DOCKET NO. HHB-CV-14-6027085-S	:	SUPERIOR COURT
COMMISSIONER, STATE OF CONNECTICUT DEPARTMENT OF EMERGENCY SERVICES AND PUBLIC PROTECTION	:	JUDICIAL DISTRICT OF NEW BRITAIN
VS.	:	
FREEDOM OF INFORMATION COMMISSION AND THOMAS J. MCDONNELL	:	AUGUST 20, 2019

MEMORANDUM OF DECISION

OVERVIEW

This administrative appeal requires the court to resolve an apparent conflict between two statutory schemes, each of which codifies an important public policy. The Freedom of Information Act generally requires the disclosure of all public records, including records of law enforcement agencies, except as otherwise provided by law. It serves the vital public policy of ensuring accountability in government operations. Disputes about the denial of access to public records must be adjudicated, in the first instance, by the Freedom of Information Commission, subject to judicial review. But the erasure statute, General Statutes § 54-142a, generally requires the nondisclosure of all police, court, and prosecutorial records pertaining to a criminal charge whenever the person charged is acquitted or pardoned or the charge is dismissed or nolled. Intended to protect innocent persons from the stigma of an arrest that did not result in a conviction, § 54-142a (e) expressly prohibits any court, police, or prosecutorial custodian of such erased records from disclosing information pertaining to such erased charge.

electronic notice sent to all counsel of record.
mailed to official Reporter.
a Jordanopoulos 8/20/19.

At issue in this appeal are records in the "case file" of the state police investigation of the 1973 homicide of Barbara Gibbons. The plaintiff, the Commissioner of the Department of Emergency Services and Public Protection (department),[1] contends that the defendant Freedom of Information Commission (commission) does not have jurisdiction to order the release of these records because they are erased pursuant to § 54-142a. It is undisputed that the person who was arrested, tried, and convicted for the Gibbons homicide – her then teen-aged son, Peter Reilly[2] – was granted a new trial in 1976 and the charges against him were dismissed with prejudice in 1977. The department contends that § 54-142a prohibits the disclosure of erased records except by order of the court, and the commission therefore lacks jurisdiction to order the disclosure of erased records. The commission does not claim that it has the authority to order the disclosure of erased records, but it contends that it has jurisdiction to review disputed records in camera and to order the disclosure of records in the Gibbons case file that do not pertain to the charge against Reilly.

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[1] In 2011, the name of the Department of Public Safety was changed to the Department of Emergency Services and Public Protection. See Public Acts 2011, No. 11-51, §§ 133, 134. In this case, to avoid confusion between the plaintiff commissioner and the defendant commission, the court will refer to the plaintiff as the department and to the defendant as the commission.

[2] The court considered whether it was necessary to redact the name of the accused person in this decision. Given the national publicity concerning the accused's original trial, the reported judicial decision granting his petition for a new trial, and the public availability of the commission's decisions and court documents in this appeal that identify the accused, the court concluded that redaction of the accused's name would serve no purpose. Neverthless, the court exercises care in this decision to limit its discussion of the records so as not to disclose information not already published in *Reilly* v. *State*, 32 Conn. Supp. 349, 355 A.2d 324 (1976) (granting Reilly's petition for a new trial).

In the decision at issue in this appeal, the commission concluded that § 54-142a "erases only such records that expressly reference Reilly as an accused person, or that reveal his status as in custody, under arrest, or charged with the crime of homicide of Gibbons." It further concluded that "the records of the investigation, even those that mention Reilly by name, are not erased unless they reveal that he was in custody, arrested, charged, or tried for the homicide of Barbara Gibbons." Applying that standard, the commission conducted an in camera review of some 15,697 pages of records and concluded that approximately 7,155 pages are not erased.[3]

For the reasons stated in this decision, the court concludes that the commission has jurisdiction to conduct an in camera review of investigative records of a law enforcement agency, including putatively erased records, and to order disclosure of records it determines not to be erased. In determining what records are erased, however, it must employ the standard stated in *State* v. *West*, 192 Conn. 488, 496, 472 A.2d 775 (1984). Because the commission did not use that standard, the appeal is sustained in part and the case is remanded to the commission to review the records it previously ordered disclosed and to apply the *West* standard in revising its order.

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[3] Contrary to the commission's stated intention, many of the pages that the commission ordered the department to disclose in fact refer to Reilly as an accused person or reveal the fact of his arrest. The court assumes that the inclusion of such pages was inadvertent. The fact that the commission has ordered disclosure of pages that are erased under its own standard reflects the difficulty of applying a consistent standard to such a voluminous and complex set of records.

PROCEDURAL HISTORY

The final decision on remand, dated October 13, 2016, discloses much of the long history of this appeal. On May 8, 2008, the complainant, Thomas J. McDonnell, sent a written request to the department for "personal access to the case file and then personally selected copies of documents regarding the homicide of Barbara Gibbons on September 28, 1973 in the town of Canaan, Connecticut, case number B-73-1442-C." When the department denied his request, he filed an appeal to the commission. Docketed as Freedom of Information Commission Docket No. FIC 2008-416 (FIC 2008-416), McDonnell's appeal was heard as a contested case on October 14, 2008. The respondents[4] argued that General Statutes § 54-142a prohibited disclosure of the entire case file, with the exception of reports since 2000 concerning forensic testing of certain pieces of physical evidence.

On January 29, 2009, the commission adopted a final decision in FIC 2008-416, concluding that § 54-142a does not erase all public records of the underlying crime. More specifically, it concluded that § 54-142a does not apply to "records that do not directly or indirectly link the accused to the underlying crime." The commission ordered the respondents to provide all such records to the complainant.

The department appealed the final decision to Superior Court, where it was captioned *State of Connecticut Department of Public Safety* v. *Freedom of Information Commission*,

[4] The Commissioner of Public Safety and the Department of Public Safety were separately named as respondents in the commission proceeding.

Superior Court, judicial district of New Britain, Docket No. CV 09-4019898S (CV 09-4019898S). On August 14, 2009, the court (*Cohn, J.*) remanded the matter to the commission to consider whether the subject of erased records may waive the protection of the erasure act.[5] On August 25, 2010, the commission adopted a final decision upon remand, again concluding that the erasure statute's "prohibition against disclosure may not be waived by the subject of the records, except in limited circumstances specified by statute that do not apply to the facts of this case."[6] The commission concluded that the respondents had violated the Freedom of Information Act by failing to provide all non-erased responsive records to the complainant.

The department renewed its appeal to the court in CV 09-4019898S. On December 14, 2010, in response to an order from the court, the department submitted a general list of the contents of the records that it claimed were erased. On January 28, 2011, again in response to an order of the court, the department indicated that the case file requested by the complainant included records that pertained to Reilly and records that did not pertain to Reilly. The department also claimed for the first time that some records that were not subject to § 54-142a

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[5] In its first final decision in FIC 2008-416, the commission had considered whether Reilly had waived the protection of the erasure act in 2004, when he submitted an affidavit to the commission in connection with Freedom of Information complaints by a journalist and a newspaper. In that affidavit, he stated that he did not object to the disclosure of the files. See FIC 2008-416, Final Decision (January 29, 2009), p. 6, ¶ 31. The commission concluded that the subject of an erased record cannot waive the protection of the erasure statute, citing *Lechner* v. *Holmberg*, 165 Conn 152, 161-62, 328 A.2d 701 (1973) (erasure statute "is not directed toward a right of an accused which may be waived at his pleasure but rather toward the duty of the clerk not to disclose records subject to erasure"). The question of waiver is not at issue in this appeal.

[6] FIC 2008-416, Final Decision (August 25, 2010), p. 6, ¶ 32.

were subject to other exemptions from disclosure.

On May 27, 2011, the court (*Cohn, J.*) issued an order agreeing that the commission's interpretation of § 54-142a was correct. The court appointed a special master (*Levine, J.T.R.*) to review the records to determine which were subject to erasure under § 54-142a. On November 26, 2012, at the special master's suggestion, the department moved to remand the case to the commission. On January 3, 2013, the court granted the motion for remand. In its memorandum of decision granting the remand, the court observed that it had previously ruled that § 54-142a "protects an accused directly or indirectly linked to the underlying crime," and stated that "records that do not reference or identify Reilly as the alleged perpetrator of the Gibbons homicide are not erased by operation of § 54-142a." The court remanded the case to the commission to "consider the evidence in the record in light of the standard set forth by this court."

