FILED

2013 NOV 26 P 12:15

SUPERIOR COURT

DOCKET NO. HHB CV 13-6022849 S

STEPHEN J. SEDENSKY III STATE'S ATTORNEY FOR THE JUDICIAL DISTRICT OF DANBURY	:	SUPERIOR COURT JUDICIAL DISTRICT
v.	:	OF NEW BRITAIN
FREEDOM OF INFORMATION COMMISSION ET AL.	:	NOVEMBER 26, 2013

MEMORANDUM OF DECISION ON MOTION FOR STAY

This is an administrative appeal brought by the plaintiff, Stephen J. Sedensky III, State's Attorney for the Judicial District of Danbury, challenging a decision of the Freedom of Information Commission ("Commission"). The Commission ordered the Chief of Police of the Newtown Police Department to provide to Jack Gillum and the Associated Press (collectively, the "AP") copies of audio recordings of 911 calls made from Sandy Hook Elementary School on that tragic morning when twenty schoolchildren and six teachers were murdered by a gunman in Newtown, Connecticut.

Because the Uniform Administrative Procedure Act ("UAPA") provides that an agency's decision is not automatically stayed by the filing of an appeal, the plaintiff seeks a stay of the Commission's decision from this court. For the reasons stated below, the motion for stay is denied.

I. FACTUAL AND PROCEDURAL HISTORY

The following facts and procedural history are relevant to the disposition of the plaintiff's motion for stay. On the morning of December 14, 2012, a gunman entered Sandy Hook Elementary School in Newtown, Connecticut and shot and killed twenty children, six adults, and

himself. That same day, the AP faxed a request pursuant to the Freedom of Information Act ("FOIA") to the Newtown Police Department, seeking, among other records, copies of audio recordings of 911 calls made from Sandy Hook Elementary. The AP received no immediate response from the Newtown Police Department. The AP reiterated the requests on January 14, 2013 and January 15, 2013, and again received no response. On January 23, 2013, it appealed to the Commission. The respondents to the complaint were the Chief of Police of the Newtown Police Department and the Newtown Police Department (collectively, the "Newtown respondents").[1]

On February 22, 2013, the Newtown respondents formally denied the AP's FOIA request, claiming that "[p]roduction of responsive documents is currently prohibited under General Statutes §1-210 (b) (3) (C) as information to be used in a prospective law enforcement action." The Commission scheduled a hearing for June 3, 2013. On May 30, 2013, the plaintiff, State's Attorney Stephen Sedensky, intervened in the Commission's proceeding.

At the hearing, the hearing officer requested in camera review of the recordings of the 911 calls. After listening to the audio recordings, the hearing officer issued a proposed decision ordering that the recordings be released to the AP. The Commission adopted the proposed decision as final on September 25, 2013, with only minor changes.

The Commission held that General Statutes § 17a-101k, which requires that certain information related to child abuse be kept confidential, did not exempt the 911 tapes from the Newtown shooting from disclosure under FOIA. The Commission reasoned that the statute did not apply because no evidence was presented that that the shooter was being investigated for

[1] Although this appeal was filed by the plaintiff, Stephen Sedensky, who intervened in the Commission's proceedings, the Newtown respondents filed a motion to intervene in this appeal, which this court granted.

child abuse or was ever a person responsible for or entrusted with the care of the students at Sandy Hook Elementary School.

Additionally, the Commission concluded that the plaintiff and the Newtown respondents had failed to demonstrate that the release of the records would (1) "reveal the identity of witnesses not otherwise known, whose safety would be endangered or who would be subject to threat or intimidation" or (2) be prejudicial to a prospective law enforcement action. The Commission held that the records were therefore not exempt from disclosure under General Statutes § 1-210 (b) (3) (A) or (C), respectively. Finally, the Commission held that 911 recordings were not signed statements of witnesses, and therefore were not exempt under § 1-210 (b) (3) (B). Further facts are set forth below as necessary.

On October 30, 2013, the plaintiff filed this administrative appeal pursuant to General Statutes §4-183 (j), with a return date of November 19, 2013. Upon filing of his appeal, the plaintiff immediately moved for a stay of the Commission's decision. On October 31, 2013, this court issued an order scheduling a hearing on the plaintiff's motion for stay on November 8, 2013. Because the return date had not yet passed, this court also ordered the plaintiff to serve a copy of the court's order on all parties who participated in the Commission's proceeding below.

On November 8, 2013, the court held a lengthy hearing on the motion to stay. All of the parties to the proceeding before the Commission appeared and participated in the hearing.

Additionally, pursuant to Practice Book §§ 7-4B, 7-4C, and 11-20A, on November 7, 2013, the Commission filed a motion to lodge and file under seal a copy of the audio recordings of the 911 calls that are at issue in this appeal. The Commission and the AP asserted that the court should listen to the audio recordings prior to deciding the motion for stay because it will assist the court in assessing the plaintiff's likelihood of success on the merits and the equities in

deciding whether to grant a stay. At oral argument, the plaintiff indicated that, although he did not believe that it was necessary for the court to listen to the audio recordings, he did not object to the court doing so. The records were then lodged with the court.

Accordingly, the court held a hearing on November 25, 2013 on the motion to file and seal the record. After making the requisite finding required by the Practice Book, the court granted the Commission's motion and ordered the audio recordings be filed and sealed.[2] The court has now reviewed the audio recordings in camera. The court's conclusions about the content of audio recordings, as they bear on the issues raised by the motion to stay, are discussed below.

II. ANALYSIS

The filing of an administrative appeal pursuant to the UAPA does not automatically stay the enforcement of the agency decision. General Statutes § 4-183 (f). Instead, an aggrieved party may seek a stay from the agency or from the court. Any stay, if granted, shall be on appropriate terms. General Statutes § 4-183 (f).

The decision whether to issue a stay rests within the sound direction of the court. *Griffin Hospital* v. *Commission on Hospitals & Health Care*, 196 Conn. 451, 458-59, 493 A.2d 229 (1985). In exercising this discretion, the court is directed to balance the equities, and in doing so, consider: (1) the likelihood that the appellant will prevail; (2) the irreparability of the injury to be suffered from immediate implementation of the agency's decision; (3) the effect of a stay on the other parties in the proceeding and (4) the public interest involved." Id., 458-60.

---

[2] The court also relied on General Statutes §1-206 (d), which provides in relevant part: "Notwithstanding the provisions of section 4-183, in any . . . appeal of a decision of the [freedom of information] commission, the court may conduct an in camera review of the original or a certified copy of the records which are at issue in the appeal but were not included in the record of the commission's proceedings, admit the records into evidence and order the records to be sealed or inspected on such terms as the court deems fair and appropriate, during the appeal."

