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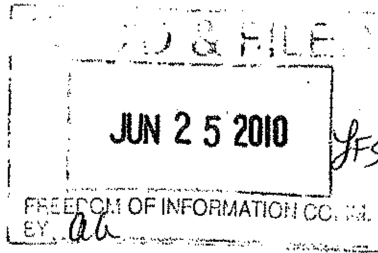

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SUPERIOR COURT

HHB CV 08 4019021S	:	SUPERIOR COURT
PICTOMETRY	:	JUDICIAL DISTRICT
V.	:	OF NEW BRITAIN
FOIC	:	JUNE 23, 2010

HHB CV 08 4019025 S	:	SUPERIOR COURT
DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	JUDICIAL DISTRICT
V.	:	OF NEW BRITAIN
FOIC	:	JUNE 23, 2010

HHB CV 08 4019024S	:	SUPERIOR COURT
DEPARTMENT OF PUBLIC WORKS	:	JUDICIAL DISTRICT
V.	:	OF NEW BRITAIN
FOIC	:	JUNE 23, 2010

MEMORANDUM OF DECISION

I
STATEMENT OF APPEAL

Before the court are three consolidated Uniform Administrative Procedure Act appeals, docketed as *Pictometry* v. *Freedom of Information Commission*, Docket No. HHBCV084019021S, *Department of Environmental Protection* v. *Freedom of Information Commission*, Docket No. HHBCV084019024S and *Department of Public Works* v. *Freedom*

of Information Commission, Docket No. HHBCV084019025S. The plaintiffs, Pictometry International Corporation (Pictometry), the commissioner of the state of Connecticut Department of Environmental Protection (DEP) and the commissioner of the state of Connecticut Department of Public Works (DPW), appeal from a September 3, 2008 final decision of the defendant Freedom of Information Commission (FOIC), ordering DEP to provide Stephen Whitaker, who had been granted intervenor status, with copies of Pictometry's "images, only, without any associated metadata or software," as described in paragraph 2.b of FOIC's final decision.[1] The three consolidated appeals share the same record and are disposed of in this single memorandum of decision.

II

BACKGROUND

The matter presented involves three consolidated administrative appeals from a final decision of the defendant FOIC. As detailed in FOIC's September 3, 2008 final decision, docket number FIC 2007-514, the genesis of the complaints was the denial of Whitaker's request of the DEP under the Freedom of Information Act (FOIA) for, *inter alia*, all

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[1] Pictometry, DEP and DPW are sometimes herein referred to as "the plaintiffs" when appropriate.

In *Pictometry* v. *Freedom of Information Commission*, Stephen Whitaker, DEP and DPW are named defendants in addition to FOIC. For purposes of this administrative appeal, however, the court references to FOIC as the defendant.

Pictometry imagery and the software required to view that imagery. The September 3, 2008 final decision of FOIC provides the following relevant facts.[2]

By e-mail sent July 5, 2007, the complainant, Stephen Whitaker, requested that the respondent Commissioner of DEP provide him with copies of: a. "All contracts with DEP and Pictometry, including DEMHS [Department of Emergency Management and Homeland Security] for Pictometry services, data and software; b. All Pictometry imagery and any software required to view the Pictometry images . . . ."

On August 24, 2007, DEP sent an e-mail to the complainant, providing a redacted copy of the contract requested by him. DEP claimed that some of the records requested by the complainant were exempt from mandatory disclosure as trade secrets and that others were protected by federal copyright law and available under the licensing agreement at a cost of $25 per image. DEP asked the complainant whether he wished to narrow the scope of his request for images, in light of the cost of nearly 300,000 images at $25 per image. DEP further advised the complainant that once the complainant narrowed his request for images, DEP would still need to seek a determination from DPW as to whether disclosure of the images requested by the complainant would constitute a safety risk.

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[2]ROR, 798-806.

DEP learned from the complainant that he decided not to narrow his request.

By letter of complaint dated and filed September 20, 2007, the complainant appealed to the Commission, alleging that DEP violated the Freedom of Information ("FOI") Act by failing to comply promptly and completely with his request for records. On September 28, 2007, DEP requested DPW's opinion of whether disclosure of the images posed a public security risk.