On July 10, 2013, the commission issued its second final decision on remand in FIC 2008-416. The commission noted that the respondents had conceded that some responsive records were not subject to erasure under § 54-142a. The commission also noted the complainant's suggestion of several categories of records to which § 54-142a would not apply, such as photographs, maps, charts, medical examiner reports in the department's custody, and names of employees assigned to the investigation. The commission cited case law on the application of § 54-142a to demonstrate that there are types of records to which the erasure act

does not apply. The commission ordered the respondents to conduct a diligent search for responsive records to which § 54-142a does not apply and to provide those to the complainant.

On September 11, 2013, the respondents provided about 800 pages of newspaper clippings to the complainant and about 30 pages of records relating to other requests to review the files in response to a part of the complainant's original request that is no longer at issue. The respondents did not provide any other records pursuant to the commission's second final decision on remand in FIC 2008-416. On the same day, the department withdrew its appeal to this court in CV 09-4019898.

On September 30, 2013, McDonnell appealed to the commission, alleging that the department had failed to comply with the commission's order. The appeal was docketed as *McDonnell v. Commissioner, State of Connecticut Department of Public Safety,* Freedom of Information Commission Docket No. FIC 2013-586 (FIC 2013-586). The complainant asserted that newspaper clippings were not part of his request for the case file. He contended that he had firsthand knowledge of the contents of the department's case file on the Gibbons homicide because, when he was commanding officer of the state police detective division, he was ordered to reinvestigate the case years after the homicide. He asserted that the case file includes information that "does not reference or identify Peter Reilly as the perpetrator of the homicide, such as (but not limited to) photographs of the exterior of the house, photographs of the church across the street, sketch maps, photos of the victim's automobile, lists of names of investigators

that worked on the case, local weather reports for the day of the crime, names of people who took polygraph tests, names of prosecutors and dates employed, statements of witnesses that do not contain reference to or identify Reilly, diagram of the crime scene, victim's death and birth certificates, photographs of crime scene evidence, and correspondence among state agencies."[7]

After a contested case hearing, the commission adopted a final decision in FIC 2013-586 on September 24, 2014. The department filed a timely appeal to this court (this appeal). On April 29, 2015, the court (*Schuman, J.*) remanded the case to the commission "for an in camera review to determine which, if any, of the records are subject to the state erasure statute (General Statutes § 54-142a) and therefore not subject to public disclosure under the Freedom of Information Act." As ordered by the court, the department submitted a copy of the entire case file concerning the Gibbons homicide investigation for in camera inspection.

A commission hearing officer reviewed 15,697 pages of records in camera. The hearing officer concluded that "the proper test for whether a record included in the case file is erased is whether the record reveals the fact of the arrest of and charges against Reilly for the homicide." More specifically, the hearing officer concluded that § 54-142a "erases only such records that expressly reference Reilly as an accused person, or that reveal his status as in custody, under arrest, or charged with the crime of homicide of Barbara Gibbons." The hearing officer expressly concluded that "all other records, which reveal the historical facts of the homicide

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[7] FIC 2013-586, Final Decision (September 24, 2014), p. 5, ¶ 28.

investigation, and which do not reveal the arrest of Reilly or the subsequent charge of homicide, are not erased. In other words, it is concluded that the records of the investigation, even those that mention Reilly by name, are not erased unless they reveal that he was in custody, arrested, charged, or tried for the homicide of Barbara Gibbons." The commission approved the hearing officer's proposed decision in its final decision on remand.[8]

The commission rejected the department's claim that other exemptions applied to some documents because the department provided no evidence concerning such exemptions. Based on the hearing officer's in camera review, the department ordered disclosure of more than 7,000 pages that it concluded were not erased. The commission concluded that the respondents had violated General Statutes §§ 1-210 (a) and 1-212 (a) by failing to provide copies of the non-erased records to the complainant. The commission ordered the department to provide a copy of all non-erased records to the complainant within eight weeks of the decision, and "henceforth . . . [to] strictly comply with §§ 1-201(a) and 1-212 (a) . . . ."

The department filed an amended complaint in this appeal on October 25, 2016. The commission filed an amended answer and a supplemental administrative record on February 2, 2017. The commission subsequently moved for leave to file under seal the documents it had reviewed in camera and had ordered disclosed. The court (*Shortall, J.*) granted that motion on

[8] In the final decision on remand, the commission took administrative notice of all the pleadings and rulings filed in the earlier administrative appeal in CV 09-4019898S. See FIC 2013-586, Final Decision On Remand (October 13, 2016), p. 3, ¶ 15.

December 18, 2017. The appeal was argued on February 7, 2018. On May 17, 2018, the department filed a suggestion of death, reporting that McDonnell, the complainant, had died on January 30, 2018, and that it did not appear that an estate had been opened for him. It nevertheless asserted that the appeal was not moot because the commission's second order was prospective in nature. On June 19, 2018, in response to the court's order to address the issue of mootness, the commission filed a request for final judgment, arguing that the case is not moot and that the appeal can proceed pursuant to General Statutes § 52-600. The commission noted that the same file had been the subject of other Freedom of Information requests. In addition, the commission attached a letter from Joyce McDonnell, the complainant's widow, stating that she would like to receive the records at issue.

In reviewing the record on appeal, the court learned that the court's pleading file in CV 09-4019898S, of which the commission had taken administrative notice in the final decision on remand, had been destroyed pursuant to Practice Book § 7-10 after the department withdrew its appeal in 2013. To ensure that the record for its review was complete, the court directed the commission to file a supplemental record containing the court pleadings in CV 09-4019898S.[9] The commission filed the supplemental record on October 12, 2018.

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[9] The administrative record in CV 09-4019898S was filed on April 27, 2009, and a supplemental record was filed on September 9, 2010. The administrative record and supplemental record were maintained in a separate location from the court's pleading file and were not destroyed with the pleading file. These documents will be maintained in the office of the tax and administrative appeal session pending any appellate review of this decision.

On December 5, 2018, this court issued an order for supplemental briefing to address several questions that had arisen in the court's review of the decisions construing the erasure statutes in light of the many amendments to those statutes. Both parties requested and were granted extensions of the deadline for the supplemental briefs, which were filed on May 10, 2019.

THE COURT'S JURISDICTION

The court first considers whether the complainant's death renders this appeal moot and, if the appeal is not moot, whether the court can proceed in the absence of a representative of the complainant's estate. The court concludes that the appeal is not moot and may proceed.

The appeal is not moot because the commission's second order – that the department must strictly comply with General Statutes §§ 1-210 (a) and 1-212 (a) – is prospective in character. As the Supreme Court has held, prospective orders issued by the commission govern the conduct of the affected agency in dealing with future requests of a similar nature. See, e.g., *Gifford* v. *Freedom of Information Commission*, 227 Conn. 641, 649 n.9, 631 A.2d 252 (1993) ("The order issued by the commission is prospective in nature and impacts the discovery obligations of the state's attorneys in pending criminal matters."); *Director, Retirement & Benefits Services Division* v. *Freedom of Information Commission*, 256 Conn. 764, 769 n.8, 775 A.2d 981 (2001) ("[w]here orders issued by the commission are prospective in nature, an appeal of a commission order is not moot."). In this case, as in *Director* and *Gifford*, the

commission ordered that "[h]enceforth, the respondents shall strictly comply with §§ 1-210 (a) and 1-212 (a), G.S." The order affects the department not only with respect to the records at issue in this case but also those at issue in all other requests for records which may contain some erased information and some non-erased information. Noncompliance with the commission's order may subject the department's officials to criminal sanctions. See General Statutes § 1-240 (b) (failure to comply with a commission order is a class B misdemeanor). In light of these precedents, the court concludes that the complainant's death does not render the appeal moot.

The court is not precluded from considering the case without the substitution of a representative of the complainant's estate for two reasons. First, General Statutes § 4-183, which governs administrative appeals, does not require the participation of parties other than an aggrieved plaintiff and the agency that issued the decision on appeal. See *Yellow Cab Co. of New London & Groton, Inc.* v. *Dept. of Transportation*, 127 Conn. App. 170, 176-78, 13 A.3d 690 (2011). Second, General Statutes § 52-600 permits the continuance of an action against one defendant after the death of a codefendant.[10] *HSBC Bank USA, N.A.* v. *Lahr*, 165 Conn. App. 144, 149-51, 138 A.3d 1064 (2016). Accordingly, the court turns to the merits of the appeal.