A. Likelihood of Success on the Merits

The court first turns to whether the plaintiff has demonstrated a reasonable likelihood of success on the merits. In this appeal, the plaintiff contends that the Commission improperly ordered that the 911 audio recordings must be disclosed because: (1) the Commission lacked jurisdiction over the complaint filed by the AP; (2) the recordings are records of child abuse and therefore exempt from disclosure pursuant to General Statutes § 17a-101k (a); and (3) the recordings are exempt from disclosure pursuant to General Statutes §§ 1-210 (b) (3) (A) through (C). The court will address each of these claims in turn.

1. Jurisdiction.

The plaintiff asserts that the Commission lacked jurisdiction over this matter because the AP did not file its appeal with the Commission within thirty days of the denial to inspect or copy the records as required by General Statutes § 1-206 (b) (1). The plaintiffs cannot establish a likelihood of success on the merits of this claim.

The facts relevant to this claim as found by the Commission are as follows. On the day of the Sandy Hook tragedy, the AP requested in writing from the Newtown Police Department, among other things, access to and copies of the audio recordings of 911 calls made from Sandy Hook Elementary School. The following day they requested by letter that any responsive records be disclosed as they become available rather than all at once.

On January 14, 2013, the AP called the Newtown Police Department and reiterated its request for the records. The call was transferred to the office of the Chief of Police, but the AP was only able to leave a voicemail with the Chief's secretary. The following day, January 15, 2013, the AP again called the police department to speak with the Chief of Police but again was

only able to leave a voicemail reiterating the request and seeking a return phone call. These calls were never returned. The Associated Press then filed its freedom of information complaint with the Commission on January 23, 2013.

On February 14, 2013, the plaintiff informed the Chief of Police and the Newtown Police Department that the Office of the State's Attorney was in charge of the ongoing criminal investigation into the shootings and that materials related to the investigation, such as 911 calls, "are not subject to a Freedom of Information Act request." The plaintiff instructed the Chief of Police and the Newtown Police Department not to release any materials at this time. On February 22, 2013, Attorney Nathan Zezula, counsel for the Newtown Police Department, formally notified the Associated Press, in writing, that its freedom of information request was denied.

Based upon the court's review of the record and the facts found by the Commission, the court concludes that there is no likelihood that the plaintiff will prevail on the merits of his jurisdictional claim. Pursuant to General Statutes § 1-206 (b) (1), any person denied the right to inspect or copy records under the FOIA may appeal the denial to the Commission by filing a notice of appeal. The notice "shall be filed not later than thirty days after such denial . . . ." Accordingly, in order for the Commission to exercise jurisdiction over the matter, the appeal must be filed within thirty days of the denial of the freedom of information request.

Consequently, in order for the court to determine whether the Commission properly exercised jurisdiction, the court must determine the date on which the FOIA request was denied. General Statutes § 1-206 (a) provides in relevant part: "Any denial of the right to inspect or copy records provided for under section 1-210 shall be made to the person requesting such right by the public agency official who has custody or control of the public record, in writing, *within four*

business days of such request . . . . *Failure to comply with a request to so inspect or copy such public record within the applicable number of business days shall be deemed to be a denial.*" (Emphasis added.) Therefore, the statute provides that a request for information under the FOIA is constructively denied if there is no response from the public agency within four business days of the request.

In addressing statutory denials of information requests under General Statutes 1-21i, later recodified as § 1-206 in 1999, our Supreme Court has held: "Although written denial of a request for disclosure of public records is required; General Statutes § [1-206] (a); there is no statutory recourse against a public agency for failure to comply with this requirement. Without the statutory denial provision, therefore, if a public agency failed to respond to a request, the person seeking disclosure would have no further recourse because the right of appeal to the FOIC in § [1-206] (b) is the right to appeal a denial. We further conclude that § [1-206] (b) affords a right to appeal to the FOIC any denial, whether written or statutory, of a request for disclosure of public records." *West Hartford* v. *Freedom of Information Commission*, 218 Conn. 256, 261-62, 588 A.2d 1368 (1991).

In the present case, the AP filed its first FOIA request on December 14, 2012. There was no immediate response, oral or written, from the public agency. Therefore, that request was statutorily denied four business days later, on December 20, 2012. Accordingly, if the Associated Press desired to appeal the initial denial of this request it was obligated to do so on or before January 19, 2013, which it did not do.

It is also well established, however, that even if there is an initial denial and failure to appeal, the FOIA does not bar a person seeking public records from making "successive requests, nor does it bar successive denials, nor does it require an appeal within thirty days of the

denial of [the intitial] request. . . . [T]here is no provision in [§ 1-206] precluding a party from making successive requests to an agency for the same records, where previous requests have been denied, barring him from appealing within thirty days of any denial." (Internal quotation marks omitted; citations omitted.) *Board of Education* v. *Freedom of Information Commission*, 208 Conn. 442, 451, 545 A.2d 1064 (1988).

The Commission found, based upon substantial and uncontested[3] evidence in the record, that on January 14 and 15, 2013, the AP "reiterated" its written request for the records by calling the Newtown Police Department on successive days and leaving phone messages for the Chief of Police. There was no response to these January phone calls. Consequently, pursuant to § 1-206 (a), therefore, the telephone request made on January 14th was statutorily denied on January 18th. AP then appealed to the Commission on January 23, 2013, well within thirty days of the statutory denial of its January 14th request.

During oral argument regarding this motion, the plaintiff contended that the phone messages left by the AP on January 14th and January 15th did not constitute new freedom of information requests because such requests must be made in writing. Under the facts of this case, however, this assertion is without merit.

The FOIA permits a party to request the right to inspect public records during regular business hours, copy such records, or receive copies of such records. General Statutes § 1-210 (a); *Planning & Zoning Commission* v. *Freedom of Information Commission*, 130 Conn. App.

---

[3] The issue of the Commission's jurisdiction over this matter was raised sua sponte by the hearing officer on July 23, 2013, when she issued an order to the AP to provide evidence that its FOIA complaint had been timely filed. In response, the AP submitted an affidavit by Jack Gillum setting forth the facts discussed above. The hearing officer then provided the plaintiff an opportunity to submit any "comment, reply or contest" regarding the affidavit. Although counsel for the Newtown respondents filed a letter arguing the jurisdictional implications of these facts, neither the Newtown respondents nor the plaintiff submitted any evidence in affidavit or testimonial form that factually contested the affidavit filed by the AP.

448, 456, 23 A.3d 786 (2011). Nowhere in the statute does the legislature provide that any person seeking to exercise the right to *inspect records* under the FOIA must do so in writing. The Act itself recognizes that only some FOIA requests will be in writing. See General Statutes § 1-212 (a) ("Any person applying in writing shall receive, promptly upon request . . . a copy of any public record.").

