FIC# 2013-011
FIC# 2011-370
AHJ: PSP

DOCKET NO. HHB CV 12-6017045 S	:	SUPERIOR COURT
OFFICE OF CORPORATION COUNSEL OF THE CITY OF DANBURY AND CITY OF DANBURY	:	JUDICIAL DISTRICT OF NEW BRITAIN
V.	:	
FREEDOM OF INFORMATION COMMISSION, ET AL.	:	AUGUST 23, 2013

MEMORANDUM OF DECISION

This case is an appeal from the June 13, 2012, decision of the defendant, Freedom of Information Commission (FOIC), ordering the plaintiffs, Corporation Counsel of the City of Danbury and the City of Danbury (Danbury), to disclose certain personnel records of city employees, or portions thereof, to the intervenor defendant, Attorney Elisabeth Maurer. The records request was made in connection with certain employment litigation for a client then pending in federal court. The federal case has concluded, but the Freedom of Information Act litigation continues. Danbury argues, *inter alia*, that the records are exempt from disclosure pursuant to General Statutes § 1-210(b)(2). For the following reasons, the court dismisses the appeal and affirms the decision of the FOIC, for the most part, and remands the case for further proceedings in certain particulars as set forth at the conclusion of this decision.

I

Appeals from the decisions of the Freedom of Information Commission are available pursuant to the Uniform Administrative Procedure Act (UAPA). General Statutes § 1-206(d). In a UAPA appeal, it is not the function of the court to retry the case. The facts before the court are ordinarily confined to those that were in the record of proceedings before the agency. General Statutes § 4-183(i). The court cannot substitute its judgment for that of the agency as to the weight of the evidence on questions of fact, and it is required to affirm the decision of the agency unless the court finds that substantial rights of the person appealing have been prejudiced under certain well-defined criteria. General Statutes § 4-183(j). "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; internal quotation marks omitted.) *Rocque v. Freedom of Information Commission*, 255 Conn. 651, 659, 774 A.2d 957 (2001). Where the main issue turns not so much on the agency's findings of fact, but on its interpretation of the legal requirements under the pertinent statutes and regulations, deference to the agency's interpretation is also merited sometimes. "[C]ourts should accord great deference to the construction given the statute [and regulation] by the agency charged with its enforcement. [W]here the governmental agency's time-tested interpretation is reasonable, it should be accorded great weight by the courts." (Internal quotation marks omitted; citations omitted) *Anderson v. Ludgin*, 175 Conn. 545, 555-56, 400 A.2d 712 (1978); accord, *Longley v. State Employees Retirement Commission*, 284 Conn. 149, 162-67, 931 A.2d 890 (2007). However,

where an agency's determination of a question of law has not previously been subject to judicial scrutiny, is not so time-tested, and where the case presents a pure question of law, no deference is due. See, e.g., *Autotote Enterprises, Inc. v. State, Div. of Special Revenue,* 278 Conn. 150, 154, 898 A.2d 141 (2006); *Williams v. Freedom of Information Commission,* 108 Conn. App. 471, 478, 948 A.2d 1058 (2008); *Plastic Distributors, Inc. v. Burns,* 5 Conn. App. 219, 225, 497 A.2d 1005 (1985) citing *Wilson v. Freedom of Information Commission*, 181 Conn. 324, 342-43, 435 A.2d 353 (1980).

To the extent that the issues in this case involve applying the well-settled law concerning application of General Statutes § 1-210(b)(2) to the facts of this particular case, the appropriate standard of review is whether the FOIC's factual determinations are reasonably supported in the record as a whole. *Rocque v. Freedom of Information Commission*, 255 Conn. 651, 659-60, 774 A.2d 957 (2001). To the extent that novel issues of law are presented, the review is *de novo*. *Department of Children and Families v. Freedom of Information Commission*, 48 Conn. App. 467, 471, 710 A.2d 1378 (1998).