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[10] General Statutes § 52-600 provides: "If there are two or more plaintiffs or defendants in any action, one or more of whom die before final judgment, and the cause of action survives to or against the others, the action shall not abate by reason of the death. After the death is noted on the record, the action shall proceed."

APPLICABLE LEGAL PRINCIPLES

This appeal is brought and must be reviewed pursuant to the Uniform Administrative Procedure Act (UAPA), General Statutes §§ 4-166 et seq. "Under the UAPA, it is [not] the function . . . of this court to retry the case or to substitute its judgment for that of the administrative agency. . . . Even for conclusions of law, the court's ultimate duty is only to decide whether, in light of the evidence, the [agency] has acted unreasonably, arbitrarily, illegally, or in abuse of its discretion." (Citation omitted; internal quotation marks omitted.) *Chairperson, Connecticut Medical Examining Board* v. *Freedom of Information Commission*, 310 Conn. 276, 281, 77 A.3d 121 (2013).

The courts ordinarily afford "deference to the construction of a statute applied by the administrative agency empowered by law to carry out the statute's purposes. . . . Cases that present pure questions of law, however, invoke a broader standard of review than is . . . involved in deciding whether, in light of the evidence, the agency has acted unreasonably, arbitrarily, illegally or in abuse of its discretion. . . . Furthermore, when a state agency's determination of a question of law has not previously been subject to judicial scrutiny . . . the agency is not entitled to special deference." (Internal quotation marks omitted.) *Dept. of Public Safety* v. *Freedom of Information Commission*, 298 Conn. 703, 716, 6 A.3d 763 (2010).

The department contends that the erasure statutes vest exclusive jurisdiction over requests for disclosure of erased records in the courts and prohibit the disclosure of the

existence of erased records to anyone, including the commission. The commission contends, to the contrary, that the Freedom of Information Act confers jurisdiction upon it to review disputes about whether a particular document is subject to disclosure, and that its jurisdiction encompasses disputes over whether particular records are erased. Whether the commission's jurisdiction extends to disputes over the erasure of arrest records is a pure question of law. The deference normally accorded to an agency's interpretation of a statute is not required, and the court must instead apply a plenary review. See *Dept. of Public Safety* v. *Freedom of Information Commission*, supra, 298 Conn. 717-18 (holding that trial court erred in applying abuse of discretion standard to novel question of statutory construction).

Well-settled principles govern the court's approach to statutory construction. "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 . . . . The test to determine ambiguity is whether the statute, when read in context, is susceptible to more than one reasonable interpretation." (Internal quotation marks omitted.) *Mayer* v. *Historic District Commission*, 325 Conn. 765, 774-75, 160 A.3d 333 (2017).

Certain additional principles apply in construing our Freedom of Information Act. The act enshrines the public's right to know what its government is doing. The first sentence of General Statutes § 1-210 (a) broadly declares that "[e]xcept as otherwise provided by any federal law or state statute, all records maintained or kept on file by any public agency . . . shall be public records and every person shall have the right to (1) inspect such records promptly during regular office or business hours, (2) copy such records in accordance with subsection (g) of section 1-212, or (3) receive a copy of such records in accordance with section 1-212." As the Supreme Court has repeatedly stated, "[t]he Freedom of Information Act expresses a strong legislative policy in favor of the open conduct of government and free public access to government records." *Wilson* v. *Freedom of Information Commission*, 181 Conn. 324, 328, 435 A.2d 353 (1980).

The act does not, however, confer upon the public an absolute right to all government information. "Its careful delineation of the circumstances in which public meetings may be held

in executive session . . . and in which agency records . . . may properly remain undisclosed . . . reflects a legislative intention to balance the public's right to know what its agencies are doing, with the governmental and private needs for confidentiality. . . . [I]t is the balance of governmental and private needs for confidentiality with the public right to know that must govern the interpretation and application of the Freedom of Information Act. The general rule, under the act, however, is disclosure. . . . Exceptions to that rule will be narrowly construed in light of the underlying purpose of the act . . . and the burden of proving the applicability of an exemption rests upon the agency claiming it." Id., 328-29.

As provided by the first sentence of § 1-210 (a), however, the act recognizes that federal law and other state statutes may exclude certain records. In this case, the parties agree that § 54-142a prohibits disclosure of erased records and thus is within the scope of the exception in § 1-210 (a). In that, they are clearly correct. See *Commissioner of Emergency Services & Public Protection* v. *Freedom of Information Commission,* 330 Conn. 372, 390, 194 A.3d 759 (2018) (statutes that create confidentiality in documents or otherwise limit the disclosure, copying, or distribution of documents satisfy the "otherwise provided" requirements of § 1-210 (a)). Although "all exceptions from the [Freedom of Information] act must be construed narrowly to effectuate the purpose of the act, which favors disclosure"; id., 392; the court must also give effect to the erasure statute. Its purpose is to "protect innocent persons from the harmful consequences of a criminal charge which is subsequently dismissed." (Emphasis

omitted; internal quotation marks omitted.) *State* v. *Anonymous*, 237 Conn. 501, 516, 680 A.2d 956 (1996). The court's task is to apply the "familiar assumption that the legislature, in enacting § 54-142a, was cognizant of existing statutes . . . and intended to create a harmonious and consistent body of law." *State* v. *West*, supra, 192 Conn. 494. The court "must, if possible, read the two statutes together and construe each to leave room for the meaningful operation of the other." Id.

DISCUSSION

The department appeals the commission's order directing it to disclose more than 7,000 pages of records from the Gibbons homicide investigation file. The department contends that these records are erased as a matter of law and only a court can order the disclosure of erased records. Although framed as a challenge to the commission's jurisdiction to order the disclosure of erased records, the department's appeal is premised on its contention that the entire investigative file is erased. The court disagrees with that premise. It concludes that the commission has jurisdiction to review the disputed records but lacks the statutory authority to order the disclosure of erased records. The court will first address the commission's jurisdiction to review the records at issue and then will consider the scope of the erasure statute to determine whether the commission has erroneously ordered the disclosure of records that are erased.

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The department asserts that the commission lacks jurisdiction over erased records because the erasure statute expressly gives only the court the authority to order the disclosure of erased records. The department has confused the issue of the commission's jurisdiction with the issue of the commission's authority, based on a proper construction of § 54-142a, to order disclosure of erased records. See *Kleen Energy Systems, LLC* v. *Commissioner of Energy and Environmental Protection*, 319 Conn. 367, 381 n.15, 125 A.3d 905 (2015) (issue before the court in a case involving confidential records of the Department of Children and Families did not concern the commission's jurisdiction but concerned the meaning and scope of certain statutes governing access to public records, "which the commission clearly had the authority and expertise to interpret in the first instance.").

The request at issue in this case is not a request for records of Reilly's arrest, but for records of the Gibbons homicide investigation. The department's framing of the issue assumes that *all* documents in the Gibbons case file pertain to the dismissed charge against Reilly and that the commission therefore lacks jurisdiction. In the department's first appeal to this court, Judge Cohn rejected the underlying assumption that all records in the file are erased. He concluded – based at least in part on information provided by the department – that some documents in the investigation file did not refer to Reilly and were not erased. This court rejects the department's jurisdictional argument as a matter of statutory construction.

The commission's jurisdiction is governed by the Freedom of Information Act. In

relevant part, General Statutes § 1-206 (b) (1) provides as follows: "Any person denied the right to inspect or copy records under section 1-210 . . . may appeal therefrom to the Freedom of Information Commission, by filing a notice of appeal with said commission. . . ." Section 1-206 (b) (2) provides in relevant part: "In any appeal to the Freedom of Information Commission under subdivision (1) of this subsection . . . the commission may confirm the action of the agency or order the agency to provide relief that the commission, in its discretion, believes appropriate to rectify the denial of any right conferred by the Freedom of Information Act. . . ."