In *Planning & Zoning Commission* v. *Freedom of Information Commission*, 130 Conn. App. 448, 456, 23 A.3d 786 (2011), the Appellate Court concluded that only if a party is seeking *copies* of a public record is there a statutory obligation, imposed by General Statutes §1-212 (a), that the request be made in writing. Consequently, any oral request for *access* to public records need not be in writing. Because the AP's original request made on December 14, 2012 sought both *access to and copies of* the 911 audio recordings, and the phone messages left by the AP on January 14th and January 15th "reiterated" that request of access, the reiterated request could reasonably be construed as a request to inspect the recordings and thus did not need to be in writing.

In addition, even if the AP had only sought *copies* of the records in its reiterated request, under the circumstances where the original request was in writing and sought copies of the audio recording, the statutory obligation that the request for copies be in writing would have been met by simply indicating, i.e., reiterating, that the original in writing request was renewed. Thus, this case factually is unlike *Planning & Zoning Commission* v. *Freedom of Information Commission*, supra, 130 Conn. App. 456, in which the FOIA request for copies of public records had never been reduced to writing. For all of these reasons, the court concludes that there is no likelihood of success on the merits of the plaintiff's jurisdictional challenge.

2. *Confidentiality of Records of Child Abuse*

The court next turns to an analysis of whether the plaintiff is likely to succeed on the merits of his claim that the audio recordings are exempt from disclosure pursuant to General Statutes §17a-101k. For the reasons set forth below, the court concludes that the plaintiff does not have a reasonable likelihood of success on the merits of this claim.

There is no dispute in this case that the audio recordings of the 911 calls made from Sandy Hook Elementary School on December 14, 2012, are public records within the FOIA. The FOIA requires the disclosure of any public record unless the record is exempt from disclosure pursuant to federal law or state statute. General Statutes § 1-210 (a). Some of the exemptions from disclosure are contained in the FOIA itself; see, e.g., §1-210 (b) (1) – (26); and other recognized exemptions may be found in federal law or other provisions of the General Statutes. See, e.g., *Commissioner, Department of Public Safety* v. *Freedom of Information Commission*, 204 Conn. 609, 621-22, 529 A.2d 692 (1987).

In this case, the plaintiff contends that General Statutes § 17a-101k (a) exempts the audio recordings of the 911 calls from disclosure. Section 17a-101k (a) provides in relevant part: "The Commissioner of Children and Families shall maintain a registry of the commissioner's findings of abuse or neglect of children pursuant to section 17a-101g that conforms to the requirements of this section. The regulations adopted pursuant to subsection (i) of this section shall provide for the use of the registry on a twenty-four-hour daily basis to prevent or discover abuse of children and the establishment of a hearing process for any appeal by a person of the commissioner's determination that such person is responsible for the abuse or neglect of a child pursuant to subsection (b) of section 17a-101g. *The 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. Any violation of this section or the regulations adopted by the commissioner under this section shall be punishable by a fine of not more than one thousand dollars or imprisonment for not more than one year." (Emphasis added.)

The plaintiff contended before the Commission, and again before this court, that the audio recordings contain "information relative to child abuse" because all of the children who were present during the shootings at the school were victims of child abuse within the meaning of § 17a-101k and the recordings reflect information about that child abuse.[4]

The Commission and the AP argue that the plaintiff's reading of the statute is far too expansive and that the statutory phrase "information relative to child abuse" must be read in context with the entire statutory scheme in which the provision is found. Specifically, the Commission and the AP contend that the provision, when read in context, applies only within the meaning of General Statutes § 17a-101g (a) to instances in which the alleged perpetrator of the child abuse is "(1) a person responsible for such child's health, welfare or care, (2) a person given access to the child by such responsible person, or (3) a person entrusted with the care of a child." Because the plaintiff and the Newtown respondents did not meet their burden to establish that the perpetrator of the Newtown tragedy was an individual who fell within one of these three categories, the Commission and the AP argue that the records are not exempt from disclosure. They also emphasize that there is no evidence in the record before the Commission that any report of child abuse regarding the Sandy Hook tragedy was ever made to the Department of Children and Families ("DCF").

[4] The plaintiff asserted this claim before the Commission despite the fact that he had not listened to the recordings to ascertain their content.

The meaning and application of the confidentiality provision contained in §17a-101k is a question of statutory interpretation for the court. As our Supreme Court has repeatedly held, "[w]hen construing a statute, [o]ur fundamental objective is to ascertain and give effect to the apparent intent of the legislature. . . . 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. . . . The test to determine ambiguity is whether the statute, when read in context, is susceptible to more than one reasonable interpretation. . . . 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 . . . ." (Internal quotation marks omitted.) *Chairperson, Connecticut Medical Examining Board* v. *Freedom of Information Commission*, 310 Conn. 276, 283, __A.3d __ (2013).

Other principles of statutory instruction also guide the court's analysis of § 17a-101k. First, because the legislature has plainly provided that any person who violates the confidentiality provision of the section, or the regulations adopted thereunder, has committed a class A misdemeanor, the statute is penal in nature. "[P]enal statutes are to be construed strictly, and not extended by implication . . . ." (Internal quotation marks omitted.) *State* v. *Lafleur*, 307 Conn. 115, 127, 51 A.3d 1048 (2012). Ambiguities are ordinarily to be resolved against imposing criminal liability.[5] Id., 126.

[5] The plaintiff contends that his interpretation of § 17a-101k is entitled to deference because he is the "enforcement authority" under the statute. Presumably, he makes this claim because he is

With these principles in mind, the court turns to an analysis of the language of § 17a-101k and the statutory scheme in which it appears. At the outset, it is important to note that the statutory language relied upon by the plaintiff falls within a statute that specifically authorizes the Commissioner of Children and Families to create and maintain an abuse and neglect registry: "The Commissioner of Children and Families shall maintain a registry of the commissioner's finding of abuse and neglect of children . . . ." § 17a-101k (a). It is also clear from the plain language of the statute that the purpose of this statute is to create a list of individuals who are responsible for the abuse of children, and to authorize an administrative hearing process by which the commissioner can determine who should or should not be placed on the registry. § 17a-101k (a) and (b).

The statute is also clear that the abuse and neglect findings contemplated by § 17a-101k are limited to the type of abuse and neglect that is described by § 17a-101g. Indeed, subsection (a) of § 17a-101k refers twice to § 17a-101g. In the second instance, the subsection mandates the Commissioner to adopt regulations that establish a "hearing process for any appeal by a person of the commissioner's determination that such person is responsible for the abuse or neglect of a child pursuant to subsection (b) of section 17a-101g." Accordingly, the statutory phrase upon which the plaintiff relies, that is, "information contained in the registry and any other information relative to child abuse, wherever located, shall be confidential", must be read in context of the internal reference that the "child abuse" outlined in § 17a-101k (a) is the type of "child abuse" contemplated by § 17a-101g.

