "as otherwise provided" state statutes that serve as FOIA exemptions. But the Commission did not directly address that issue, nor did it make any findings about whether the cellphone video constituted voyeuristic material. Instead, the Commission simply stated, "[m]oreover, it is concluded that a public agency's compliance with a lawful Commission order cannot be construed as unlawful dissemination as contemplated by § 53a-189b." See Final Dec., ¶ 24.

The Commission takes a slightly different tact on appeal. Initially, it argues that it "has no jurisdiction to interpret or enforce the State's penal code." FOIC Br., p. 12. Yet, it then argues that the plaintiffs failed to present any persuasive evidence to prove their claim that the cellphone video constituted voyeuristic material. FOIC Br., p. 14. The Intervenor makes these arguments as well. Intervenor Br., pp. 13-16.

The court is not persuaded. The court concludes that §§ 53a-189a and 53a-189b are "as otherwise provided" statutes under § 1-210 (a) and that the Commission has jurisdiction to determine whether the cellphone video was voyeuristic material under the criminal statutes.

In *Commissioner of Emergency Services*, the court addressed whether a statute that requires materials the police had seized to be returned to the lawful owner was an "as otherwise provided" statute under § 1-210 (a). The court answered that question no, but in doing so it provided the test for answering that question in future cases involving other state or federal statutes. "In order for a statute to form the basis of an exemption pursuant to § 1-210 (a), the statute being cited as the basis for the exemption must, by its express terms, address confidentiality *or otherwise limit the copying or disclosing of the documents at issue.*" (Emphasis added.) *Commissioner of Emergency Services*, supra, 330 Conn. 385; see also id., 390 (statute must "limit disclosure, copying, or distribution of the documents at issue").

By its express terms, § 53a-189b makes it a crime to "disseminat[e] voyeuristic material" recorded in violation of § 53a-189a. Dissemination is disclosure.[12] Under the holding in *Commissioner of Emergency Services*, § 53a-189b is an "as otherwise provided statute" under § 1-210 (a).

If the Commission had found that the cellphone video was not voyeuristic material, and if substantial evidence supported that finding, the court would agree that the plaintiffs' compliance with an order requiring them to disclose the video would not constitute the commission of a crime under § 53a-189b. But the Commission did not make any factual findings regarding the

[12] The Intervenor argues that disseminating and disclosure are different. Intervenor Br., pp. 18-19. The court is not persuaded. The Intervenor also states that she has no intention of disseminating the cellphone video. The court does not doubt that statement, but if the video is subject to disclosure to the Intervenor, it is subject to disclosure to any member of the public, including persons who would not hesitate to distribute the explicit video broadly.

status of the cellphone video as voyeuristic material. And it is not this court's role to examine the evidence in the administrative record and make the relevant factual findings in the first instance. Nor will the court decide whether the evidence the plaintiffs submitted is so overwhelming that the Commission could only reach one possible conclusion, i.e., that the cellphone video is voyeuristic material. Thus, a remand to the Commission for further fact-finding is required.

Because questions are likely to arise on remand concerning precisely what the plaintiffs must prove to support their exemption claim, the court articulates the following legal standards, with full awareness that an appellate tribunal will likely have the final say on these important matters.

First, the specific question the Commission must resolve on remand is whether the cellphone video is voyeuristic material within the meaning of § 53a-189a.[13]

Second, like any other FOIA exemption, a party claiming that a record is exempt from disclosure based on §§ 53a-189a and 53a-189b bears the burden of proving that the exemption applies. See *Director, Dept. of Information Technology* v. *Freedom of Information Commission*, 274 Conn. 179, 187, 874 A.2d 785 (2005) ("burden of proving the applicability of an exception . . . rests upon the party claiming it" [internal quotation marks omitted]).

Third, "[t]his burden requires the claimant of the exemption to provide more than conclusory language, generalized allegations or mere arguments of counsel. Rather, a sufficiently

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[13] The Commission states that the plaintiffs presented "no evidence on the record that [they] ever contemplated making an arrest of the person responsible for creating the cell phone video recording . . . ." FOIC Br., p. 13. Proof that a person was arrested for violating the voyeurism statute, or that the police at least contemplated arresting someone, is not required to support an exemption under §§ 53a-189a and 53a-189b. Such proof is not an element of the criminal offenses. However, in assessing the persuasiveness of a law enforcement agency's argument that a record is exempt under these statutes, it is fair for the Commission to consider the agency's explanation why the alleged voyeuristic material did not result in an arrest. The Commission may also consider whether this explanation is presented in the form of testimony or argument of counsel.

detailed record must reflect the reasons why an exemption applies to the materials requested." *Director, Retirement & Benefits Services Division, Office of the Comptroller* v. *Freedom of Information Commission*, 256 Conn. 764, 773, 775 A.2d 981, 988 (2001).

Fourth, although §§ 53a-189a and 53a-189b are penal statutes, the Commission does not function as a criminal court when it considers an exemption claim under these statutes. As noted, the Commission's role is to determine whether the record is voyeuristic material within the meaning of the statutes, not whether a particular person should be held criminally responsible for violating them. Therefore, a party asserting these statutory provisions as an exemption need not prove the elements of the offense beyond a reasonable doubt, but only by a preponderance of the evidence, the customary burden of proof in civil and administrative proceedings. *Goldstar Medical Services, Inc.* v. *Dept. of Social Services*, 288 Conn. 790, 821, 955 A.2d 15 (2008) ("we conclude that the preponderance of the evidence standard is the appropriate standard of proof in administrative proceedings"); *Connecticut Alcohol & Drug Abuse Commission* v. *Freedom of Information Commission*, 233 Conn. 28, 43, 657 A.2d 630 (1995) (preponderance standard applies to proving FOIA exemption).

Fifth, because the hearing before the Commission is an administrative proceeding, the rules of evidence are somewhat relaxed. "[A]dministrative tribunals are not strictly bound by the rules of evidence and . . . they may consider evidence which would normally be incompetent in a judicial proceeding, as long as the evidence is reliable and probative. . . . There is moreover no specific prohibition against hearsay evidence in the Uniform Administrative Procedure Act . . . ." (Citations omitted; internal quotation marks omitted.) *Jutkowitz* v. *Dept. of Health Services*, 220 Conn. 86, 108, 596 A.2d 374 (1991).