General Statutes § 1-210 (a) provides in relevant part that "[e]xcept as otherwise provided by any federal law or state statute, all records maintained or kept on file by any public agency . . . . shall be public records and every person shall have the right to . . . inspect such records promptly during regular office or business hours . . . or . . . receive a copy of such records in accordance with section 1-212." In addition to this broad statement of scope, the Freedom of Information Act contains several provisions that govern the disclosure of police records and records of criminal investigations. First among these is General Statutes § 1-210 (b) (3), which provides certain exceptions to the rule of disclosure for records of a law enforcement agency compiled in connection with the investigation of a crime.[11] General

[11] General Statutes § 1-210 (b) provides in relevant part: "Nothing in the Freedom of Information Act shall be construed to require the disclosure of: . . . (3) 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, (B) the identity of minor witnesses,

Statutes § 1-210 (b) (27) exempts visual images of homicide victims to the extent that such records could reasonably be expected to constitute an unwarranted invasion of privacy of the victim or the victim's surviving family members. General Statutes § 1-215 requires the disclosure of the "record of the arrest" of any person, but specifically defines "record of the arrest" to exclude "a record erased pursuant to chapter 961a or any investigative file of a law enforcement agency compiled in connection with the investigation of a crime resulting in an arrest."[12] Except for records the retention of which is otherwise governed by law or regulation, General Statutes § 1-216 requires the destruction of records of law enforcement agencies consisting of uncorroborated allegations that an individual has engaged in criminal activity.[13]

(C) signed statements of witnesses, (D) information to be used in a prospective law enforcement action if prejudicial to such action, (E) investigatory techniques not otherwise known to the general public, (F) arrest records of a juvenile, which shall also include any investigatory files, concerning the arrest of such juvenile, compiled for law enforcement purposes, (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 . . . ."

[12] Chapter 961a includes General Statutes §§ 54-142a through 54-142s.

[13] It is worth noting that in 1975, before the Freedom of Information Act was enacted, all "investigatory files compiled for law enforcement purposes, except to the extent available by law to a private citizen," were excluded from the definition of "public records" for the purposes of the then-existing public records act. See General Statutes § 1-19 (Rev. to 1975). When the Freedom of Information Act was passed, however, the legislature created the commission as a quasi-judicial body and, among other things, redefined the status of law enforcement records, creating an exemption for certain records but making the rest presumptively public. See Public Acts 1975, No. 75-342, § 2 (amending § 1-19 with respect, inter alia, to records of law enforcement agencies), § 14 (creating a right of appeal of denial of access to records to the Freedom of Information Commission), and § 15 (creating the commission and authorizing it to "require the production for examination of any books and papers which the commission deems relevant in any matter under investigation or in question").

Although none of the exemptions in §§ 1-210 (b), 1-215, or 1-216 are at issue in this appeal because the commission did not assert them, they are nevertheless relevant to the analysis of the commission's jurisdiction. The existence of these exemptions in the Freedom of Information Act implies that records of law enforcement agencies are generally subject to disclosure. "[W]here express exceptions are made, the legal presumption is that the legislature did not intend to save other cases from the operation of the statute." (Internal quotation marks omitted.) *Marrocco* v. *Giardino*, 255 Conn. 617, 637, 767 A.2d 720 (2001). Because the commission has jurisdiction to order the disclosure of non-exempt records, including records of law enforcement agencies concerning the detection or investigation of crime, it necessarily has jurisdiction to determine whether disputed records are within the scope of a claimed exemption.

General Statutes § 1-205 (d) provides in relevant part that the commission "shall have the power to investigate all alleged violations of said Freedom of Information Act and may for the purpose of investigating any violation hold a hearing, administer oaths, examine witnesses, receive oral and documentary evidence, [and] have the power to . . . require the production for examination of any books and papers which the commission deems relevant in any matter under investigation or in question." Citing this provision (formerly codified as General Statutes § 1-21j), the Supreme Court has held that "[w]here the nature of the documents, and, hence, the applicability of an exemption, is in dispute it is not only within the commission's power to

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This history indicates that the legislature intended the commission to have jurisdiction to adjudicate disputes about the exemption of specific law enforcement records, subject to judicial review.

examine the documents themselves, it is contemplated by the act that the commission do so." *Wilson* v. *Freedom of Information Commission*, supra, 181 Conn. 339-40. "Unless the character of the documents in question is conceded by the parties, an in camera inspection of the particular documents by the commission may be essential to the proper resolution of a dispute under the act." Id., 340. As the Supreme Court has further held, the commission "has full authority to determine the existence of public records and the propriety of their disclosure." *Board of Education* v. *Freedom of Information Commission*, 208 Conn. 442, 454, 545 A.2d 1064 (1988).

The department relies on the plain language of § 54-142a and early cases construing that language to argue that the erasure statute requires erasure of the entire Gibbons homicide file, cover to cover. In particular, it relies on § 54-142a (a), which provides that, where a criminal charge is dismissed, "all police and court records and records of any state's attorney pertaining to such charge shall be erased," and on § 54-142a (e), which provides in relevant part that "any law enforcement agency having information contained in such erased records shall not disclose to anyone, except the subject of the record . . . information pertaining to any charge erased under any provision of this section and . . . such person . . . shall provide adequate security measures to safeguard against unauthorized access to or dissemination of such records or upon the request of the accused cause the actual physical destruction of such records . . . ."[14] The

[14] The erasure statutes do not require physical destruction of the records unless requested by the subject of the records. General Statutes § 54-142a (e) provides in relevant part that "[s]uch clerk

department also relies on *Lechner* v. *Holmberg*, 165 Conn. 152, 161-62, 328 A.2d 701 (1973), where the Supreme Court expansively construed the erasure statute, then codified as General Statutes § 54-90, to provide a "blanket prohibition" against disclosure to "anyone," observing that the word "'anyone' would seem to embrace the entire human race, of which the plaintiff is a member."[15]

While the text of § 54-142a and the *Lechner* decision provide some support for the department's argument that the Gibbons homicide file is subject to a "blanket prohibition" against disclosure, subsequent developments in the law have established that discrete items in a law enforcement file may not be erased even though the file is generally subject to erasure. In *State* v. *West*, supra, 192 Conn. 496, the court concluded that identification photographs in the file of a case that had been nolled were not within the scope of the erasure statute because such records "pertain to the subject individual's identity and not to any specific criminal charge."

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or such person [charged with the retention and control of such records] shall provide adequate security measures to safeguard against unauthorized access to or dissemination of such records or upon the request of the accused cause the actual physical destruction of such records, except that such clerk or such person shall not cause the actual physical destruction of such records until three years have elapsed from the date of the final disposition of the criminal case to which such records pertain."

[15] In *Lechner*, the plaintiff had been acquitted of criminal charges relating to an automobile accident that resulted in a death. The plaintiff sought a copy of the transcript of his criminal trial to use in defense of a civil action arising from the same accident. The Supreme Court construed § 54-90 to preclude the disclosure of transcripts to anyone, even the subject of the erased record. See *Lechner* v. *Holmberg*, supra, 165 Conn. 161-62. The year after *Lechner* was decided, the legislature amended § 54-90 to allow a court to order disclosure of erased records to the subject of the records if the court found that nondisclosure would be harmful to the accused in a civil action. See 1974 Public Acts, No. 74-163, § 3.

Relying on *West*, the Appellate Court subsequently held that the erasure statute does not erase "evidence" – in that case a videotape – obtained by police in the course of an investigation. See *Boyles* v. *Preston*, 68 Conn. App. 596, 608-10, 792 A.2d 878 (2002).

In light of the provisions in the Freedom of Information Act that address law enforcement records, discussed above, and the decisions explaining the scope of the erasure statutes, the court concludes that the commission had jurisdiction to determine whether additional non-erased records existed and, if so, to order the disclosure of such records.

B

Before the court turns to statutory analysis, it must first determine which version of the erasure statute applies to this case. The erasure statute has been amended more than thirty times since its enactment in 1963. Although many of the amendments are not relevant to the issue in this appeal, one is significant. In 1996, the legislature amended the erasure statute to provide that transcripts of court proceedings are not "court records" for purposes of the erasure statute. See Public Acts 1996, No. 96-63 (P.A. 96-63), codified as General Statutes § 54-142a (h).[16] Before P.A. 96-63 was enacted, transcripts were within the scope of "court records" that

[16] General Statutes § 54-142a (h) provides as follows: "For the purposes of this section, 'court records' shall not include a record or transcript of the proceedings made or prepared by an official court reporter, assistant court reporter or monitor." The legislative history of this provision indicates that "a primary purpose in excluding trial transcripts from the meaning of 'court records' pursuant to § 54-142a was to preserve a record, notwithstanding a criminal defendant's acquittal, to facilitate a victim's ability to file a complaint with the judicial review council in situations in which a judge allegedly engages in misconduct during the trial." *Cloukey* v. *Leuba*, 47 Conn. Supp. 263, 270-71, 788 A.2d 1275 (2000), affirmed, 67 Conn. App. 221, 786 A.2d 1182 (2001), citing Conn. Joint Standing Committee Hearings, Judiciary, Pt. 4, 1996 Sess., pp. 991-93, 1020-26; 39 S. Proc., Pt. 7,

were erased upon acquittal, dismissal or nolle of the charges, or an unconditional pardon. See *Lechner* v. *Holmberg*, supra, 165 Conn. 160.