II

The record in this case reveals the following pertinent facts: By letter dated February 16, 2011, the complainant, Attorney Maurer, made a 22-part request to Danbury seeking thousands of personnel records from the city in connection with certain employment litigation for a client then pending in federal court. This was her third request. Danbury objected to the disclosure of

a majority of the requests. Attorney Maurer filed a complaint with the FOIC specifically requesting public disclosure of the following items pertinent to this appeal:

1. A copy of the pension application of the following persons … [Kenneth Ackell, Kenneth Altberg, Charles Ballard, Ronald Bowers, Robert Blantin, Thomas Burke, Phillip Curran, Randy Esposito, Richard Gerlach, Sr., George Gomez, Ronald Hollister, Douglas Howley, Douglas Lyle, Bruce Micalik, Gary Moline, Michale Pascuzzi, James Patton, James Pearce, Mark Perry, Michael Speed, Kevin Sullivan, James Thorne, Edward Vachobetz, Robert Vosburgh]…. This request includes but is not limited to all medical reports and records, all correspondence, all pension applications, all pension board records, all requests for documents, all e-mails, and all personnel documents.
2. A copy of the sick leave or injury leave requests or applications of the [24 individuals listed in section 1 above].
3. A copy of all records or reports … performed … in connection with pension, sick leave or injury leave requests or applications by any Danbury City employee from January 1, 2005 through January 1, 2010 by the following medical providers: Thomas Landino, Ph.D, Walter Borden, M.D., Mark Rubenstein, M.D., Ruth Light, M.D., Roger J. LaGratta, M.D., Jose Mendez, M.D., Michael L. Stern, Ph.D, Ronald A. Ripps, M.D., James Flint, M.D., Jacob N. Mushaweh, M.D., Daniel N. Fish, M.D., Donald R. Grayson, M.D., Lynn Beinfield, M.D., Mark Ligorski, M.D., David

W. Mader, D.P.M., Howard B. Kaplan, M.D., Michale G. Brand, M.D., Ghazi Asaad, M.D., Matthew J. Klein, M.D., Martin J. Krathamer, M.D., James Flint, M.D., John Shine, M.D., Jay A. Lasser, M.D., J. Shield, M.D., Stephen A. Torrey, M.D., Kent J. Kilbourn, PA-C, Michael Luberit, PA-C, William Keith Shafto, PA-C and Pankaj Chidwal, PT, MS.

Danbury supplied the FOIC with 1,888 pages of records responsive to the requests in categories 1 and 2 above for *in camera* inspection[1]. It supplied no records in response to the request in category 3, protesting that the request was unreasonably burdensome because it had no searchable database for such records and it would need to review the file of each and every current and former employee, including retirees, to determine who was treated by a particular medical professional.

With respect to the category 3 items, the FOIC found Danbury's excuse for non-disclosure to be invalid and ruled that Danbury violated the FOI Act by failing to provide the complainant with any records responsive to the request. With respect to the category 1 and 2 requests, the FOI conducted an exhaustive analysis of each document supplied, except for six documents that were not addressed, and rendered orders requiring disclosure of all or part of the records addressed. The FOIC concedes that the six documents not addressed were inadvertently overlooked.

[1] Each page was Bates stamped commencing with document "FOIC 2011-370-1." All documents continue to be so referenced.

Danbury has complied with all of the FOI orders with respect to the records in categories 1 and 2, and it has supplied the Attorney Maurer with those records, except that it has made certain additional redactions, not authorized by the FOIC, in 794 of those records. It is those 794 records that were disclosed with unauthorized redactions (and supplied to the court and parties on a CD-R compact disc dated November 28, 2012), and the category 3 records never disclosed, which are the primary subjects of the instant case.

The federal case, which was the original motivation for the records request, has concluded, but the Freedom of Information Act litigation continues.