---

authorized to commence a criminal prosecution for alleged violations of the statute. It is well-established, however, that an agency's construction of a statute is only entitled to deference if the agency's construction has been consistently applied over a long period of time, has been formally articulated, and is reasonable. *Longley* v. *State Employees Retirement Commission*, 284 Conn. 149, 166, 931 A.2d 890 (2007). Because the plaintiff cannot demonstrate that he has met any of these criteria, his deference argument fails.

The court, therefore, next turns to the language contained in the first sentence of subsection (a) of § 17a-101g: "Upon receiving a report of child abuse or neglect, as provided in sections 17a-101a to 17a-101c, inclusive or section 17a-103, *in which the alleged perpetrator is (1) a person responsible for such child's health, welfare or care, (2) a person given access to the child by such responsible person, or (3) a person entrusted with the care of a child*, the Commissioner . . . shall cause the report to be classified and evaluated immediately." (Emphasis added.) Both § 17a-101a and § 17a-103 refer to General Statutes § 46b-120 for the definition of abuse and neglect. Section 46b-120 (7) provides that a child or youth may be found abused "who (A) has been inflicted with physical injury or injuries other than by accidental means, (B) has injuries that are at variance with the history given of them, or (C) is in a condition that is the result of maltreatment, including, but not limited to, malnutrition, sexual molestation or exploitation, deprivation of necessities, emotional maltreatment or cruel punishment."[6]

Thus, subsection (a) of 17a-101g contemplates that the DCF will receive reports of child abuse that meets the broad definition found in child abuse contained in § 46b-120 (7), but then, for purpose of § 17a-101g, limits that universe of abuse cases in which the Commissioner is directed to take further investigatory efforts to those involving instances in which the alleged perpetrator is a "(1) a person responsible for such child's health, welfare or care, (2) a person given access to the child by such responsible person, or (3) a person entrusted with the care of a child . . . ." These further investigatory efforts may then lead to the hearing process contemplated by subsection (b) of § 17a-101g, and the placement of the abuser's name on the abuse and neglect registry.

With respect to those reports of abuse that do not involve a person responsible for the child, the statute directs that they be referred to law enforcement and do not require further

[6] The definition of neglect contained in § 46b-120 (6) is not relevant here.

action by DCF: "If the report is a report of child abuse or neglect in which the alleged perpetrator is not a person specified in subsection (1), (2), or (3) of this subsection, the Commissioner of Children and Families shall refer the report to the appropriate local law enforcement authority . . . ." § 17a-101g (a).

Returning to § 17a-101k (a), therefore, it is highly significant that the language "information relative to child abuse wherever located" does not contain a reference back to the broad definition of "child abuse" located in § 46b-120 (7). Instead, the only references in the confidentiality provision are to § 17a-101g cases that may result in a determination of abuse or neglect and the inclusion of an individual on the abuse and neglect registry. Even if there is any ambiguity in this regard (which the court concludes there is not), that ambiguity must be resolved in favor of the more narrow reading urged by the Commission and the AP because exemptions to the FOIA and penal statutes such as § 17a-101k must be narrowly construed.

In addition to the reference back to § 17a-101g, the breadth of the confidentiality language in §17a-101k (a) is limited in a second and significant way. The provision provides that the confidential information is "subject to such statutes and regulations governing their use and access as shall conform to the requirements of federal law and regulations." The regulations adopted by the Commissioner of Children and Families to implement §17a-101k reflect a narrower definition of the meaning of the phrase "child abuse" under this provision. The regulations define "reports of child abuse or neglect" to mean "complaints received by the department alleging that a person under the age of eighteen (18) has had physical injury or injuries inflicted upon him or her *by a person responsible for such child's health, welfare or care, by a person entrusted with the care of such child, or by a person given access to such child,* other than by accidental means or has injuries that are at variance with the history given of them,

or is in a condition that is the result of maltreatment such as, but not limited to, malnutrition, sexual abuse, sexual exploitation, deprivation of necessities, emotional maltreatment, or cruel punishment, or has been abandoned or is being denied proper care and attention, physically, educationally, emotionally, or morally, or is being permitted to live under conditions, circumstances or associations injurious to his or her well-being." (Emphasis added.) Regs., Conn State Agencies § 17a-101k-1 (4).[7]

Of course, these regulations have been reviewed and approved by the legislature's regulation review committee and by the Attorney General for legal sufficiency. See General Statutes § 4-168 (e). In similar circumstances our Supreme Court has stated: "[W]e presume that these regulations are an accurate reflection of the legislature's intent articulated in the statute's more general language. . . . This presumption is enhanced when the regulation has been in existence for a long period of time and has been legislatively approved. The fact that the . . . regulation has been approved by the standing legislative regulation review committee, although not dispositive . . . is an important consideration of whether the . . . regulation[] comports with

[7] In subsections (5) – (7), the regulations also provide the following additional definitions: "(5) A person responsible for such child's health, welfare or care" means a child's or youth's parent, guardian or foster parent; an employee of a public or private residential home, agency or institution or other person legally responsible in a residential setting, or any staff person providing out-of-home care, including center-based child day care, family day care or group day care;

"(6) A person entrusted with the care of a child" means a person given access to a child by a person responsible for the health, welfare or care of a child for the purpose of providing education, child care, counseling, spiritual guidance, coaching, training, instruction, tutoring or mentoring of such child;

"(7) A person given access to a child" means a person who is permitted to have personal interaction with a child by a person responsible for such child's health, welfare or care or a person entrusted with the care of a child under circumstances in which the person responsible for such child's health, welfare or care or the person entrusted with the care of a child has a reasonable expectation that the person given access will exercise some responsibility, control, influence or supervisory role with the child."

the legislative intent." (Citations omitted; emphasis added; footnote omitted; quotation marks omitted.) *Vitti* v. *Allstate Insurance Co.*, 245 Conn. 169, 182-83, 713 A.2d 1269 (1998); see also *Velez* v. *Commissioner of Labor*, 306 Conn. 475, 50 A.3d 869 (2012)(same).

The Commissioner of Children and Families also has adopted specific regulations that delineate to whom and under what circumstances reports of child abuse and other information relative to abuse may be disclosed to third parties. Regs., Conn. State Agencies § 17a-101k-13. For example, these regulations permit DCF, among other things, to disclose in response to a lawful background check for employment, licensure or benefits, whether an individual's names is on the abuse and neglect registry and the type of abuse and neglect that has been substantiated against that individual. Critically, only in cases in which the abuse or neglect is committed by a person responsible for the child's health and well-being does the Commissioner conduct an investigation and hold a hearing to whether abuse an d neglect has been substantiated. It is clear from these regulations that reports of child abuse in this context do not involve acts of violence committed by a stranger against a child.