In the first erasure case arising after P.A. 96-63 was enacted, the court concluded that whether the 1996 amendment applied to records of a particular case depended on when the accused's right to erasure vested. See *Cloukey* v. *Leuba*, 47 Conn. Supp. 263, 788 A.2d 1275 (2000), affirmed, 67 Conn. App. 221, 786 A.2d 1182 (2001). In *Cloukey*, a court reporter received a request from the public for the transcripts of a criminal trial in which Cloukey, the defendant in that trial, had been acquitted. Cloukey sought a writ of mandamus ordering the erasure and destruction of the transcripts. He claimed that P.A. 96-63 did not apply to his case because he had been arrested in 1994, before P.A. 96-63 was enacted. The court denied mandamus, concluding that Cloukey's right to erasure did not vest until his acquittal in 2000, after the effective date of the amendment. *Cloukey* v. *Leuba*, supra, 47 Conn. Supp. 272.

In supplemental briefs submitted in this case, the parties agreed that Reilly's right to erasure vested when the charges against him were dismissed with prejudice in 1977. The parties further agree that under the version of the erasure statute in effect in 1977, then codified as § 54-90, any transcripts that pertain to the charges against Reilly are erased as a matter of law.[17]

1996 Sess., pp. 2130-38, remarks of Senator Thomas F. Upson.

[17] In its supplemental brief filed on May 10, 2019, the commission represents that the records on file under seal with the court "should not and do not include any court transcripts from the

The court concurs with the parties' analysis. In *Cloukey*, the trial court relied in part on an opinion of the attorney general which concluded that the amendment in P.A. 96-63, excluding court transcripts from the scope of the erasure statute, did not apply to cases that had been erased before October 1, 1996, the effective date of the amendment. That opinion succinctly summarized the general principle that statutes should not be construed to apply retroactively "where the statutes affect substantial changes in the law, unless the legislative intent clearly and unequivocally appears otherwise." (Internal quotation marks omitted.) Opinions, Conn. Atty. Gen. No. 96-011 (August 2, 1996), quoting *State* v. *Lizotte*, 200 Conn. 734, 741, 517 A.2d 610 (1986). "[A] statute affecting vested rights or imposing new obligations is construed to apply prospectively unless the legislature clearly and unequivocally expresses its intent that the legislation shall apply retrospectively." Opinion, Conn. Atty. Gen. No. 96-011, citing *Turner* v. *Turner*, 219 Conn. 703, 712, 595 A.2d 297 (1991). The attorney general's opinion observed that P.A. 96-32 effectively overruled *Lechner* v. *Holmberg*, supra, 165 Conn. 160, a case decided twenty-three years earlier, and "[t]here is nothing in this public act or its legislative history to indicate either that the legislature viewed this change as a clarification of the law or that it intended the change to apply retroactively." Opinion, Conn. Atty. Gen. No. 96-011.

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underlying prosecution." The court has nevertheless found some transcript excerpts in the records it reviewed in camera. At least one of those excerpts is clearly identified by a court reporter's certification as a transcript from Reilly's criminal trial; others are unidentified but are clearly related to the charge against Reilly.

"Although an opinion of the attorney general is not binding on a court, it is entitled to careful consideration and is generally regarded as highly persuasive." (Internal quotation marks omitted.) *Velez* v. *Commissioner of Correction*, 250 Conn. 536, 545, 738 A.2d 604 (1999). After review of the text and legislative history of P.A. 96-63, the court agrees with the attorney general's analysis. The right to erasure is clearly a substantive right and, in Reilly's case, had vested nearly twenty years before P.A. 96-63 was enacted. There is nothing in the text or history of P.A. 96-63 that indicates that it was intended to apply retroactively to divest a formerly accused person of his right to erasure. Accordingly, any transcripts at issue in this case are erased.

C

The court turns next to the task of construing the scope of records to which § 54-142a applies. The department contends that *all* records in the Gibbons investigation file pertain to the charge against Reilly and are therefore erased. The commission's construction of the phrase "pertaining to such charge," however, has changed over the long course of the department's appeals and repeated remands.[18] It has construed the phrase to include records "that link the accused, directly or indirectly, to the underlying crime,"[19] or "records that reference or identify

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[18] Although, as a technical matter, this appeal arises from the decision on the noncompliance complaint, both parties have treated this appeal as in essence a continuation of the appeal originally filed in 2009, and the court will do so also.

[19] FIC 2008-416 (January 29, 2009), Final Decision, p. 4, ¶ 19.

the accused as the perpetrator of the underlying crime,"[20] or as "person-specific" records relating to a formal "charge," [21] or, most recently, only "such records that expressly reference Reilly as an accused person, or that reveal his status as in custody, under arrest, or charged with the crime of homicide of Gibbons."[22]

The court has reviewed, in camera, the records that the commission has ordered to be disclosed. Even under the commission's most recent and most restrictive construction of § 54-142a, many of the records ordered to be disclosed should have been withheld because they contain direct references to Reilly as an accused person, in custody, under arrest, charged with, or on trial for Gibbons' homicide. Far more – indeed, most – of the remaining records should have been deemed erased if the applicable standard is either the standard articulated in the commission's first decision in 2009 and approved by Judge Cohn in his order of May 27, 2011 – that is, records "that link the accused, directly or indirectly, to the underlying crime" – or the standard articulated in *State* v. *West*, supra, 192 Conn. 496.

Analysis of the scope of the phrase "pertaining to such charge" begins, as it must, with the text of the provision in which it is used. In 1977, when Reilly's right to erasure vested, the relevant subsection of the erasure statute provided: "Whenever in any criminal case, on or after October 1, 1969, the accused, by a final judgment, is found not guilty of the charge or the

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[20] FIC 2008-416 (August 25, 2010), Final Decision, p. 5, ¶ 25.

[21] FIC 2013-586, Final Decision (September 24, 2014), p. 6, ¶ 31.

[22] FIC 2013-586, Final Decision on Remand (October 13, 2016), p. 7, ¶ 37.

charge is dismissed, all police and court records and records of the state's or prosecuting attorney pertaining to such charge shall be immediately and automatically erased." General Statutes § 54-90 (a) (Rev. to 1977). In all respects material to this appeal, the current version of the statute, now codified as § 54-142a (a), is the same.[23]

The commission's construction of the phrase "pertaining to such charge" in its 2014 and 2016 decisions focuses on the meaning of the word "charge." In its 2014 decision, the commission observed that the word "charge" is defined by Black's Law Dictionary as "a formal accusation of an offense as a preliminary step to prosecution." Based on this definition, it concluded that "by using the phrase 'pertaining to such charge' instead of 'pertaining to such crime,' the statute is person-specific and does not sweepingly cover all records pertaining to the criminal incident."[24]

The commission's "person-specific" construction of the word "charge" overlooks another subsection of the statute that indicates a broader meaning. "[I]t is a basic tenet of statutory construction that [w]e construe a statute as a whole and read its subsections

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[23] General Statutes § 54-142a (a) (Rev. to 2019) provides: "Whenever in any criminal case, on or after October 1, 1969, the accused, by a final judgment, is found not guilty of the charge or the charge is dismissed, all police and court records and records of any state's attorney pertaining to such charge shall be erased upon the expiration of the time to file a writ of error or take an appeal, if an appeal is not taken, or upon final determination of the appeal sustaining a finding of not guilty or a dismissal, if an appeal is taken. Nothing in this subsection shall require the erasure of any record pertaining to a charge for which the defendant was found not guilty by reason of mental disease or defect or guilty but not criminally responsible by reason of mental disease or defect."