On January 25, 2008, DPW directed DEP not to disclose "Pictometry's software and GIS data of critical infrastructure and key resources that are not available to the public." DPW also directed DEP to withhold from disclosure "all of Pictometry's detailed oblique (angled) aerial photography images and the specialized software for zooming in for additional detail . . . ." FOIC conducted an evidentiary hearing on this matter on January 31, 2008, at which time DPW was added as a party by the FOIC hearing officer. A second FOIC hearing was held on March 27, 2008, to entertain the security risk issues argued by DPW and DEP.

Pictometry is a private corporation that provides specialized aerial photographic services throughout the United States. Pictometry's imaging processes capture georeferenced, high resolution oblique images (images at an angle that provide for a 3D-like view) and ortho images (looking straight down). The apparatus on the airplane that captures the images is

covered by a U.S. patent. The method of capturing the images, especially the oblique images, is the subject of a pending patent application.

Pictometry also generates metadata (individual data files that contain discrete information about corresponding images) at the moment an image is captured. The metadata contains such information as: time the image was captured, the angle at which the image was captured, and the position of the camera, expressed in terms of its latitude, longitude, altitude, and other characteristics.

Pictometry has developed and owns software that generates measurements utilizing the metadata. The measurements generated by the software are what makes Pictometry's product unique, useful and, therefore, valuable to the company. The precise georeferences make Pictometry's product attractive to its customers for its accurate measurements and great detail of the physical landscape.

Pictometry licensed DEP to install on the agency's computers the company's visual information system with respect to identified communities. The visual information system provided to DEP under the licensing agreement contains software, metadata, and images. The software, metadata, and images in the possession of DEP are the subject of the complainant's request for records.

With respect to the complainant's request for "[a]ll Pictometry imagery and any software required to view the Pictometry images," the respondents, before the FOIC, contended that the software, metadata and images are not public records, within the meaning of General Statutes § 1-200(5), because Pictometry retains its ownership interest in such materials pursuant to its licensing agreement. The respondents contended, in the alternative, that if the software and metadata are public records, then they are exempt from mandatory disclosure pursuant to General Statutes §§ 1-210(b)(5) and 1-210(b)(19) . The respondents contended that if the images are public records, they are exempt from mandatory disclosure pursuant to the Federal Copyright Act of 1976, 17 U.S.C. § 106.

FOIC found that the software, imagery, and metadata requested by the complainant are public records within the meaning of General Statutes §§ 1-200(5), 1-210(a), and 1-212(a). FOIC further found that the software and metadata constitute a 'trade secret' within the meaning of General Statutes § 1-210(b)(5), and, therefore, are exempt from mandatory disclosure. FOIC concluded that the respondents did not violate the FOI Act by withholding the software and metadata from the complainant.

As to the images, FOIC rejected the respondents contention that the Federal Copyright Act protects the images from mandatory disclosure pursuant to General Statutes § 1-210(a) which exempts all records "as otherwise provided by any federal law."

FOIC found that such records are protected by the Federal Copyright Act. FOIC, however, citing *Chief of Police* v. *Freedom of Information Commission*, 252 Conn. 377, 399, 746 A.2d 1264 (2000) and *Venetian Casino Resort* v. *Equal Employment Opportunity Commission*, 453 F. Supp. 2d 157, 166 (D. D.C. 2006), rev'd, 530 F.3d 925, 382 U.S. App. D.C. 12 (2008), FOIC, found that the Federal Copyright Act is not a 'federal law' that provides for the explicit confidentiality of records or some other similar shield from public disclosure. FOIC also noted the exceptions to the Copyright Act for affirmative disclosure requirements, which allow full public inspection of registered copyrighted documents and permit fair use of copyrighted material. FOIC acknowledged its Advisory Opinion #62, cited by the plaintiffs to support their claim that copyrighted records are exempt from the disclosure requirements of the FOI Act, pursuant to General Statutes § 1-210(a), but stated that its advisory opinion was issued before *Chief of Police* and *Venetian* were decided.

FOIC concluded that the Federal Copyright Act does not prohibit DEP from disclosing the records requested by Whitaker pursuant to its obligations under the FOI Act.

