DOCKET NO. HHB-CV-19-6053190	:	**SUPERIOR COURT**
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COMMISSIONER OF THE DEPARTMENT OF CORRECTION, ET AL	:	**JUDICIAL DISTRICT OF NEW BRITAIN**
	:	**ADMINISTRATIVE APPEALS**
VS.	:	**SESSION**
	:	
FREEDOM OF INFORMATION COMMISSION	:	**JULY 30, 2020**

MEMORANDUM OF DECISION

INTRODUCTION:

This is an administrative appeal from a final decision of the Freedom of Information Commission (FOIC) brought by the plaintiffs, the Commissioner of the Department of Correction (Commissioner) and the Department of Correction (Department).

FACTS AND PROCEDURAL HISTORY:

On May 23, 2018, Noah Snyder, an inmate at the Carl Robinson Correctional Facility[1], made a request of the Department for certain records pursuant to the Freedom of Information Act (FOIA). In relevant part, Mr. Snyder requested:

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[1] Mr. Snyder was serving a series of sentences for felony theft and drug offenses. Mr. Snyder has since passed away. Given Mr. Snyder's passing, the matter is now partly mooted since we do not have a party interested in the

> "[a] Any written correspondence between any and all DOC staff especially kitchen staff or staff holding the titles CFSS I, CFSS II, or CFSS III, or regional institutional or district food service managers, to and/or from any and all UCONN and/or CMHE staff discussing, referencing, and/or referencing myself specifically (inmate Noah Snyder #282683) by name, pseudonym, inmate number, or any other manner identifying me specifically and/or by reference, including electronic correspondence.
> [b] All invoices for food and kitchen supplies ordered for use at CRCI and/or an enumeration of all individual food items ordered for use at CRCI from October 21, 2017, to the date this request is fulfilled." (FOIA Request)[2]

Apparently Mr. Snyder wanted to investigate communications concerning his alleged dietary restrictions arising from an alleged intolerance to bananas. On June 5, 2018, Mr. Snyder filed a complaint with the FOIC alleging that the Department failed to produce records in response to his FOIA request. The Department produced responsive records, including some redacted emails, free of charge to Mr. Snyder in early September 2018.

The FOIC held a contested case hearing on September 11, 2018 concerning Mr. Snyder's complaint. At the hearing, testimony and evidence were presented by both parties. Mr. Snyder contended that he was suspicious that the Department had not conducted an exhaustive search for records responsive to his FOIA Request. At the hearing, there was testimony concerning a search

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disclosure of public records. However, the Department has been found to have violated FOIA and seeks to rectify that finding.

[2] Initially Mr. Snyder's requests were broader but the requests were refined through the administrative process below.

for text messages on Department issued cell phones. At and after the September 11, 2018 hearing, the hearing officer issued various orders concerning redactions and additional documents. The Department complied with the various orders.

On November 28, 2018, on her own motion, the hearing officer reopened the hearing. The continued hearing was held on January 7, 2019. A proposed final decision was issued on February 4, 2019 which was considered by the FOIC at its meeting on March 13, 2019. The FOIC voted to remand the matter to the hearing officer for consideration of various issues raised by Mr. Snyder at the meeting. On March 19, 2019 and March 21, 2019, the hearing officer issued additional orders to the Department which the Department complied with. A revised proposed final decision was issued by the hearing officer on April 9, 2019. On April 24, 2019, the FOIC voted to amend the second proposed final decision of the hearing officer and then issued its final amended decision.

The final decision of FOIC contained the following findings and related orders:

> "18. With respect to the requests described in paragraph 2[a], above, it is found that, in addition to conducting the search for emails, as described in paragraph 9, above, CS Washington searched for written correspondence and facsimilies. With respect to text messages, at the April 24, 2019 commission meeting, the complainant clarified that he sought text messages only to and from those employees with the specific titles "CFSS I, CFSS II, or CFSS III", and "regional institutional or district food service managers". **At the hearings, CS Washington [also] testified that he does not have a mechanism by which to "capture" text messages.** CS Washington testified that he contacted the respondents' telephone service provider regarding retrieving text messages, and was informed that such information would not be provided without a warrant. **It is found, however, that**

> **the respondents did not provide any testimony as to whether [individual] DOC staff members searched their *personal and/or [business] department issued cellphones* for any responsive text messages. It is therefore found that the respondents failed to prove that they do not maintain text messages responsive to the requests described in paragraph 2[a], above. Accordingly, it is concluded that the respondents violated the FOI Act by withholding text messages.**
>
> 1.**The respondents shall undertake a search for text messages responsive to the complainant's records request as clarified in paragraph 18 of the findings, above,** and provide the complainant with a copy of such text messages, if located [, or otherwise inform the complainant in writing of the results of such search]. The respondents shall also provide an affidavit to the complainant and the commission, prepared by a person with knowledge of the efforts taken, and detailing the scope and results of their search. [emphasis added]

The CS Washington noted was the Department's experienced FOIA officer who handled Mr. Snyder's FOIA Request.

The plaintiffs are aggrieved because they have exhausted their administrative remedies and appeal a final adverse decision of the FOIC finding that the plaintiffs have violated FOIA and ordering the plaintiffs to conduct further searches for responsive records.