Federal law also supports this narrow interpretation of § 17a-101k. For example, the federal regulations implementing the Child Abuse Prevention and Treatment Act, 42 U.S.C. § 5101 et. seq., define child abuse and neglect to mean "physical or mental injury, sexual abuse or exploitation, negligent treatment or maltreatment of a child under the age of eighteen . . . *by a person . . . responsible for the child's welfare . . . .*" (Emphasis added.) 45 C.F.R. § 1340.2 (d). "A person responsible for a child's welfare includes the child's parent, guardian, foster parent, an employee of a public or private residential home or facility . . . or any staff person providing out of home care." 45 C.F.R. § 1340.2 (d) (4). Thus, the plaintiff's contention that the 911 audio

recordings constitute information relative to child abuse within the specific meaning of § 17a-101k is not in accord with the statutory scheme in which the provision falls.

The plaintiff's reliance on *Groton Police Department* v. *Freedom of Information Commission*, 104 Conn. App. 150, 931 A.2d 989 (2007), is not justified. In *Groton*, the mother of a child who allegedly had been sexually assaulted filed a freedom of information request with the Groton Police Department seeking a copy of the police reports regarding the alleged assault on her child. The Appellate Court concluded that the police reports were exempt from disclosure pursuant to § 17a-101k because they contained "information relative to child abuse, wherever located." Id., 160.

The *Groton* case does not bear the weight the plaintiff places upon it for several reasons. First, there is nothing in the Appellate Court's factual recitation of the case that would suggest that the perpetrator of the sexual abuse was anyone but an individual who was responsible for the child's health, welfare, or care of the child. In other words, there is no discussion or analysis in the *Groton* case regarding whether § 17a-101k applies in instances in which the alleged child abuse is committed by a stranger.

Second, the court has reviewed the two Superior Court decisions and two Commission decisions that gave rise to the Appellate Court's decision in *Groton*. None of these decisions indicate on their face whether the alleged abuse was or was not committed by someone responsible for the welfare of the child. However, during the second round of Superior Court proceedings in the *Groton* case, the underlying Groton Police Departments records were filed with the court and placed under seal. See *Groton* v. *Freedom of Information Commission*, HHB CV05-4004903S. This court has reviewed those records[8] and determined that the allegations of

[8] The court may take judicial notice of court records for their existence, content and legal effect. *State* v. *Gaines*, 257 Conn. 695, 705 n.7, 778 A.2d 919 (2001).

abuse involved one or more individuals who plainly fall within § 17a-101g as a "(1) a person responsible for such child's health, welfare or care, (2) a person given access to the child by such responsible person, or (3) a person entrusted with the care of a child. . . ." Consequently, the Appellate Court's decision cannot be construed to apply to this case which has a markedly different facts.

Third, in deciding in *Groton* that the exemption in § 17a-101k applied to the police reports in that case, the Appellate Court relies only upon our Supreme Court's decision in *Ward* v. *Greene*, 267 Conn. 539, 839 A.2d 1259 (2004). The child abuse records in *Ward*, however, involved allegations of abuse committed by a daycare provider for the child. A day care provider also falls plainly within the class of individuals described in § 17a-101g. Consequently, the Appellate Court's decision in *Groton* must be read both as limited to its facts and in context with the Supreme Court's decision in *Ward* v. *Greene*, which does not address the applicability of §17a-101k to records involving child abuse committed by a stranger to the child.[9]

Having analyzed the statutory scheme and the *Groton* decision, this court must now assess the potential legal and practical ramifications of the plaintiff's assertion that § 17a-101k must be construed as applying in any instance in which any child is abused regardless of the identity of the abuser. Under his reasoning, *any* record containing *any* information regarding a shooting of a seventeen year old by a rival gang member would be exempt from disclosure even when it does not meet one of the law enforcement exemptions contained in the FOIA. Although the shooter in such cases could never be placed on DCF's abuse and neglect registry, under the plaintiff's theory, all records and information pertaining to the shooting would be confidential.

---

[9] If sexual abuse of child is committed by a stranger to the child, the records may be protected by other statutory exemptions that relate to sexual assault cases. See, e.g., General Statutes § 1-210 (b) (3) (F).

Similarly, all records of other renown criminal events, such as the 2007 murder of three members of the Petit family in Cheshire, would also be exempt from disclosure. There simply is no evidence that the legislature intended to sweep so broadly in adopting § 17a-101k.

It is also important to note that, unlike many of the exemptions contained in the FOIA, see, e.g., General Statutes § 1-210 (b) (3) (D) (records prejudicial to prospective law enforcement action); General Statutes § 1-210 (b) (4) (records pertaining to strategy and negotiation of pending claims or pending litigation until claim or litigation is settled or finally adjudicated); the confidentiality of records created by § 17a-101k does not expire. In other words, if the plaintiff is correct that § 17a-101k applies to the 911 audio recordings in this case, these recordings must never be released to the public, despite the public interest in them and their potential importance in evaluating the adequacy of the police response to the 911 calls. Indeed, under the plaintiff's legal argument, any disclosure of the audio recordings at any time in the future would be punishable by up to one year in prison.[10] It is highly improbable that the legislature intended to cast such a wide confidentiality net.

Finally, the court has reluctantly listened to the audio recordings in camera. Although the 911 callers describe, in a harrowing and disturbing manner, an emergent criminal event that is taking place in a school location where there obviously are many children, the callers do not describe any particular acts of child abuse. No children are identified by name. No caller indicates that he or she could see whether any child has been injured. Indeed, the only injury that is described relates to an educator who had been shot in the foot. Under these circumstances, the plaintiff's claim that the recordings actually contain "information relative to child abuse," regardless of the identity of the perpetrator of that abuse, is attenuated at best.

[10] Indeed, none of the exemptions from disclosure contained in the FOIA have attached to them any criminal sanction if a public agency discloses a record that falls within the exemption.

For all of these reasons, the court concludes that the plaintiff has not demonstrated a likelihood of success on the merits of his claim that § 17a-101k exempts the 911 audio recordings from disclosure.