FOIC also found that the determination by the Commissioner of DPW that there was reasonable grounds to believe that disclosure of the records requested by the complainant may result in a safety risk was based on the assumption that not only the photographic images would be disclosed, but also the associated software and metadata. That without the software

and metadata, which provide detailed georeferencing, the oblique and ortho images remaining are high-resolution photographs of the physical landscape and the images alone reveal nothing that is not available from visible inspection or a photograph. FOIC concluded it is not reasonable to believe that disclosure of such images, without accompanying geo-references, may result in a safety risk, within the meaning of General Statutes § 1-210(b)(19).

The respondents contended that, pursuant to the licensing agreement, Pictometry will charge DEP $25/image for each copy of a Pictometry image that is beyond the scope of the licensing agreement, even if the software and metadata are not disclosed. FOIC found that the $25/image is in addition to the approximately $700,000 two-year licensing agreement and DEP contended that DEP is entitled to recoup that cost by charging the complainant for copies of the records he requested. It further found that the charge of $25 per image in addition to the $700,000 two-year licensing agreement would be an unreasonable charge and DEP is not entitled to recoup those costs by charging the complainant for disclosure.

Based on the facts and circumstances before it, FOIC concluded that the respondents violated the disclosure requirements of the FOI Act by failing to provide to the complainant copies of the images, only, of records requested. FOIC concluded its final decision by ordering "DEP shall forthwith provide to the complainant copies of the images, only, without any associated metadata or software. . . .at its minimum cost."

By appeals dated October 27, 2008, Pictometry, DEP and DPW appeal from the decision of FOIC ordering DEP to provide copies of Pictometry's copyrighted images at DEP's minimum cost as being in violation of federal and state statutory provisions, in excess of the statutory authority of the agency, clearly erroneous, arbitrary, capricious and an abuse of discretion.

III

DISCUSSION

The plaintiffs bring their appeals pursuant to General Statutes §§ 1-206 and 4-183, specifically § 1-206 (d) and § 4-183 (j). By virtue of FOIC's findings and orders in its final decision, aggrievement is found. *See State Library* v. *Freedom of Information Commission*, 240 Conn. 824, 832, 694 A.2d 1235 (1997).

A

Standard of Review

Resolution of these appeals is guided by the limited scope of judicial review afforded by the Uniform Administrative Procedure Act; General Statutes § 4-166 et seq.; to the determination made by an administrative agency. "We must decide, in view of all of the evidence, whether the agency, in issuing its order, acted unreasonably, arbitrarily or illegally, or in abuse of its discretion. . . . Conclusions of law reached by the administrative agency

must stand if the court determines that they resulted from a correct application of the law to the facts found and could reasonably and logically follow from such facts. . . . Although the interpretation of statutes is ultimately a question of law . . . it is the well established practice of this court to accord great deference to the construction given [a] statute by the agency charged with its enforcement. . . ." (Citations omitted.) *Rocque* v. *Freedom of Information Commission*, 255 Conn. 651, 658, 774 A.2d 957 (2001).

"Our review of an agency's factual determination is constrained by . . . § 4-183 (j), which mandates that a 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 . . . (5) clearly erroneous in view of the reliable, probative and substantial evidence on the whole record . . . . This limited standard of review dictates that, with regard to questions of fact, it is [not] the function of the trial court . . . to retry the case or to substitute its judgment for that of the administrative agency. . . . An agency's factual determination must be sustained if it is reasonably supported by substantial evidence in the record taken as a whole." (Citations omitted.) *Rocque* v. *Freedom of Information Commission*, supra, 255 Conn. 658-59.

"Cases that present pure questions of law, however, invoke a broader standard of review than is ordinarily involved in deciding whether, in light of the evidence, the agency has acted unreasonably, arbitrarily, illegally or in abuse of its discretion. . . . We have determined, therefore, that the traditional deference accorded to an agency's interpretation of a statutory term is unwarranted when the construction of a statute . . . has not previously been subjected to judicial scrutiny [or to] . . . a governmental agency's time-tested interpretation . . . . Consequently, an agency's interpretation of a statute is accorded deference when the agency's interpretation has been formally articulated and applied for an extensive period of time, and that interpretation is reasonable." (Citations omitted.) *Williams* v. *Freedom of Information Commission*, 108 Conn. App. 471, 476-77, 948 A.2d 1058 (2008).