[24] FIC 2013-586, Final Decision (September 24, 2014), p. 6, ¶ 31.

concurrently in order to reach a reasonable overall interpretation." (Internal quotation marks omitted.) *Lackman* v. *McAnulty*, 324 Conn. 277, 287, 151 A.3d 1271 (2017). As it did in 1977, the last sentence of subsection (f) of the erasure statute provides that "[t]he jury charge in connection with erased offenses may be ordered by the judge for use by the judiciary, provided the names of the accused *and the witnesses* are omitted therefrom." (Emphasis added.) General Statutes § 54-142a (f) (Rev. to 2019); General Statutes § 54-90 (f) (Rev. to 1977).[25] This provision was enacted in Public Acts 1976, No. 76-345, three years after the Supreme Court had held that transcripts of a criminal proceeding were subject to erasure as "court records." See *Lechner* v. *Holmberg*, supra, 165 Conn. 160. When the legislature granted judges permission to order transcripts of their jury charges for use by the judiciary, it required that names of witnesses as well as the name of the accused be redacted. If the legislature had intended the erasure statute to encompass only "person-specific" information, redaction of the name of the accused alone would have accomplished that goal.

The commission also overlooked the discussion of the scope of the erasure statute in *State* v. *West*, supra, 192 Conn. 496. In *West*, a criminal case, an undercover police officer had identified the defendant, from a photograph in a photo array, as the person who had sold her cocaine on one occasion. The defendant's photograph had been taken in connection with a prior arrest that had been nolled. The defendant claimed that the photograph was erased

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[25] This provision had its origin in Public Acts 1976, No. 76-345, which also amended other provisions of § 54-90.

pursuant to § 54-142a (c) and should not have been used in the photo array. The Supreme Court considered the scope of § 54-142a (c) in relation to General Statutes § 29-15, which requires the return of identification data where a defendant with no prior criminal conviction is acquitted or the charges against him are nolled or dismissed. In that context, the court stated: "The 'police and court records and records of the state's or prosecuting attorney or the prosecuting grand juror' that § 54-142a (c) orders to be erased are records 'pertaining to [the] charge' which has been nolled. Unlike transcripts, police reports, charging documents and other records covered by § 54-142a, identification data, as defined by § 29-15, pertain to the subject individual's identity and not to any specific criminal charge. Photographs and fingerprints need not disclose when or where a person was arrested, the nature of or circumstances surrounding the crime charged or the names of witnesses from whom further information may be obtained. The defendant does not claim that the photograph whose suppression he seeks contained any information about his arrest. It is only such descriptive information that is subject to the erasure provisions of § 54-142a." *State* v. *West*, supra, 192 Conn. 496.

Contrary to the commission's conclusion, *West* does not stand for the broad proposition that a record is not within the scope of the erasure act if it contains no *direct* reference to a charge that has been nolled or dismissed. In *West*, the court observed that § 54-142a encompasses "descriptive information" that discloses "when or where a person was arrested, the nature of or circumstances surrounding the crime charged or the names of witnesses from

whom further information may be obtained." It specifically included "police reports" within the scope of records that are covered by § 54-142a. Months after *West* was decided, the Appellate Court similarly concluded that witness affidavits provided to support an arrest warrant were erased under § 54-142a when the charge was dismissed. *Pascal* v. *Pascal*, 2 Conn. App. 472, 484-85, 481 A.2d 68 (1984).

Although several decisions issued since *West* was decided have considered the scope of the erasure statute, no controlling decision has provided a more detailed description of what records *are* included within the scope of § 54-142a. At least two Superior Court decisions have relied on *West* in determining what records are erased. In *State* v. *Weber*, 49 Conn. Supp. 530, 534-35, 896 A.2d 145 (2004) (*Keller, J.*), an individual whose larceny charge had been nolled sought to obtain "the complete original file of any state's attorney and Inspector involved in the investigation and prosecution" of the larceny charge. The state claimed that disclosure of the records would violate the attorney work product privilege and that some thirty-three records did not pertain to the charge. The *Weber* court, applying the definition of the phrase "pertaining to the charge" suggested by *West*, concluded that thirty of the thirty-three records at issue pertained to the charge because "anything that discloses when or where a person was arrested, the nature of or circumstances surrounding the crime charged, or the names of witnesses from whom further information may be obtained pertains to the charge." Id.

In *Bramato* v. *Board of Firearms Permit Examiners*, Superior Court, judicial district of New Britain, Docket No. CV-14-6027600S (June 9, 2015) (*Schuman, J.*), the court concluded

that the defendant board had improperly considered a police report of an arrest that had resulted in a nolle when it considered an appeal from a municipal police department's denial of a pistol permit. The court recognized that the definition suggested in *West* was "technically dicta," but it concluded that *West* provided "a strong indication that the Supreme Court believes that the erasure statute encompasses police reports." Id. It also considered the Appellate Court's decision in *Pascal*, reasoning that "if the affidavits in support of an arrest by warrant are subject to erasure, then the police reports supporting a warrantless arrest should fall into the same category." Id. The court rejected the defendant's argument that § 54-142a required erasure only of reference to the fact that the accused was arrested but not the erasure of the entire police report, observing that "[t]he broadly worded language of the statute . . . simply does not contain the sort of limiting language that [the municipality] proposes." Id.

In the decision that is directly at issue in this appeal, the commission relied on several cases that this court finds distinguishable from this case. First, the issues in *Martin* v. *Hearst Corp.*, United States District Court Docket No. 3:12 cv 1023 (MPS) (D. Conn. Aug. 5, 2013), and *Martin* v. *Griffin*, Superior Court, judicial district of Hartford, Docket No. CV 99-0586133S (June 13, 2000) (*Lavine, J.*), do not involve the disclosure of erased records by a custodian of the records. Both cases were libel cases in which the plaintiff claimed that a private party had published information about the plaintiff's arrest, which had been erased pursuant to § 54-142a. In *Martin* v. *Griffin*, the defendant was a candidate for sheriff who had published information about the plaintiff's arrest in a political advertisement; in *Martin* v.

Hearst Corp., the defendant was a news organization that refused, after charges against the plaintiff were dismissed, to take down the online articles published at the time of the plaintiff's arrest. In each case, the plaintiff argued that, because § 54-142a (e) provides that "[a]ny person who shall have been the subject of such an erasure shall be deemed to have never been arrested," any statements about his or her arrest *became* false when records of the arrest became subject to erasure. In both cases, the court rejected the argument, concluding that § 54-142a was never intended to govern the conduct of private parties or to change historical facts. See *Martin* v. *Griffin,* supra ("The erasure statute operates in the legal sphere, not the historical sphere.")

Neither *Martin* v. *Griffin* nor *Martin* v. *Hearst Corp.* involved the disclosure of a putatively erased record by a public official charged with safeguarding its confidentiality. This case, unlike those cases, does concern the statutory duty of the custodian of erased police records to protect the confidentiality of those records. Neither of those libel cases provide relevant guidance for the question presented here.

The commission also relied on *Penfield* v. *Venuti*, 93 F.R.D. 364 (D. Conn. 1981), but that case, too, provides scant guidance for the very different circumstances in this case. *Penfield* was a civil action for damages allegedly incurred in a motor vehicle accident; the defendant had been arrested as a result of the accident but the charges had been dismissed. The defendant sought a protective order to bar the discovery of information from the police who had investigated the accident and to bar production of certain physical evidence gathered by the police at the scene of the accident. The federal district court, exercising diversity jurisdiction,

concluded that § 54-142a did not bar the disclosure of certain police records "pertaining to the performance of customary community caretaking functions" or to "police records which existed prior to a criminal "charge.'" The district court observed that "[p]olice officers perform many functions not directly related to their duty to investigate crimes. This is especially true with regard to automobile traffic and accidents . . . . In the aftermath of an automobile accident, the police, in the exercise of their customary community caretaking functions, generally investigate the situation and prepare a report . . . regardless of whether the accident is one that requires an investigation of a possible violation of the criminal law." Id., 366-67. The court concluded that such reports that preceded an arrest were not intended to be covered by the erasure statute. Id., 368. The court also concluded that physical evidence collected by the police at the time of the accident would have been collected, or reported on, by police officers performing their community caretaking functions. Although the court denied the protective order, it limited the scope of depositions of police officers to exclude questions about any aspect of the investigation and prosecution that took place after a defendant was arrested. Id., 369.

In this case, unlike *Penfield, all* of the police reports were created after Reilly's arrest[26] and pursuant to the law enforcement function of criminal investigation, not pursuant to a community caretaking function. *Penfield* does not support the commission's decision in this case.

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[26] According to *Reilly* v. *State*, supra, 32 Conn. Supp. 351, Reilly was in "effective custody" from the time the state police arrived on the scene of the homicide.