III

A preliminary matter to be decided is whether Danbury is aggrieved by the decision of the FOIC. Aggrievement is a jurisdictional prerequisite to any administrative appeal, and the court must find whether a plaintiff is aggrieved before it can proceed to the merits of the case. See General Statutes § 4-183(a). With respect to FOIC appeals, it has been held that when the FOIC finds that a governmental agency violated the Freedom of Information Act, the agency is aggrieved for purposes of appeal because failure to comply with the FOIC order can result in criminal and civil sanctions. See *State Library v. Freedom of Information Commission,* 240 Conn. 824, 834, 694 A.2d 1235 (1997); *Davis v. Freedom of Information Commission*, 47 Conn.Sup. 309, 312 790 A.2d 1188 (2001), aff'd., 259 Conn. 45, 787 A.2d 530 (2002).

In the instant case, the FOIC found that the Danbury violated the Freedom of Information Act in particulars. Therefore, the court finds that Danbury is aggrieved.

IV

The FOI Act generally provides 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 … or … receive a copy of such records…." General Statutes § 1-210(a). There are exceptions to this general rule. The exception relevant to the instant case is contained in General Statute § 1-210(b)(2), which provides, in pertinent part: "Nothing in the Freedom of Information Act shall be construed to require disclosure of …[p]ersonnel or medical files and similar files the disclosure of which would constitute an invasion of personal privacy." "When a claim for exemption involves [§ 1-210(b)(2)] the plaintiffs must meet a twofold burden of proof … First, they must establish that the files in question are within the categories of files protected by the exemption, that is, personnel, medical or 'similar' files. Second, they must show that disclosure of the records would constitute an invasion of personal privacy." (Citations omitted; internal quotation marks omitted,) *Perkins v. Freedom of Information Commission*, 228 Conn. 158, 168, 635 A.2d 783 (1993); accord, *Rocque v. Freedom of Information Commission*, supra, 255 Conn 661-62; *Tompkins v. Freedom of Information Commission*, 136 Conn. App. 496, 46 A.3d 291 (2012). The burden of establishing the applicability of the exemption clearly rests upon the party claiming the exemption. *Connecticut Alcohol and Drug Abuse Commission v. Freedom of*

Information Commission, 233 Conn. 28, 43, 657 A.2d 650 (1995). The FOIC found that the identifiable records in this case, the disclosure of which were objected to by the employees involved, consisted primarily of physical examination reports, hospital records, work status reports, employer accident or injury reports and supervisor's reports and investigations associated with workers' compensation claims, return to work notices, verifications of disability notices and absence records, excused absence records, work capacity reports, fit and unfit for duty notifications, certificates of care, employer inquiries to medical professionals, notices of retirement and pension request, employer requests for medical evaluations, pension board's evaluator's summary forms and independent medical examination reports. It found that those records constituted personnel, medical or 'similar' files. That finding was clearly correct[2]. The parties are in disagreement as to whether the agency correctly ordered disclosure of all or parts of the records. The issues are discussed seriatim:

[2] The intervening defendant, Attorney Maurer, argues that the records are not medical or similar documents because there is no doctor-patient relationship, the records were not produced for medical treatment, the records were created to help the employer make an administrative decision, that sick leave, injury leave and workers' compensation applications are not medical records and that IME subjects were informed that no doctor-patient relationship existed. The court is not persuaded. The argument ignores the full language of the statute. The statute addresses "personnel or medical files and similar files." Employing the commonly approved usage of the language, as we must pursuant to General Statutes § 1-1(a), "personnel" means "[t]he people employed by or active in an organization, business or service," "medical" means "[r]equiring treatment by medicine," and "similar" means "[h]aving a resemblance in appearance or nature; alike though not identical." The American Heritage Dictionary (5th Ed. 2011). The request in this case was for records filed by or on behalf of employees with the city regarding pension, sick leave or injury requests or applications. The records contain medical information about the employees, including their injuries, conditions, diagnoses, medical procedures and medications. In many instances, the information was supplied by or came from the employee's physician. The record supports the finding that they were "[p]ersonnel or medical files and similar files" under the commonly approved useage of the language. The records contain material that, under ordinary circumstances, would be found in a medical or personnel file. *Connecticut Alcohol and Drug Abuse Commission v. Freedom of Information Commission*, 233 Conn. 28, 41, 657 A.2d 650 (1995). The material is similar in nature. *Almeida v. Freedom of Information Commission*, 39 Conn. App. 154, 158, 664 A.2d 322 (1995).