B

Safety Risk

DPW raises a question of fact on appeal as to FOIC's determination of the safety risk in disclosing the images. In its final decision, FOIC states: "45. It is found that the determination by the Commissioner of DPW that there was reasonable grounds to believe that disclosure of the records requested by the complainant may result in a safety risk was based on the assumption that not only the photographic images would be disclosed, but also the associated software and metadata." (ROR, 805.) "46. It is found that without the software and

metadata, which provide detailed georeferencing, the oblique and ortho images remaining are high-resolution photographs of the physical landscape. It is found that the images alone reveal nothing that is not available from visible inspection or a photograph. . . . [I]t is not reasonable to believe that disclosure of such images, without accompanying geo-references, may result in a safety risk, within the meaning of § 1-210(b)(19), G.S." (ROR, 805.)[3]

In its appeal from FOIC's final decision, DPW argues that there are reasonable grounds to believe that the disclosure of the requested records may result in a safety risk, and as such, FOIC erroneously substituted its judgment for that of the DPW Commissioner in the application of General Statues § 1-210 (b) (19) to the records requested by Whitaker. DPW further argues that neither the hearing officer nor the FOIC reviewed any of the Pictometry images that were requested by Whitaker, that were reviewed by the DPW commissioner and were the bases of DPW's claimed exemption from disclosure, nor did FOIC administratively notice any expertise to determine whether disclosure of the images constituted a security and public safety risk.

FOIC argues that "[t]he administrative record in this case contains the barest of evidence to support DPW's sweeping directive not to disclose any of the hundreds of

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[3]FOIC found that the *software and metadata* constitute a "trade secret" within the meaning of § 1-210 (b) (5) and, therefore, are exempt from mandatory disclosure.

thousands of images that DEP maintains." FOIC maintains that disclosure of the images only, without software or metadata, poses no security risk, because someone in possession of only the images cannot make use of Pictometry's methods for measurement and zoom of the landscape, termed geo-references. FOIC further maintains that DPW opposition to disclosure of the images was based on the assumption that the images, software and metadata would all be disclosed, which was not ordered.

General Statutes § 1-210 (b) provides in relevant part: "Nothing in the Freedom of Information Act shall be construed to require disclosure of . . . (19) Records when there are reasonable grounds to believe disclosure may result in a safety risk . . . ."

"[T]he general rule under the [act] is disclosure, and any exception to that rule will be narrowly construed in light of the general policy of openness expressed in the [act]. . . . [Thus] [t]he burden of proving the applicability of an exception [to disclosure under the act] rests upon the party claiming it. (Internal quotation marks omitted.) *Ottochian* v. *Freedom of Information Commission*, 221 Conn. 393, 398, 604 A.2d 351 (1992)." *Director* v. *Freedom of Information Commission*, 274 Conn. 179, 187, 874 A.2d 785 (2005).

The record on appeal reveals letters from the commissioner of the Department of Corrections; (ROR, 814); the chairman of the Department of Public Utilities Control; (ROR, 816); and the commissioner of DEMHS; (ROR, 164); which provide evidence that *detailed*

information and *measurement capabilities* involved with Pictometry's materials could pose a safety risk. (ROR, 146, 161-62; 164; 341-52; 810-11; 813-17.)[4] There is, however, a dirth of evidence in the record that disclosure of the images alone, without the associated metadata and software, could reasonably result in a security risk, where the images alone do not provide for the ability to measure the landscape and enhance the zoom of the image for detail.