It is noteworthy, moreover, that the *Penfield* decision cited by the commission was issued in an early stage of the lawsuit. In a subsequent ruling on a motion in limine, the *Penfield* court granted a motion to preclude testimony concerning toxicology analyses performed in the course of the criminal investigation. The reports had previously been ordered sealed by the court but apparently had been disclosed to the plaintiff's counsel through the inadvertence of a court clerk. See *Penfield* v. *Venuti*, 589 F. Supp. 250, 257 (D. Conn. 1984); and see *Penfield* v. *Venuti*, supra, 93 F.R.D. 369-70 (precluding testimony "regarding any aspect of the investigation and prosecution which took place after the defendant in the criminal case was arrested or charged."). This subsequent ruling illustrates the distinction between police records reflecting a "community caretaking function" and police records reporting on a criminal investigation. The latter, which are the type at issue here, are subject to erasure.

Other decisions addressing the erasure statute provide only indirect insight into the scope of records that are subject to erasure. For instance, in *State* v. *Anonymous*, supra, 237 Conn. 501, the defendant had been arrested on a larceny charge that was later dismissed. The defendant then gave notice to the police department of the town where he had been arrested that he intended to bring an action for damages for false arrest. He also sent a request to the police department for the physical destruction of all records of his arrest and then filed a motion in the trial court to compel destruction of the records. After initially ordering the records destroyed, the trial court, on the town's motion, vacated that order and permitted the town to have access to the records for the purpose of defending a false arrest action. On appeal, the Supreme Court

was called upon to reconcile § 54-142a (e), which allows the subject of erased records to request the physical destruction of the records, and § 54-142a (f), which allows disclosure of information in erased records to a defendant in a false arrest action relating to the erased charge. The town argued that permitting the destruction of the erased records "would hinder the town's efforts to determine its liability in the impending civil action by making it difficult, if not impossible, to reconstruct dates and times of events, recollect investigative efforts, and identify locations and statements of witnesses, letters and other written documents." Id., 512-13. The court agreed with the town, concluding that by giving notice of his intention to sue, the defendant had waived, to a limited extent, his right to seek the physical destruction of the records, and the town was entitled to disclosure of information to the extent necessary to defend against the false arrest claim. Although *State* v. *Anonymous* is not directly applicable here, it suggests that the records to be erased under § 54-142a include police investigative records. It confirmed that the fundamental purpose of the erasure statute is to "erect a protective shield of presumptive privacy for one whose criminal charges have been dismissed." Id., 516.

Other decisions construing the scope of § 54-142a establish that it does not preclude testimony by individuals with personal recollection of events reflected in erased records. For instance, in *State* v. *Morowitz*, 200 Conn. 440, 512 A.2d 175 (1986), a defendant challenged the use of testimony, in his trial for sexual assault, of a victim of a prior sexual assault. The defendant had been arrested for the prior assault but the charge had been dismissed after his successful completion of conditions of accelerated rehabilitation. He claimed that § 54-142a

barred the testimony of the prior victim because the charge had been erased. The Supreme Court disagreed, concluding that the trial court had carefully distinguished between testimony about the defendant's prior misconduct, based on the prior victim's personal recollection, and testimony about his arrest or prosecution or any records related to that prosecution. The court observed that "[t]here is no reference in the statute to disclosures by private parties or to matters extraneous to the records themselves." Id., 450. The court held that § 54-142a did not bar testimony based on personal knowledge, independent of erased records. Id., 451.

The Supreme Court has continued to distinguish between the use of erased *records* and the use of *testimony* based on personal recollection or sources other than erased records. In *Rado* v. *Board of Education*, 216 Conn. 541, 548-552, 583 A.2d 102 (1990), the court held that a board of education considering termination of a teacher could properly consider testimony by a police officer who had investigated allegations that the teacher had tampered with the school's telephone system, even though the teacher had been acquitted of the charges resulting from that investigation, because "the Erasure Act was not intended to obliterate memory or to exclude any testimony not shown to have derived from erased records." Id., 550.

In *State* v. *Apt*, 319 Conn. 494, 126 A.3d 511 (2015), the state sought to have the defendant's sentence for larceny in the third degree enhanced under General Statutes § 53a-40b because the defendant had committed the crime while he was released on bond following arrest for a number of other offenses. Before the hearing on the sentence enhancement took place, the records of the prior arrests were erased pursuant to § 54-142a, but the trial court allowed the

state to introduce records relating to those arrests to prove the factual basis for the sentence enhancement. The Appellate Court ruled that the trial court had improperly admitted the records and that the state could not seek to establish the basis for the sentence enhancement on remand because the records were erased. *State* v. *Apt*, 146 Conn. App. 641, 643, 648-50, 78 A.3d 249 (2013). On certification, the Supreme Court agreed that the erased records had been improperly admitted, but a majority of the court also concluded that § 54-142a did not "categorically preclude the state from seeking to establish the basis for the defendant's sentence enhancement in the present case by use of evidence other than the erased records." *State* v. *Apt*, supra, 319 Conn. 522-23. In reaching that conclusion, the court relied in part on § 54-142a (h), which provides that transcripts are not "court records" for purposes of § 54-142a. Id., 520.

In *Boyles* v. *Preston*, supra, 68 Conn. App. 596, the Appellate Court distinguished between physical evidence seized in a criminal case and records that are subject to erasure under § 54-142a. *Boyles* was a civil action "arising from alleged sexual harassment that resulted in the intentional and negligent infliction of emotional distress." Id., 598-99. The plaintiff in that civil action alleged that the defendant had engaged in a variety of inappropriate actions, including videotaping her without her knowledge or consent. In the course of a criminal investigation of those allegations, a videotape was seized from the defendant's home. The defendant was arrested but succeeded in having certain evidence, including the videotape, suppressed, and the criminal charges were then dismissed. In granting the motion to suppress, however, the trial court had specifically ordered the videotape preserved for possible use in a

civil proceeding. In the civil action, the defendant unsuccessfully sought to preclude admission of testimony about the videotape, claiming it was erased pursuant to § 54-142a. The Appellate Court disagreed, holding that the records erased by § 54-142a do not include evidence obtained by the police in the course of an investigation or the testimony of witnesses as to their personal recollection of events. Id., 610.

Boyles should be understood in the context of the law in effect when it was issued. The civil action in *Boyles* was commenced in 1995. See *Boyles* v. *Preston*, supra, 68 Conn. App. 600. Seven years before the *Boyles* action was commenced, the legislature amended the erasure statutes to allow disclosure of information from an erased file to the victim of the alleged crime for purposes of civil litigation. See Public Acts 1988, No. 88-278 (amending General Statutes § 54-142c (b)). In support of that amendment, its proponent in the House of Representatives explained that under the erasure statute, "even the Police Reports are closed, so there may be information that is necessary . . . to bring a civil action against a perpetrator of a crime, and that information may only be available in those reports, which are closed." 31 H.R. Proc., 1988 Sess., Pt. 14, p. 4904 (remarks of Representative Richard D. Tulisano). He stated that the amendment was intended to maintain the integrity of the erased files while allowing victims information that was necessary for a civil action. Id. Consequently, when the *Boyles* civil action commenced in 1995, the erasure statutes expressly allowed disclosure of information in an erased file to the victim for use in civil litigation. The 1988 amendment to § 54-142c (b) was not intended to overturn the general rule that police reports are erased after charges are

dismissed, but only to allow disclosure to the victim of the crime for the sole purpose of civil litigation.

This case, unlike *Boyles*, concerns a Freedom of Information Act request for the police records created during the investigation of the homicide. As the Supreme Court has observed, "the fundamental purpose of the records erasure and destruction scheme embodied in § 54-142a is to erect a protective shield of presumptive privacy for one whose criminal charges have been dismissed." *State* v. *Anonymous*, supra, 237 Conn. 516. The records request at issue goes to the core meaning of the erasure statute.

After reviewing the text of § 54-142a, the legislative history of its enactment and many amendments, and the cases construing it, the court concludes that the best available working definition of the scope of records erased under § 54-142a is that set out in *State* v. *West*, supra, 192 Conn. 496, and employed by the courts in *State* v. *Weber*, supra, and *Bramato* v. *Board of Firearms Permit Examiners*, supra. For the purposes of this case, where the subject's right to erasure vested in 1977, the erasure statute includes "transcripts, police reports, charging documents and other records covered by § 54-142a," including all records that disclose "when or where a person was arrested, the nature of or circumstances surrounding the crime charged or the names of witnesses from who further information may be obtained." *State* v. *West*, supra, 192 Conn. 496.