A

As mentioned above, the FOIC inadvertently missed making decision on six documents, identified by the plaintiffs in paragraph 22 of their amended complaint: Items 352, 1046, 1058, 1395, 1626 and 1635. Where dispositive issues have not yet been addressed by the administrative agency, it is appropriate for the court to remand the matter for further decision making before engaging in judicial review. See, e.g., *Groton Police Department v. Freedom of Information Commission,* 104 Conn.App. 150, 153, 931 A.2d 989 (2007). A remand is appropriate in the instant case with respect to those records. Accordingly, the court remands the case for analysis and disposition of the six records identified by the plaintiffs in paragraph 22 of their amended complaint: Items 352, 1046, 1058, 1395, 1626 and 1635.

B

The FOIC ordered 213 personnel records, some of which are identified in paragraph 23 (a)-(g) of the plaintiffs' amended complaint, to be disclosed in their entirety because the subject of those records, Thomas Burke, Robert Blantin, Michael Pascuzzi, Douglas Lyle, Bruce Michalek, James Patton and James Pearce, did not object to the request for disclosure.

Whether the employee objected is significant because the statutory regime on point provides as follows:

> (b) Whenever a public agency receives a request to inspect or copy records contained in any of its employees' personnel or medical files and similar files and the agency reasonably believes that the disclosure of such records would legally constitute an invasion of privacy, the agency shall immediately notify in writing

(1) each employee concerned, provided such notice shall not be required to be in writing where impractical due to the large number of employees concerned and (2) the collective bargaining representative, if any, of each employee concerned. Nothing herein shall require an agency to withhold from disclosure the contents of personnel or medical files and similar files when it does not reasonably believe that such disclosure would legally constitute an invasion of personal privacy.

(c) A public agency which has provided notice under subsection (b) of this section shall disclose the records requested unless it receives a written objection from the employee concerned or the employee's collective bargaining representative, if any, within seven business days from the receipt by the employee or such collective bargaining representative of the notice or, if there is no evidence of receipt of written notice, not later than nine business days from the date the notice is actually mailed, sent, posted or otherwise given. Each objection filed under this subsection shall be on a form prescribed by the public agency, which shall consist of a statement to be signed by the employee or the employee's collective bargaining representative, under the penalties of false statement, that to the best of his knowledge, information and belief there is good ground to support it and that the objection is not interposed for delay. Upon the filing of an objection as provided in this subsection, the agency shall not disclose the requested records unless ordered to do so by the Freedom of Information Commission pursuant to section 1-206. Failure to comply with a request to inspect or copy records under this section shall constitute a denial for the purposes of section 1-206. Notwithstanding any provision of this subsection or subsection (b) of section 1-206 to the contrary, if an employee's collective bargaining representative files a written objection under this subsection, the employee may subsequently approve the disclosure of the records requested by submitting a written notice to the public agency.

General Statutes § 1-214(b) and (c)

The record reveals that the prescribed notices were sent to all employees and unions involved. Danbury does not claim that the unions objected on behalf of Thomas Burke, Robert Blantin, Michael Pascuzzi, Douglas Lyle, Bruce Michalek, James Patton or James Pearce.

Mr. Burke did not object, but Danbury argues that was because he is deceased. Mr. Lyle, Mr. Michalek, Mr. Pearce and Mr. Patton also did not object. Danbury argues that was because they, too, are deceased; however, objections were filed on their behalf by women with the same last name. Danbury argues that they qualify as "next of kin" who can object on behalf of the deceased. The FOIC made no findings as to whether any of the above were deceased or whether the persons who filed objections on their behalf were "next of kin." Assuming that they are deceased, and that some next of kin did object, the disclosure of the requested records would not be an invasion of personal privacy under General Statutes § 1-210(b)(2) because no such privacy right exists with respect to the deceased. *Freedom of Information Officer v. Freedom of Information Commission*, Superior Court, judicial district of New Britain, Doc. No. CV 12-6015969 (April 29, 2013, Cohn, J.), appeal pending, A.C. 35662. Generally, "an action for invasion of privacy can be maintained only by a living individual whose privacy is invaded." 3 Restatement (Second) Torts, § 651 I. The right of privacy is based on injury to feelings and sensitivity which, absent a statute, extinguishes on death. See, generally B. W. Sanford, *Libel and Privacy* (2nd Ed., 2013 Supp.) § 11.3.10; see, e.g., Public Acts 2013, No. 13-311 §§ 3 and 4 (exempting certain photographs and audio tape descriptions of murder victims from FOIA disclosure). Danbury identifies no applicable statute that extends privacy rights after death