3. Law Enforcement exemptions contained in General Statutes §1-210(b) (A)-(C)

The plaintiff contends that the audio recordings are exempt from disclosure pursuant to General Statutes §§ 1-210 (b) (3) (A), (B), and (C) (Rev. to 2011)[11], which exempts specified records relating to law enforcement activities from disclosure under FOIA.[12] Before addressing these specific claims, it is important to remember that "the overarching legislative policy of the [Freedom of Information Act] is one that favors the open conduct of government and free public access to government records. . . . The sponsors of the [act] understood the legislation to express the people's sovereignty over the agencies which serve them . . . and [our Supreme Court] consistently has interpreted that expression to require diligent protection of the public's right of access to agency proceedings." (Internal quotation marks omitted.) *Pictometry International Corp.* v. *Freedom of Information Commission*, 307 Conn. 648, 671-72, 59 A.3d 172 (2013). "[T]he exemptions contained in § [1-210] reflect a legislative intention to balance the public's

[11] The Connecticut legislature amended § 1-210 (b) (3) by No. 13-311, § 1, of the 2013 Public Acts, which related to the identity of minor witnesses. The commission decision in this case was based upon the prior version of the statute and none of the parties have claimed that this amendment is at issue in this appeal. Accordingly, all references to § 1-210 (b) (3) in this opinion are, hereinafter, to the earlier revision of the statute.

[12] General Statutes § 1-210 (b) (3) provides in relevant part: "Nothing in the Freedom of Information Act shall be construed to require disclosure of . . . 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) signed statements of witnesses, (C) information to be used in a prospective law enforcement action if prejudicial to such action . . . ."

right to know what its agencies are doing, with the governmental and private needs for confidentiality. . . . [I]t is this balance of the governmental 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.*" (Emphasis added; internal quotation marks omitted.) *Commission of Consumer Protection* v. *Freedom of Information Commission*, 207 Conn. 698, 701, 542 A.2d 321 (1988). With these principles in mind, this court will analyze of the claimed exemptions in turn.

a. Section 1-210 (b) (3) (A): Identity of Witnesses

The court first examines the plaintiff's claimed exemption under § 1-210 (b) (3) (A).[13] Pursuant to that subsection, the plaintiff claims that the audio recordings are exempt because disclosure of the recordings would reveal "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." The plaintiff argues that the identity of witnesses may be discerned through the 911 recordings and other information about the school. The plaintiff contends that witnesses who would become known because of the audio recordings' release would be subjected to intimidation and harassment because he claims that a known witness was once harassed in the aftermath of the shootings. The Commission and AP contend that the plaintiff did not meet his

[13] General Statutes § 1-210 (b) (3) (A) exempts from disclosure: "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 . . . *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. . . .*" (Emphasis added.)

burden of proving the applicability of the exemption and failed to offer an adequate explanation how disclosing the audio recordings would reveal the identity of witnesses "not otherwise known."

The Commission found that the plaintiff "did not offer any evidence" to support this exemption.[14] The plaintiff challenges the Commission's finding that he presented "no evidence" regarding the applicability of § 1-210 (b) (3) (A). In particular, he claims that an individual who lives across the street from the school and who sheltered some of the children who escaped the school had been "bothered by in terms of what is going on in the media, in terms of people writing things about him." No other detail about this individual was presented. Thus, even if he is correct that the Commission improperly concluded that he presented "no evidence," the dispositive issue in this appeal is whether the Commission properly concluded that he failed to meet his burden of proving the applicability of the exemption.

The Appellate Court has held that "the mere good faith assertion" of the applicability of an exemption to disclosure is insufficient and that "there must be an evidentiary showing" of an exemption's applicability. See *Department of Public Safety* v. *Freedom of Information Commission*, 51 Conn. App. 100, 105, 720 A.2d 268 (1998). This court has reviewed the record and concludes that the plaintiff failed to meet his evidentiary burden of establishing that the audio recordings are exempt from disclosure under § 1-210 (b) (3) (A).

[14] The plaintiff challenges the Commission's finding that he presented "no evidence" regarding the applicability of § 1-210 (b) (3) (A). In particular, he claims that an individual who lives across the street from the school and who sheltered some of the children who escaped the school had been "bothered by in terms of what is going on in the media, in terms of people writing things about him." No other detail about this individual was presented. Thus, even if he is correct that the Commission improperly concluded that he presented "no evidence," the dispositive issue in this appeal is whether the Commission properly concluded that he failed to meet his burden of proving the applicability of the exemption.

This court's in camera review of the audio recordings additionally confirms that the 911 recordings do not meet the exception to disclosure provided by § 1-210 (b) (3) (A). Only one individual is mentioned by name and there is nothing to suggest his or her identity as a witness is currently unknown to the general public. Even if the 911 callers are unknown to the public, nothing in the recordings or in the record below indicates that their safety may be endangered or that they would be subject to threat or intimidation if their identity was revealed. Therefore, the plaintiff has failed to demonstrate a likelihood of success on the merits of his claim of exemption pursuant to § 1-210 (b) (3) (A).

b. Section 1-210 (b) (3) (B): Signed Statements of Witnesses

The court now turns to the plaintiff's argument that the 911 recordings are protected by § 1-210 (b) (3) (B),[15] which exempts from disclosure records of "signed statements of witnesses" compiled in connection with a criminal investigation. To support his contention, the plaintiff cites *State* v. *Whelan*, 200 Conn. 743, 513 A.2d 86 (1986), which discusses the circumstances under which a prior inconsistent statement by a witness may be admissible in evidence at trial as evidence of the truth of the matter contained in the statement. The Supreme Court concluded in *Whelan* that, under some circumstances, "prior tape recorded statements possess similar indicia of reliability and trustworthiness to allow their substantive admissibility . . ." in the same manner as a signed written statement as an exception to the hearsay rule. Id., 754 n.9.

The plaintiff's claim borders on the frivolous. The *Whelan* decision, which involves the admission of evidence in a criminal trial, is wholly inapplicable to the statutory exemption

[15] General Statutes § 1-210 (b) (3) (B) exempts from disclosure under FOIA: "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 . . . *signed statements of witnesses* . . . ." (Emphasis added.)

contained in the FOIA. The statutory exemption contains no language that would suggest that the applicability of the exemption turns, not on whether the statement is actually signed, but on an overall determination of its reliability as a piece of evidence regardless of whether the statement is signed. The plaintiff has not cited a single case in which a court has exempted an unsigned audio recording from disclosure under this exemption.

Here, the Commission found that, "because [the 911 recordings] are audio recordings, [they] are not signed statements of witnesses" under § 1-210 (b) (3) (B). This court agrees. Audio recordings are not "signed statements of witnesses" under § 1-210 (b) (3) (B) and the plaintiff has failed to provide a legal basis to treat them as such. Therefore, the plaintiff has failed to demonstrate a likelihood of success on the merits under § 1-210 (b) (3) (B).

c. Section 1-210 (b) (3) (C): Prejudice to Prospective Law Enforcement Action

The court now addresses the plaintiff's claim that the audio recordings are exempt from disclosure under § 1-210 (b) (3) (C). That subsection creates an exemption from the FOIA disclosure for "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 result in the disclosure of . . . information to be used in a prospective law enforcement action if prejudicial to such action." The Commission found that the plaintiff failed to meet his burden of demonstrating that the 911 recordings would be used in a prospective law enforcement action arising out of the Sandy Hook Elementary School shootings. The Commission further found that the plaintiff "failed to prove that, even if there was a prospective law enforcement action, disclosure of the in camera records would be prejudicial to such action."