FOIC found that disclosure of images alone, "without accompanying geo-references," does not result in a safety risk within the meaning of § 1-210 (b) (19). Although there is evidence in the record regarding the disclosure of Pictometry imagery *and* software, combined, to produce detailed images with zooming capability which could pose a security risk, pursuant to § 4-183 (j), this court cannot substitute its judgment for that of FOIC as to the weight of the evidence on this question of fact, where FOIC only ordered the images disclosed, not the accompanying software or metadata. DPW's assertion of a safety risk blankets the entire set of images without providing FOIC with supporting evidence other than in generalities such as that detailed information about correctional facilities might aid a planned escape and terrorists

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[4]See, e.g., (ROR, 814) ("Individuals seeking to escape from a correctional facility or individuals who wish to aid and abet an escape would have *extremely detailed information* to help them accomplish this purpose.") (Emphasis added.) See also (ROR, 816) ("These oblique images, *in conjunction with* Pictometry's proprietary software . . . . The information from Pictometry's images *and* software is unique, comprehensive, detailed and it is not presently available from any public information source. . . .") (Emphasis added.)

could use the measurement capabilities to aid a terrorist attack . "Generalized claims of a possible safety risk do not satisfy the plaintiff's burden of proving the applicability of an exemption from disclosure under the act." *Director* v. *FOI Commission*, supra, 274 Conn. 183. "[W]ith regard to questions of fact, it is [not] the function of the trial court . . . to retry the case or to substitute its judgment for that of the administrative agency. . . . An agency's factual determination must be sustained if it is reasonably supported by substantial evidence in the record taken as a whole." (Citations omitted.) *Rocque* v. *Freedom of Information Commission*, supra, 255 Conn. 658-59.

Accordingly, DPW's appeal as to FOIC's factual determination of the safety risk of disclosure of the images alone, without accompanying software or metadata, is dismissed.

C

General Statutes § 1-210 (a) and The Federal Copyright Act

In its appeal from FOIC's final decision, Pictometry argues that disclosure and copying of images captured by it and licensed to DOIT is exempted by the language of General Statutes § 1-210 (a) which provides in relevant part: "Except as otherwise provided by any federal law or state statute, all records maintained or kept on file by any public agency, whether or not such records are required by any law or by any rule or regulation, 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 . . ." See also General Statutes § 1-211. (Disclosure of computer stored public records.)

The Federal Copyright Act, 17 U.S.C. § 106, provides in relevant part: "Subject to sections 107 through 122, the owner of copyright under this title has the exclusive rights to do and to authorize any of the following: (1) to reproduce the copyrighted work in copies or phonorecords; (2) to prepare derivative works based upon the copyrighted work; (3) to distribute copies or phonorecords of the copyrighted work to the public by sale or other transfer of ownership, or by rental, lease, or lending; . . . ."

FOIC found "the Federal Copyright Act . . . applies to the digital images that Pictometry provided to DEP pursuant to the licensing agreement." (ROR, 804.) Insofar as FOIC ordered that copies of the images be available to Whitaker, the protection of the copyright act is invoked.

Pictometry contends the images enjoy copyright protection pursuant to the Federal Copyright Act of 1976, 17 U.S.C. § 101, *et seq.* and that the Federal Copyright Act is a "federal law" within the meaning of § 1-210 (a).

FOIC argues that 17 U.S.C. § 101 *et seq* does not fall within the meaning of "any federal law" under § 1-210 (a) because that exemption is limited to laws that "by their terms, provide for confidentiality of records or some other similar shield from public disclosure."

FOIC found that Pictometry's metadata and software were exempt from disclosure as trade secrets pursuant General Statutes § 1-210 (b)(5) but that the digital images alone were not trade secrets and not exempt as such.[5] FOIC also found the digital images, although copyrighted, were not exempt from disclosure, including copying. because the language in § 1-210 (a) that "except as otherwise provided by federal law" refers to federal laws that by their terms provide for confidentiality of records or some other similar shield from public disclosure. (ROR, 804.)

"In deciding what the [Freedom of Information] Act requires, the court follows the plain language of the statute, if that language is unambiguous. "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 test and considering such relationship, the meaning of such test is plain and unambiguous and does not yield absurd or unworkable results, extratextual evidence of the

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[5] Substantial evidence, especially the testimony of Michael Neary, Vice Preseident of Administration at Pictometry, supports that finding and the conclusion that the digital images are not trade secrets.

meaning of the statute shall not be considered." (Internal quotation marks omitted.) *Director* v *Freedom of Information Commission,* 293 Conn. 164, 977 A.2d 148 (2009).