applicable to this case. Additionally, it has been held that "family members of the deceased have no standing to receive notice of an FOIC hearing, let alone to object or otherwise be heard at the hearing." *Galvin v. Freedom of Information Commission*, 201 Conn. 448, 461, 518 A.2d 64 (1986). Accordingly, the court finds no error in the FOIC decision on this ground.

With regard to Robert Blantin, the FOIC found that he, too, did not object to the records request. Danbury argues that his failure to object should be excused because he filed an objection to an earlier, virtually identical request. The agency made no findings as to the earlier request and objection. Assuming that he did file an earlier objection, the earlier objection was not relevant. This case concerned the Attorney Maurer's February 16, 2011, records request only.

C

The FOIC found that Danbury violated the FOI Act by failing to provide any records responsive to the request in category 3. Danbury argues that it could not respond because it "has no way of determining whether any specific employee underwent treatment by the listed medical professionals, or if any medical service was provided at all to current or past employees.... In order to comply with this request, plaintiff's staff would have to review the file of each and every current and former employee, including retirees, to determine who was treated by a particular medical professional." Plaintiffs' Brief, p. 12. Danbury argues that type of search would be unreasonably burdensome.

It has been stated that an agency need not honor a request that requires an unreasonably burdensome search, and that it is the requestor's responsibility to frame requests with sufficient particularity to ensure that searches are not unreasonably burdensome. *Connecticut Department of Public Safety v. Freedom of Information Commission*, Superior Court, Doc. No. CV 96-60565901 (August 25, 1997, McWeeney, J.) aff'd as to result only, 247 Conn. 341, 720 A.2d 1111 (1998). On the other hand, it has been held more recently that a records request that is simply burdensome does not excuse an agency from its obligations under the FOI Act. *Wildin v. Freedom of Information*, 56 Conn. App. 683, 687, 746 A.2d 175 (2000). In the instant case, the agency determined that Danbury is required to comply with the request even if it is time consuming. This court agrees. The request in the instant case would certainly be time consuming, but not necessarily unreasonably burdensome. There is no evidence in the record that confirms that a request for those certain pension, sick leave or injury leave records during that certain time period would require a search of every employee record. The need is not self-evident. "[U]nsupported conclusory allegations of counsel are not evidence and are insufficient for the application of an exemption from disclosure." (Citation omitted.) *Perkins v. Freedom of Information Commission*, supra, 228 Conn. 176. To the contrary, the record shows that a preliminary screen narrowed the field to 400 names. Record, p. 31. It is likely that further screening or polling could have narrowed the search further.

D

Next, Danbury argues that even if no objections were filed on behalf of certain individuals, the city itself should be able to assert objections on behalf of any employee or former employee as a matter of public policy. It argues that it should be able to assert an objection on behalf of the individuals in this case because disclosure would violate the individual's personal privacy, and it could leave Danbury open to liability under Connecticut common law for disclosing privileged information. It argues that such a public policy can be found in various common law principles and state statutes that codify or create certain doctor, psychiatrist, psychologist, therapist and other health professional-patient privileges. In particular, it points to Public Acts 2011, No. 11-242 § 37 which added a provision to the FOI Act exempting "communications privileged by the … marital relationship, clergy-penitent relationship, doctor-patient relationship, therapist-patient relationship or any other privilege established by the common law or the general statutes…" from disclosure under the FOI. See General Statutes § 1-210(10).