The plaintiff argues that the 911 tapes are exempt from disclosure because there is a pending law enforcement action related to the Sandy Hook shootings. According to the plaintiff, "prospective law enforcement action" under § 1-210 (b) (3) (C) encompasses ongoing criminal investigations, including such activities as applying for search warrants, and has a broader definition than mere criminal prosecutions. The Commission and the AP contend that § 1-210 (b) (3) (C) is inapplicable because there is "no evidence that there is a chance, let alone a reasonable chance, that anyone will be charged and prosecuted for the Sandy Hook murders."

This court disagrees with the plaintiff's expansive definition of "law enforcement action." The plaintiff has cited no legal authority for his broad characterization of the phrase. Indeed in *Department of Public Safety* v. *Freedom of Information Commission*, supra, 51 Conn. App. 100, the plaintiff there invoked a similar argument, asserting that records should be exempt from disclosure because the state's attorney had not yet closed that case. The Appellate Court, however, disagreed and held that § 1-210 (b) (3) (C) was inapplicable because FOIA "does not require that an investigation be closed before disclosure is required." Id., 105 (analyzing General Statutes § 1-19 (b) (3) (C), which was transferred to § 1-210 (b) (3) (C) in 1999).

In the present case, the plaintiff failed to meet his evidentiary burden of proving the existence of a prospective law enforcement action. The plaintiff failed to identify any individual who could potentially be subjected to criminal prosecution as the result of the pending investigation. In fact, the record is devoid of evidence of any individual who is not deceased and could potentially be prosecuted for the atrocities at Sandy Hook Elementary School. Although no party disputes that horrendous crimes were committed, the FOIA does not require that a criminal investigation be closed before disclosure is required.[16]

[16] It is true that in the first weeks that followed December 14, 2012, it may have been less clear that no criminal prosecutions would take place with respect to the shootings. Nevertheless, by

The Commission and the AP contend that, even if there was a criminal prosecution, the plaintiff never attempted to prove either that each of the 911 tapes would be used in prosecuting that action or that disclosing the audio recordings would be prejudicial. This court agrees. Even if the definition of "prospective law enforcement action" is as broad as the plaintiff claims, he failed to meet his burden of proving that any law enforcement action would be prejudiced by releasing the audio recordings. The plaintiff did not prove how releasing the audio recordings would either be prejudicial to the current investigation or any prospective criminal prosecution. See *Hartford* v. *Freedom of Information Commission*, 201 Conn. 421, 434, 518 A.2d 49 (1994) (plaintiffs failed to meet burden of proving FOIA exemption by alleging records were exempt from disclosure "in broad, conclusory terms" and that disclosing record "might" have negative effects on police operation).

The plaintiff also argues that the Commission failed to defer to (and accept) his testimony on "the practical realities of criminal investigations," which, according to the plaintiff, demonstrated that the relevance and prejudicial effect of individual pieces of evidence, like the audio recordings, may not be known until later in the investigation. Nothing required the Commission, as the finder of fact, to give deference to the plaintiff's testimony. Indeed, this argument, which at its heart, is an assertion that the records are exempt because "I say so," would eliminate the well-established rule that the burden to prove the applicability of an exemption rests on the agency asserting it.

"[Section 1-210 (b) (3) (C)] is not satisfied and, consequently, information is not exempted from disclosure by the mere good faith assertion that the matter to which the information pertains is potentially criminal." *Department of Public Safety* v. *Freedom of*

June 3, 2013, when the Commission held its hearing in this matter, the plaintiff simply failed to meet his burden of establishing, after months of investigation, that a prospective law enforcement action was likely and that disclosure would prejudice the action.

Information Commission, supra, 51 Conn. App. 105. "The statute, therefore, requires an *evidentiary showing* (1) that the records are to be used in a prospective law enforcement action and (2) that the disclosure of the records would be prejudicial to such action." (Emphasis added.) Id. The Commission reviewed the record, including the plaintiff's testimony, and found that the plaintiff failed to meet his burden of proving that either there was a prospective law enforcement action or that the release of the audio recordings would be prejudicial to such an action. Indeed, the reliability of the plaintiff's assertion that the release of the audio recordings would prejudice a prospective law enforcement action was wholly undermined by the plaintiff's admission that he had not even listened to the recordings himself.

The plaintiff's argument that the Commission did not credit his testimony fails in light of long-standing legal principles regarding the standard of review and determinations regarding the credibility of witnesses. "Judicial review of [an administrative agency's] action is governed by the Uniform Administrative Procedure Act [(UAPA) General Statutes § 4–166 et seq.] . . . and the scope of that review is very restricted. . . . With regard to questions of fact, it is neither the function of the trial court nor of this court to retry the case or to substitute its judgment for that of the administrative agency." (Internal quotation marks omitted.) *Department of Public Safety* v. *Freedom of Information Commission*, 298 Conn. 703, 716, 6 A.3d 763 (2010). "The appropriate standard of judicial review, therefore, is whether the commission's factual determinations are reasonably supported by substantial evidence in the record taken as a whole." *Rocque* v. *Freedom of Information Commission*, 255 Conn. 651, 659-60, 774 A.2d 957 (2001); see also *Briggs* v. *State Employees Retirement Commission*, 210 Conn. 214, 217, 554 A.2d 292 (1989) (court "must defer to the agency's assessment of the credibility of the witnesses and to the agency's right to believe or disbelieve the evidence presented by any witness, even an expert, in

whole or in part"); *Lane* v. *Commissioner of Environmental Protection*, 136 Conn. App. 135, 156, 43 A.3d 821, cert. granted, 307 Conn. 906, 53 A.3d 221 (2012) ("[w]e will not disturb that credibility determination"). This court, therefore, declines the plaintiff's invitation to substitute any credibility determinations for those of the Commission's. The plaintiff has failed to demonstrate a likelihood of success on the merits of his assertion that § 1-210 (b) (3) (C) exempts the recordings from disclosure.

B. The Irreparability of the Injury

The court next turns to an analysis of the irreparability of the injury to be suffered by the plaintiff by immediate implementation of the agency's decision. The plaintiff essentially makes two claims regarding irreparable harm. First, he argues that the immediate disclosure of the 911 audio recordings will cause the disclosure of information relative to child abuse, intimidation of the 911 callers, and release of witness statements. Second, he claims that the immediate release of the 911 audio recordings will cause this appeal to become moot, thereby depriving him and others of future guidance on the legal issues presented by this case. The court will evaluate both claims.