"The general rule under the [FOIA} is disclosure. Our legislature, however, has balanced this general rule with the need to exempt certain records from disclosure to the public. . . .[A]s provided by the first sentence of § 1-210(a), the act recognizes that federal law and other state statutes may exclude certain records." See *Commissioner* v. *Freedom of Information Commission,* 204 Conn. 609, 621-622, 520 A.2d 602 (1987).

Pictometry seems to argue that the images may be disclosed but may not be copied. This misconstrues the FOIA which grants members of the public the "right to (1) inspect . . . , (2) copy . . . , or (3) receive a copy of . . ." all records maintained or kept on file by any public agency. The plain language of the statute grants the public the right to inspect and copy or receive copies. That is what disclosure means. The Federal Copyright Act, however, does overlap with the FOIA in the sphere of the right to copy or receive copies.

No state trial or appellate court has addressed the precise issue in this case, whether the Federal Copyright Act is a federal law as contemplated by our legislature in General Statutes § 1-210(a).[6] FOIC in its final decision primarily relied on *Chief of Police v. Freedom of*

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[6]Respondents have referred the court to Advisory Opinion #62 (1985) which considered whether copyrighted building blueprints were exempt from the copying provisions of the FOIA. In that advisory opinion it concluded "that the Federal Copyright Act superseded the copying

Information Commission, 252 Conn. 377, 746 A.2d 1264 (2000). That case and other Connecticut cases which follow deal in the main with discovery issues, not copyrighted records. but they are instructive in analyzing the issue at hand, that is, whether the phrase "except as otherwise provided by any federal law" includes within its meaning the Federal Copyright Act.

In *Chief of Police*, the Supreme Court held that the language in question [otherwise provided by any federal or state law] does not include questions of discovery under the Federal Rules of Civil Procedure. Id., 398-99. The *Chief of Police* court was concerned with federal discovery rules and disclosure required by the FOIA. The Supreme Court's analysis of § 1-210 (a) included the following: "linking *a total federal exemption* from the disclosure provisions of

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provisions of the FOI Act." Advisory Opinion #62 also recognizes the potential copyright liability for a town providing copies that infringe on the copyright holder's exclusive rights. FOIC argues that this advisory opinion was made in 1985, is no longer of any consequence as a result of *Chief of Police*, is merely advisory and that its lack of use by FOIC belies its inapplicability. This court agrees. "[A]n agency's interpretation of a statute is accorded deference when the agency's interpretation has been formally articulated and applied for an extended period of time, and that interpretation is reasonable. Cf. *Connecticut Assn. of Not-for-Profit Providers for the Aging v. Dept. of Social Services*, supra, 390 n. 18 (finding no deference warranted to agency interpretation when agency had failed to make public declaration of interpretation and had applied interpretation for only four years)" (Internal quotation marks omitted.) *Longley v. State Employees Retirement Commission*, 284 Conn. 149, 163-64, 931 A.2d 890 (2007)." *Williams v. Freedom of Information Commission*, supra, 108 Conn. 477.

the act with a parallel reference to state statutes strongly suggests that the reference to 'federal law' was not intended to encompass federal litigation issues of discovery. It suggests, instead, a reference to federal and state law that, *by their terms*, provide for confidentiality of records or some other similar shield from public disclosure." (Emphasis added.) Id., 399. The court goes on to state that "the only references in the entire legislative history of the act to the language in question are consistent with the suggestion that it was intended to refer to other federal and state laws that by their terms shield specific information from disclosure." The court further explained that "the rules of discovery and the provisions of the act operate 'separately and independently' of each other." Id, , 396.

In *Director* of *Health Affairs Policy Planning* v. *Freedom of Information Commission*, 293 Conn. 164, 172, 977 A.2d 148 (2009), our Supreme Court addressed the question of "whether the legislature intended the phrase 'shall not be subject to discovery . . . .in any civil action, " to include in its meaning "shall not be subject to disclosure . . .in any action before the commission," and concluded it did not. "[T]he concept of 'disclosure' is related to '[t]he overarching legislative policy of the [act[" which favors 'the open conduct of government and free public access to government records. . . . Whereas "discovery is a tool by which a party may acquire information. . .." Again, they operate separately and independently.