The court is not persuaded. As a general rule, any common law, statutory or constitutional right or privilege can be waived. See *New Haven v. Local 884, Council 4, AFSCME, AFL-CIO*, 237 Conn. 378, 385, 677 A.2d 1350 (1996). General Statutes § 1-214(b) and (c) provides the mechanism by which Danbury can, indeed must, communicate with the holder of the privileges or privacy interests in issue in the instant case, in effect, to give that individual an opportunity to assert his or her objection or waive it. See *Groton Police*

Department v. Freedom of Information Commission, supra, 104 Conn. App. 161. There is nothing identified in the language or legislative history of Public Act 11-242 which repeals General Statutes §§ 1-210(b)(2) or 1-214(b) and (c) either expressly or by implication. Moreover, there is no public policy violation in this case. To the contrary, "[t]he overarching legislative policy … is one that favors the open conduct of government and the free access to government records…" *Pane v. City of Danbury*, 267 Conn. 669, 679, 841 A.2d 684 (2004), overruled in part on other grounds, *Grady v. Somers*, 294 Conn. 324, 349, 384 A.2d 684 (2009). "[T]he fact that a [government] personnel file … or a medical file includes information about the incapacity of a … public official to perform his or her duties because of an illness that would be considered highly offensive to a reasonable person would not preclude its disclosure if such information were determined to be of legitimate public concern." *Perkins v. Freedom of Information Commission*, supra, 228 Conn. 174.

The intervening defendant, Attorney Maurer, argues, on the other hand, that none of the subjects have a reasonable expectation of privacy in their records because they voluntarily waived any such privacy by filing their records with the city, a deliberative public body. That argument is also not persuasive. The expectation of privacy is affirmed and delineated by General Statutes § §1-210(b)(2); *Kureczka v. Freedom of Information Commission*, 228 Conn. 271, 280, 636 A.2d 777 (1994). That statute controls disclosure, not public policy or file location. Waivers are ascertained pursuant to the procedures set forth in General Statutes § 1-214(b) and (c). *Groton Police Department v. Freedom of Information Commission,* supra.

E

Danbury also argues that public policy weighs against allowing the broad FOI request in this case because it was made solely for the purpose of ongoing litigation. It complains that the request by Attorney Maurer was a proverbial "fishing expedition" in connection with a lawsuit, brought on behalf of a client against the city, and that case, *Gerlach v. Danbury*, Doc. No. 3:09-cv-1950 (JCH), has since been dismissed. It argues that "the FOI was not designed to permit such clearly abusive requests that waste taxpayer money...." Plaintiffs' Brief, p. 17. The court is not persuaded. Attorney Maurer's motivation for continuing the litigation is irrelevant as to her right to information from the government. Her motivation is irrelevant "because the act vindicates the public's right to know, rather than the rights of an individual." (Citation omitted.) *Chief of Police v. Freedom of Information Commission*, 252 Conn. 377, 387, 746 A.2d 1264 (2000); *Groton Police Department v. Freedom of Information Commission*, supra, 104 Conn. App. 165. Litigants against governmental agencies routinely investigate facts utilizing both interrogatories and requests for production under court discovery rules and by applications under the FOI Act. The fact that the applicant might also be a litigant (or his attorney) "does not by itself strip him of his rights under the [FOI] act." *Chief of Police v. Freedom of Information Commission*, supra, 252 Conn. 397. The fact that the lawsuit that was the source of the need for the information has since been dismissed might be a practical reason for dropping an FOI request. Nevertheless, the status of the lawsuit is irrelevant. Open government comes at a cost. Whether it is a waste of taxpayer money is an issue for the legislature, not this court. There are

remedies for FOI appeals found to be pursued frivolously, without reasonable grounds or solely for the purpose of harassing the governmental agency. General Statutes §§ 1-206(b)(2); 1-241. Those remedies can be utilized in appropriate cases.