The first claim of irreparable harm is simply a restatement of his assertion the 911 audio recordings are exempt from disclosure. These arguments have been analyzed at some length above and found to lack merit. Accordingly, this claim of irreparable harm does not weigh in the plaintiff's favor.

The second claim of irreparable harm is also not entitled to significant weight because it rests on a false premise. In *Director of Retirement & Benefits Services Division* v. *Freedom of Information Commission*, 256 Conn. 764, 769-70 n.9, 775 A.2d 981 (2001), our Supreme Court held that the disclosure of information or records sought by a freedom of information request

while an appeal is pending from the Commission's decision does not cause the appeal to become moot. The court's reasoning in *Director* is that, if the commission's order is prospective in nature, an appeal from the Commission's order is not moot. Id. Here, like in *Director*, the Commission's order applies prospectively because it will control freedom of information requests made by other media organizations and members of the public for the same 911 audio recordings. See also *Gifford* v. *Freedom of Information Commission*, 227 Conn. 641, 649 n.9, 631 A.2d 252 (1993) ("[T]he order issued by the Commission is prospective in nature and impacts the discovery obligations of the state's attorneys in pending criminal matters."). Consequently, the plaintiff's claim of mootness does not support his assertion of irreparable injury.

C. The Effect of the Stay on the other Parties to the Proceeding

The court next considers the effect of the stay on the other parties to the proceeding. The Associated Press filed this freedom of information appeal almost one year ago. Despite prevailing before the Commission, if this court grants a stay pending further proceedings in this court and any subsequent appellate review of this court's decision, it may be years before the AP has access to the audio recordings to which it seemingly is entitled. In this regard, it is important to remember that the legislature, in enacting the UAPA, has determined there should not be an automatic stay from decisions of public agencies. As a news organization, the AP will continue to be hamstrung in its ability to inform the public regarding one of the most significant, albeit tragic, events in Connecticut history. Given the weakness of the plaintiff's claims on the merits, such a result is difficult to justify.

D. The Public Interest

The court finally turns to whether the public interest favors granting of a stay. The court concludes that it does not.

The plaintiff argues that the immediate release of the 911 audio recordings is against the public interest because it will "chill" potential users of the 911 system from making emergency calls if such callers know their identity will later be made public. There is no factual or legal support for this claim. The plaintiff did not offer any evidence before the Commission or this court that there is any empirical evidence to support a claim that potential 911 callers, at a time of great urgency and need, will decline to make an emergency call because of an unsupported and vague fear that they will suffer some adverse consequence in the future if their identity becomes known. If, in a particular case, there is real evidence that disclosure of a 911 recording will result in adverse consequences to a caller, that possibility may be addressed by application of the specific law enforcement exemptions found in General Statutes § 1-210 (b) (3), that is, that the disclosure will result in threats or intimidation of the witnesses. The plaintiff has not come close to meeting his burden to demonstrate that such circumstances exist in this case. Having listened to the audio recordings, the court is confident that the individuals who placed the 911 calls would not hesitate to do so again.

The court recognizes and is deeply sensitive to the fact that the families and friends of those who died in this tragedy, as well as others in the greater Newtown community, may desire that the 911 audio recordings never be released. The public airing by the media of some or all of the recordings that will undoubtedly follow their release will likely be a searing reminder of the horror and pain of that awful day. The court's recognition of this sobering fact is magnified by its own in camera review of the recordings.

This court's sensitivity to these facts, however, must be tempered by a concomitant recognition, based upon the analysis set forth above of the controlling legal principles, of the reality that these audio recordings will eventually be made public at some point. The question is not if, but when. Further delaying their release will not ultimately serve to ameliorate the pain the recordings will likely cause to those directly impacted by the shootings.

The overall public interest in the release of the audio recordings is entitled to significant weight. The public interest in access to 911 recordings, whether of these events or others, is best reflected by the legislature's recent passage of 2013 Public Act 13-311, which was enacted after the Commission's hearing in this case and was effective immediately when it was signed by Governor Malloy on June 5, 2013.[17] This law exempts from disclosure any audio recording that describes the condition of a victim of homicide, "*except for a recording of an emergency 9-1-1 call or other call for assistance made by a member of the public to a law enforcement agency.*" (Emphasis added.) Although this legislation is not dispositive of the issues in this appeal because of the possibility that specific FOIA exemptions or other statutory confidentiality provisions may still apply in some circumstances (not present here) to 911 recordings, the Act is a recent and clear reflection of the public interest in access to 911 audio recordings.

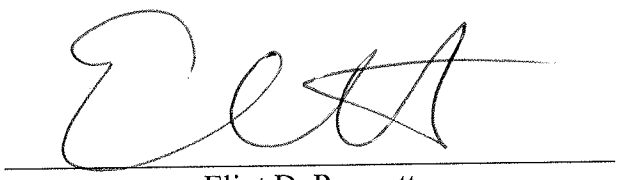
Release of the audio recordings will assist the public in gauging the appropriateness of law enforcement's response to calls from help from the public. In fact, public analysis of the recordings may serve to vindicate and support the professionalism and bravery of the first responders on December 14, 2012, who themselves have undoubtedly been subject to emotional turmoil and pain in witnessing the scene at Sandy Hook Elementary School. Release of the audio recordings will also allow the public to consider and weigh what improvements, if any, should be made to law enforcement's response to such incidents. The public has weighty interest

[17] The Act applies to any request for audio recordings made on or *before* May 7, 2014.

in addressing these questions now, not possibly two or three years from now when this case may have finally concluded. Delaying the release of the audio recordings, particularly where the legal justification to keep them confidential is lacking, only serves to fuel speculation about and undermine confidence in our law enforcement officials.

III. CONCLUSION

Having balanced the equities as required by the *Griffin Hospital* test, the court concludes that the plaintiff's application for stay of the Commission's decision must be denied and the Newtown respondents are ordered to provide the AP access to the audio recordings. Having done so, however, the court recognizes the public importance of and interest in this case, and concludes that it is appropriate to grant the plaintiff and Newtown respondents a short period of time to attempt to obtain appellate relief from this decision. Accordingly, this decision will become effective on December 4, 2013 at 2:00 pm unless the plaintiff and/or Newtown respondents have secured an order reversing this court's denial of the motion to stay. At that time, unless otherwise ordered by a higher court having jurisdiction over this matter, this decision will become effective. At the same time, this court will also order that the audio recordings that were reviewed by the court in camera be unsealed.



Eliot D. Prescott
Judge of the Superior Court