In *Groton P.D.* v. *Freedom of Information Commision*, 104 Conn. App. 150, 931 A.2d 989 (2007), the Appellate Court upheld the trial court's conclusion that police records were not subject to disclosure because the confidentiality mandate set forth in General Statutes § 17a-101k [that records of child abuse, wherever located, are exempted from the general rule of disclosure] fell within the language "except as provided by any federal law or state statute," notwithstanding a more limited exemption from disclosure under General Statutes § 1-210(b)(3)(F).

In *Danaher* v. *Freedom of Information Commission*, Superior Court, judicial district of New Britain, Docket No. CV 08 4016067 (September 5, 2008, *Domnarski, J.*), the Court held that the federal FOI Act is not an express statement of confidentiality necessary to exempt records from disclosure pursuant to General Statutes § 1-210 (a) because the federal FOI Act's exemptions are not mandatory bars to disclosure.

These cases instruct that the court examine the sphere of operation of the statutes and that what is required of a federal law or state statute to exempt records from disclosure pursuant to General Statutes § 1-210 (a) is an express statement of confidentiality and/or a mandatory bar to disclosure. The Federal Copyright Act is not such a law. The Federal Copyright Act does not require confidential treatment by the government of copyrighted material, and it does not bar disclosure. Rather, it is a tool to restrict the manner in which copyrighted material is distributed

and reproduced. The copyright argument advanced by Pictometry is not that the digital images deserve confidential treatment, DEP and DPW security concerns aside, but that *copies* of Pictometry's digital images may not be provided to an unlicensed private party, Whitaker. The Copyright Act itself, however, contains affirmative disclosure requirements, codified at 17 U.S.C. § 107, which limit a copyright holder's exclusive rights where the copyrighted material is to be put to "fair use."[7] The FOIA and the Federal Copyright Act operate separately and independently.

Considering the plain meaning of the FOIA and the Federal Copyright Act, in light of the cited Connecticut cases and the decisions and advisory opinions from federal and state jurisdictions provided by FOIC in its brief[8], the court concludes that the Federal Coryright Act is not encompassed by the phrase "except as otherwise provided by federal law" because that act does not shield confidentiality or bar disclosure.

<u>FAIR USE EXCEPTON ARGUMENTS</u>

1. FOIC argues that Whitaker should have access to the copyrighted public records at issue

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[7]The Federal Copyright Act permits the reporduction of copyrighted materials for purposes in the public interest, "such as criticism, comment, news reporting , teaching . .. Scholarship, or research without liability for infringement." 17 U.S.C. §107.

[8] See, e.g. *Weisberg v. Department of Justice*, Civil No. 75, 1996 Slip op. At 5-6 (d.D.C. Feb 9, 1978); aff'd in part, vacated in part and remanded, 631 F. 2d 824 (D.C.Cir. 1980); also, Dept. Of Justice, Office of Information Policy, FOIA Update, Vol 4, No. 4, pp3-5 (1983).

pursuant to the "fair use" exception to copyright infringement under 17 U.S.C. § 107 because "providing access to public records is a fair use of copyrighted records" and "affirmative disclosure" is required, citing to a twenty-seven year old Department of Justice Office of Information Policy update. Having concluded that the copyrighted digital images are not exempt from disclosure pursuant to § 1-210(a), it is not necessary to address this argument.

Moreover, FOIC did not make a finding in its final decision that the images requested should be copied for Whitaker by DEP because of any specific factor as they are found in 17 U.S.C. § 107. Nor does the record reveal any other evidence indicating fair use for the requested documents. Rather, FOIC simply found that the records must be disclosed pursuant to the fair use exception arguing that the purpose for which the record is being requested is immaterial. Further, it is not apparent from the record that Whitaker has made a request for the copyright images pursuant to the fair use exceptions under 17 U.S.C. § 107, nor does Whitaker's brief, submitted for all three consolidated appeals, make any mention of fair use of the copyrighted materials.

2. DEP argues that "[t]he [FOIC]'s ruling was improper under the Supremacy Clause of the Constitution because in order to comply with the federal Copyright Act, the documents requested have to be used according to 'Fair Use' as defined in 17 USCS § 107 (2009) which determination is not permitted under the Connecticut FOIA." DEP argues that "courts tend to

look at the specific provisions of their state's Freedom of Information legislation in order to determine if the federal Copyright Act was violated," but that in any event state law is preempted to the extent that it actually conflicts with federal law.