The plaintiffs further cite *Sobocinski v. Freedom of Information Commission*, 213 Conn. 126, 566 A.2d 703 (1989) in support of their argument that they should not have to pay for such a broad fishing expedition, especially where, as here, the underlying litigation is no longer pending and was resolved in favor of Danbury. In that case, a plaintiff sought information in a discovery request in a pending lawsuit, and she sought the same information in an FOI request. The FOIC denied the application and the plaintiff appealed to court. The court in the *Sobocinski* case dismissed the case for mootness because the plaintiff had withdrawn her underlying lawsuit. However, that case was based on the particular language of General Statutes § 1-19b(b) [now 1-213(b)(1)] that has since been amended. Where it previously provided that nothing in FOI Act shall be deemed to "affect the right of litigants," it now provides that nothing in the FOI Act shall "limit the rights of litigants." Public Act 1994, No. 94-236. The change removed any impediments on FOI requests when discovery rights were available. Thus, the decision in that case is inapposite and obsolete. Moreover, an information request is not moot when the applicant has interests in the information aside from the litigation. See *Ann Stanley's Appeal from Probate*, 80 Conn. App. 264, 267-68, 834 A.2d 773 (2013). That appears to be the case here.

F

Plaintiffs next argue that the FOIC misapplied the legal tests required of personnel and medical records under the FOI Act and thereby erred in requiring disclosure, with or without some redactions, of the rest and remainder of the records, identified in paragraphs 23(h) – (m) of their amended complaint.

As previously noted, the FOI Act excuses disclosure of the personnel or medical files and similar files if disclosure would constitute an invasion of personal privacy. The subject records consist of personnel or medical files or similar files. The parties fundamentally disagree as to whether the ordered disclosure would constitute an invasion of personal privacy. Under *Perkins v. Freedom of Information Commission, supra*, "the invasion of personal privacy exception of [§ 1-210(b)(2)] precludes disclosure ... only when the information sought by a request does not pertain to legitimate matters of public concern *and* is highly offensive to a reasonable person." (Emphasis added.) Id. at 175. This is to be judged "from the vantage point of an objective, ordinary reasonable person." Ibid.

The court has reviewed the FOIC orders with respect to the specific documents contested by the plaintiffs and finds that, for the most part, the agency correctly applied the law to each record and its factual findings are reasonably supported by the record as a whole. Disclosure would not be highly offensive to a reasonable person. The information is not embarrassing or humiliating. *First Selectman v. Freedom of Information Commission*, 60 Conn. App. 64, 68, 758 A.2d 429, cert. denied 255 Conn. 922, 763 A.2d 1041 (2000). They are matters of legitimate public interest. *Tompkins v. Freedom of Information Commission*, supra. Except as

follows, its decisions are affirmed as to each item. To the extent that the agency ordered disclosure of items 430, 431, 581, 1420, 1480, 1481, 1482, 1685, 1686, 1703, 1704, 1747 and 1748 without redactions, the court finds that the agency erred. Those records contain descriptive information about events or their effects on the employee which are highly personal and sensitive. Disclosure of that kind of information is not required. *Rocque v. Freedom of Information Commission*, supra 255 Conn. 665-66. The public has no legitimate interest in that type of information. *Director, Retirement and Benefits Services Division v. Freedom of Information Commission*, 256 Conn. 764, 777, 775 A.2d 981 (2000). That content should be redacted from the records. The case shall be remanded with respect to those thirteen items: Items 430, 431, 581, 1420, 1480, 1481, 1482, 1685, 1686, 1703, 1704, 1747 and 1748.

G

Plaintiffs' next argument is that public disclosure of the records sought should be denied because disclosure would constitute a violation of both the due process clause of the fourteenth amendment to the United States constitution and Article first, § 8 of the constitution of Connecticut. Those constitutional rights, if they apply, belong to the persons who are the subjects of the records. Danbury is not the subject of the records. Danbury, therefore, is not eligible to raise those claims. Our Supreme Court has "uniformly resisted the efforts of litigants to assert constitutional claims of others not in a direct adversarial posture before the court .... Under long established principles, a party is precluded from asserting the constitutional rights of

another." (Citations omitted; internal quotation marks omitted.) *Superintendent of Police v. Freedom of Information Commission*, 222 Conn. 621, 630, 609 A.2d 989 (1992).