The standard used by the commission in its final decision on remand is substantially narrower than the *West* standard. The commission limited the scope of § 54-142a to "records

that expressly reference Reilly as an accused person, or that reveal his status as in custody, under arrest, or charged with the crime of homicide of Gibbons."

The commission argues that the law of the case should preclude judgment for the department in this case, because Judge Cohn previously approved the standard used by the commission in 2009. The law of the case doctrine, however, does not preclude this court from applying its own judgment in this different stage of the proceeding. "A judge is not bound to follow the decisions of another judge made at an earlier stage of the proceedings, and if the same point is again raised he has the same right to reconsider the question as if he had himself made the original decision." (Internal quotation marks omitted.) *Breen* v. *Phelps*, 186 Conn. 86, 98, 439 A.2d 1066 (1982). The standard approved by Judge Cohn, moreover, was based on the 2009 ruling by the commission, which applied a broader standard than that used by the commission in the 2016 decision at issue in this appeal. The standard used in 2009 encompassed "records that link the accused, directly or indirectly, to the underlying crime." That standard, while imprecise, would recognize as erased many of the records that the commission has now ordered to be disclosed.

It is of course well established that exceptions to the Freedom of Information Act are to be construed narrowly. See *Commissioner of Emergency Services & Public Protection* v. *Freedom of Information Commission*, supra, 330 Conn. 390. Nevertheless, there are cases in which the courts have concluded that another statute mandates confidentiality of *all* records of a particular type. For instance, in the statutes governing the sex offender registry, General

Statutes § 54-255 (a) permits a court to restrict the dissemination of "registration information" in certain circumstances, and General Statutes § 54-258 (a) (4) provides that "registration information the dissemination of which has been restricted by court order pursuant to section 54-255 . . . shall not be a public record and shall be released only for law enforcement purposes until such restriction is removed by the court . . . ." In a case involving a request for such restricted information, the commission concluded that "registration information" did not include certain information in the registry, including information otherwise contained in court records. The Supreme Court disagreed, concluding that the term "registration information," as used in General Statutes § 54-258 (a) (4), required that "*none* of the information in the registry is accessible to the public in the very few cases in which the court determines that the information should be restricted pursuant to § 54-258 (a) (4)." (Emphasis in original.) *Dept. of Public Safety* v. *Freedom of Information Commission*, supra, 298 Conn. 728. Similarly, in *Groton Police Dept.* v. *Freedom of Information Commission*, 104 Conn. App. 150, 160, 931 A.2d 989 (2007), the Appellate Court concluded that records from the registry of abuse and neglect findings maintained by the Department of Children and Families are exempt from disclosure under § 1-210 (a) because General Statutes § 17a-101k (a) expressly provides that "[t]he information contained in the registry and any other information relative to child abuse, wherever located, shall be confidential, subject to such statutes and regulations governing their use and access as shall conform to the requirements of federal law or regulations." In such cases, where the statutory language contains no exceptions or limited exceptions, the Supreme

Court has not hesitated to give effect to a legislative determination that a particular privacy interest outweighs the public interest in disclosure. In the case of the erasure statutes, the legislature has carefully delineated certain exceptions and certain purposes for which information in erased records may be disclosed. This case does not come within any of those statutory exceptions.

The commission argues that it would be nonsensical to apply a broad definition to the scope of erasure because erasure of the investigatory records would preclude prosecution of another person for the crime, if another suspect should be identified. Even the commission's own reading of the erasure statute, however, would hinder the prosecution of a subsequent suspect. The commission concluded that more than 8,000 pages of records were erased under § 54-142a. Should another suspect be arrested for the Gibbons homicide, the state would have a duty under *Brady* v. *Maryland*, 373 U.S. 83, 87, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963), to disclose to the accused evidence that was both favorable to the defense and material to the case. That duty is based in the federal and state constitutions' guarantees of due process. So long as the erased records have not been physically destroyed, however, the erasure statute could not bar their disclosure to satisfy the demands of the constitution. In *State* v. *Douglas*, 10 Conn. App. 103, 116, 522 A.2d 302 (1987), the Appellate Court concluded that '[t]he secrecy of the erasure statute must yield to the laser-like thrust of the defendants' constitutional rights."[27]

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[27] The decision in *State* v. *Douglas*, supra, 10 Conn. App. 116, was based primarily on a criminal defendant's constitutional right of confrontation. In *Douglas*, three defendants were tried

Although the constitutional rights of a subsequent defendant would take precedence over the statutory mandate of erasure, a serious impediment to a subsequent prosecution would arise if a person entitled to erasure requested the physical destruction of all police and court and prosecutorial records. That issue is not presented in this case; these records still exist. Nevertheless, the legislature may wish to consider an amendment to the erasure statute that would require the physical preservation of erased records until the expiration of the statute of limitations for the underlying crime and would expressly allow the disclosure of erased records to a defendant subsequently accused of the same crime, to the extent required by the constitution.

In this case, in the underlying proceeding before the commission, the complainant asserted that the case file included documents that did not refer to Reilly as the perpetrator of the homicide, including "photographs of the exterior of the house, photographs of the church across the street, sketch maps, photos of the victim's automobile, lists of investigators that worked on the case, local weather reports for the day of the crime, names of people who took

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together and convicted of attempted robbery and aiding in an assault. Before their trial, a codefendant was tried separately and was acquitted of the same charges. The defendants claimed that the trial court erred in failing to order the state to produce transcripts of the testimony given by the state's witnesses in the first trial after those same witnesses testified in the defendants' trial. The Appellate Court held that the trial court had erred in refusing to conduct an in camera review of the erased transcript to determine whether it contained material inconsistent statements by witnesses who testified in the defendants' trial. The Appellate Court remanded the case with direction to the trial court to conduct such an in camera review. *State* v. *Douglas*, 13 Conn. App. 685, 539 A.2d 155 (1988). On remand, the trial court found no material inconsistent statements, and on a subsequent appeal, the Appellate Court affirmed the convictions. *State* v. *Douglas*, 16 Conn. App. 206, 546 A.2d 971 (1988), cert. denied, 209 Conn. 817, 550 A.2d 1086 (1988).

polygraph tests, names of prosecutors and dates employed, statements of witnesses that do not contain reference to or identify Reilly, diagram of the crime scene, victim's death and birth certificates, photographs of crime scene evidence, and correspondence among state agencies."[28] The records reviewed in camera by the court include such records, most of which disclose information deemed erased under *West*. The records reviewed by the court consist primarily of police reports of the original homicide investigation and the reinvestigation after the accused was granted a new trial, while the charges against him remained pending. By way of example but not limitation, the records include reports of interviews and witness statements concerning the crime; reports concerning the investigation of possible motives for the homicide, including investigation into the relationship between the victim and the accused; reports of the investigation into the accused's opportunity to commit the crime, including the investigation concerning the accused's use of the victim's automobile on the night of the homicide and various police theories about the timing of the accused's arrival at home in relation to the time of the homicide; photographs of the victim and the crime scene; sketches of the crime scene; and forensic reports. It also contains police reports concerning other individuals who were both suspects and witnesses. A substantial number of these records should be deemed to be erased under the *West* standard because they disclose information about when or where the accused was arrested, the nature of or circumstances surrounding the crime charged, or the names of

[28] FIC 2013-586, Final Decision (September 24, 2014), p. 5, ¶ 28.

witnesses from who further information may be obtained.

Because the commission did not apply the correct standard, the court sustains the appeal in part. The case is remanded to the commission to review the records that it has ordered disclosed in light of the standard stated in *West* and to revise its order of disclosure accordingly. It should not order disclosure of transcripts, police reports, or "anything that discloses when or where a person was arrested, the nature of or circumstances surrounding the crime charged, or the names of witnesses from whom further information may be obtained pertains to the charge." *State* v. *West*, supra, 192 Conn. 496.

CONCLUSION

For the reasons stated above, the court concludes that the commission had jurisdiction to review the records in camera and to issue an order requiring disclosure of any records it may contain that are not erased, but the commission applied an incorrect standard in the review it conducted. The department's appeal is denied insofar as it challenged the commission's jurisdiction. The department's appeal is sustained insofar as it challenged the scope of erasure ordered by the commission. Judgment may enter for the plaintiff, and the case is remanded to the commission for further proceedings consistent with this decision.

BY THE COURT,

Sheila A. Huddleston

Sheila A. Huddleston, Judge