Courts have been said to be under a duty to construe statutes harmoniously where that can reasonably be done. . . . If a court can by any fair interpretation find a reasonable field of operation for two allegedly inconsistent statutes, without destroying or preventing their evident meaning and intent, it is the duty of the court to do so. . . ." (Citations omitted; internal quotation marks omitted.) *Nizzardo* v. *State Traffic Commission*, 259 Conn. 131, 157, 788 A.2d 1158 (2002).

Requiring disclosure under the FOIA of the copyrighted digital images carries out the "the strong legislative policy in favor of open conduct of government and free public access to government records." *Board of Trustees v. Freedom of Information Commission*, 181 Conn. 544, 550, 436 A.2d 266 (1980) . Pursuant to § 1-210(b)(5), the exemptions contained in the FOIA for trade secrets afford a first line of protection to the legitimate proprietary and commercial interests of the copyright holder and mitigate any conflict with the Federal Copyright Act and its goals.

Requiring disclosure under the FOIA of the digital images does not conflict with the rights of Pictometry under the Federal Copyright Act or its contractual rights under the licensing

agreement. Should disclosure as ordered by the FOIC and use by Whitaker not fall within the "Fair Use" exception and infringe the copyright, matters not ripe for consideration here, Pictometry's rights and remedies for injunctive relief and damages under 17 U.S.C. §§ 502 and 504, respectively, remain intact. So too, its contractual rights and remedies.

COPYING COSTS

A further issue arises as to the reasonability of FOIC's order that DEP provide copies of the requested images to Whitaker "at its minimum cost."

DEP, through the Department of Information technology, negotiated the licensing agreement with Pictometry. Pursuant to that agreement, DEP must pay Pictometry $25 for each copy of a Pictometry image it would provide Whitaker, even if the software and metadata are not disclosed. FOIC's final decision provides that "the charge of $25 per image in addition to the $700,000 two-year licensing agreement would be an unreasonable charge and DEP is not entitled to recoup those costs by charging the complainant for disclosure. . . . DEP shall forthwith provide to the complainant copies of the images, only, without any associated metadata or software, as described in paragraph 2.b in the findings of fact, at its minimum cost."

DEP argues that "[e]ven if FOIC correctly ruled that the requested material should be distributed without the associated metadata, it incorrectly ruled that the Plaintiff should provide the records at a cost of $0.25 per image because that amount will unduly burden the state agency

and Conn. Gen. Stat. § 1-212(b) makes no mention of reasonability in allowing state agencies to recoup its costs."

It is well-settled precedent, however, that a public agency may not contract away its statutory obligations under the FOIA and any agreement that required a public agency to act contrary to state law is null and void. *Lieberman* v *Board aof Labor Relations*, 216 Conn. 253, 271 (1990). Given that DEP sought to recoup its $25 contractual obligation, it is not against the evidence that FOIC found, based on that reasoning, a $25 per image charge unreasonable. FOIC's order, on the other hand, only requires that Whitaker be charged by DEP "at its minimal cost." Copying costs are authorized and to be determined in accordance with the provisions of the FOIA, specifically sections 1-212 and 1-212(b) and 1-211(a). The FOIC's order requires no more and no less of DEP whose minimal costs are yet to be determined in accordance with those statutes.

FOIC's order was within its authority. It properly ordered DEP to provide Whitaker with copies of the digital images at DEP's minimal cost.

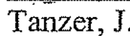
IV

CONCLUSION

For all of the above stated reasons, the appeals of the plaintiffs Pictometry and DEP, docketed *Pictometry* v. *Freedom of Information Commission*, Docket No. HHBCV084019021S

and *Department of Environmental Protection* v. *Freedom of Information Commission*, Docket No. HHBCV084019024S are dismissed.

DPW's appeal, docketed *Department of Public Works* v. *Freedom of Information Commission*, Docket No. HHBCV084019025S, as to FOIC's factual determination of the safety risk of disclosure of the images alone, without accompanying software or metadata, is dismissed.



Tanzer, J. 6/23/10