H

Next, plaintiffs argue that disclosure of the challenged records would also violate the Americans with Disabilities Act, 42 U.S.C. § 12101 et seq., the Family Medical Leave Act, 29 U.S.C § 2601, et seq. and the Connecticut Fair Employment Practices Act, General Statutes § 46a-51 et seq.

Plaintiffs argue that those acts require protection for employee medical records maintained by an employer, including a requirement that such records be maintained in separate and designated sections apart from regular personnel documents. It argues that it is counterintuitive that the FOIC's final decision denies the high degree of confidentiality and privacy protections granted to medical records by the above cited acts. Other than stating its claim, the plaintiff offers no legal analysis or legal authority supporting its position. It offers no analysis or argument on the issue of preemption or incorporation. See, e.g., *Commissioner of Public Safety v. Freedom of Information Commission*, 114 Conn. App. 821, ___ A.3d ___ (2013). In such cases, the argument is deemed to be abandoned. See *Feliciano v. Autozone, Inc.,* 142 Conn. App. 756, 762, 66 A.3d 911 (2013).

I

Next, plaintiffs claim that public disclosure of the records, which include documents concerning individuals' medical treatment and mental heath, would constitute a violation of

General Statutes §§ 52-146c and 52-146e and/or 52-140o which create or codify various patient-psychologist, psychiatrist or other health care professional privileges, and that disclosure is not required of such records under General Statutes § 1-210(b)(10). The argument was withdrawn during oral argument and in plaintiffs' reply brief dated May 28, 2013, p. 10. To whatever extent aspects of the argument have not been withdrawn, the court is not persuaded on the point. Like the argument concerning the public policy claim involving General Statutes § 1210(b)(10), there is nothing identified in any of those statutes or their legislative histories which would repeal General Statutes §§ 1-210(b)(2) or 1-214(b) and (c), either expressly or by implication.

J

Another argument advanced by the plaintiffs on appeal is that, if implemented, the FOIC's final decision exposes officers of the City of Danbury to liability in tort actions for invasion of privacy. The plaintiff does not explain how it could be liable for complying with an FOIC order. The argument is speculative, unexplained, indiscernible and not persuasive. To the contrary, "[a]ny member of any public agency who fails to comply with an order of the Freedom of Information Commission shall be guilty of a class B misdemeanor...." General Statutes § 1-240(b).

K

Finally, the plaintiffs argue that the FOIC's final decision was arbitrary and capricious in that it lacked any internal consistency. It argues that the FOIC ordered public disclosure of certain records that contained specific medical diagnoses and treatment of particular body parts,

but allowed redactions of "the very same type of private medical information" on other records. Plaintiff's Brief, p. 33. The court is not persuaded. There are differences and the fact that the agency made such distinctions reflect the agency's fact specific discernments. That is evidence of the agency exercising its judgment under the tests required by the court by *Perkins v. Freedom of Information Commission.* It is not evidence of arbitrary and capricious decision making. That the plaintiffs might disagree with the outcome does not render the agency decision illegal.

V

For all of the foregoing reasons, the plaintiffs' appeal is, for the most part, dismissed. It is sustained with respect to the six items which were not addressed by the FOIC identified by the plaintiffs in paragraph 22 of their amended complaint: Items 352, 1046, 1058, 1395, 1626 and 1635. Also, it is sustained as to the thirteen specific items which the court has ordered to be redacted: Items 430, 431, 581, 1420, 1480, 1481, 1482, 1685, 1686, 1703, 1704, 1747 and 1748. With respect to those matters, the case is remanded to the FOIC for further proceedings consistent with this decision. Judgment shall enter in favor of the defendant and intervening defendant, for the most part, and for the plaintiffs, in part, accordingly.

Vacchelli, J.

Robert F. Vacchelli
Judge, Superior Court