STANDARD OF REVIEW:

This appeal is brought pursuant to the Uniform Administrative Procedure Act (UAPA), General Statutes § 4-183[3]. Judicial review of an administrative decision in an appeal under the UAPA is limited. *Murphy* v. *Commissioner of Motor Vehicles*, 254 Conn. 333, 343, 757 A.2d 561 (2000). "[R]eview of an administrative agency decision requires a court to determine whether there is substantial evidence in the administrative record to support the agency's findings of basic fact and whether the conclusions drawn from those facts are reasonable. . . . Neither [the Supreme Court] nor the trial court may retry the case or substitute its own judgment for that of the administrative agency on the weight of the evidence or questions of fact. . . . Our ultimate duty is to determine, in view of all of the evidence, whether the agency, in issuing its order, acted unreasonably, arbitrarily, illegally or in abuse of its discretion." (Internal quotation marks omitted.) Id.

Although the courts ordinarily afford deference to the construction of a statute applied by the administrative agency empowered by law to carry out the statute's purposes, "[c]ases that

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

present pure questions of law . . . invoke a broader standard of review than is . . . involved in deciding whether, in light of the evidence, the agency has acted unreasonably, arbitrarily, illegally or in abuse of its discretion." (Internal quotation marks omitted.) *Dept. of Public Safety* v. *Freedom of Information Commission*, 298 Conn. 703, 716, 6 A.3d 763 (2010).

ANALYSIS:

It is readily apparent that significant attention, effort and expense have been incurred in addressing Mr. Snyder's FOIA Request. The plaintiffs appeal the final FOIC decision only to the extent that it requires a search of Department employees' personal cell phones for texts. Although there is argument between the parties as to the meaning of the FOIC final findings and orders, there is no doubt that FOIC found that the plaintiffs violated FOIA because they did not search their employees' personal cell phones for text messages and ordered them to do so. The FOIC findings at paragraph 18 found in relevant part:

> "It is found, however, that the respondents **did not provide any testimony as to whether [individual] DOC staff members searched their personal** *and/or* [business] department issued cellphones for any responsive text messages. **It is therefore found** that the respondents failed to prove that they do not maintain text messages responsive to the requests described in paragraph 2[a], above. **Accordingly, it is concluded that the respondents violated the FOI Act by withholding text messages.**" [emphasis added]

The "and/or" conjunctive used by FOIC in its findings means exactly that, both "and" as well as "or". Thus FOIC specifically found that the plaintiffs violated FOIA because they failed to

search the personal cell phones of at least certain employees for text messages. Further at paragraph 1 of the FOIC's orders, the FOIC ordered the plaintiffs as follows:

> "The respondents shall undertake a search for text messages responsive to the complainant's records request as clarified in paragraph 18 of the findings,..."

Thus FOIC has specifically ordered the plaintiff to search the personal cell phones of its employees for text messages.

In considering the foregoing, the court begins with an analysis of the FOIA's definition of public records and its overall disclosure requirements. General Statute § 1-200(5) provides as follows:

> "Public records or files" means any recorded data or information relating to the conduct of the public's business **prepared, owned, used, received or retained** by a public agency, or to which a public agency **is entitled to receive a copy by law or contract** under section 1-218, whether such data or information be handwritten, typed, tape-recorded, printed, photostated, photographed or recorded by any other method." [emphasis added]

Further the overall FOIA disclosure requirement is contained in General Statute §1-210(a) as follows:

> "Except as otherwise provided by any federal law or state statute, all records **maintained or kept on file by any public agency**, whether or not such records are required by any law or by any rule or regulation, shall be public records and every person shall have the right to (1) inspect such records promptly during regular office or business hours, (2) copy such records in accordance with subsection (g) of section 1-212, or (3) receive a copy of such records in accordance with section 1-212." [emphasis added]

Thus in order for records to be disclosable under FOIA the records must be prepared, owned, used, received or retained by the public agency, or the public agency must be entitled to receive a copy by law or contract, and the records must be maintained or kept on file by any public agency.

On the record in this matter, there is no doubt that text messages on the personal cell phones of Department employees are not disclosable pursuant to a FOIA request to the Department. There is no evidence that text messages on personal cell phones were prepared, owned, used, received or retained by the Department. Further, there is no evidence that the Department was entitled to receive a copy of texts on personal cell phones by law or contract. Lastly, there is no evidence that the Department maintained or kept on file text messages from the personal cell phones of its employees. In fact, the only relevant evidence in the record, not surprisingly, shows the exact opposite. Department FOIA officer, CS Washington, testified that the Department had no means of "capturing" text messages that reside only on the personal cell phones of its employees. Again, this is not a surprising finding. The inability to "capture" such text messages means that the Department did not maintain or keep such text messages on file. Further, it is evidence that such messages contained only on personal cell phones were not prepared, owned, used, received or retained by the Department. Further CS Washington testified that he contacted the cell phone carrier and inquired about the Department's ability to acquire such text messages, and was, not surprisingly, told that the carrier would not provide personal

text messages without a search warrant. The foregoing is evidence that the Department was not entitled to receive a copy of texts on personal cell phones by law or contract.

Again, not surprisingly, the Department represents that it has a policy that prohibits personal cell phones in its facilities. The FOIC complains that this policy was not presented at the hearing below. However, one should expect that such a policy would be in place with an agency such as the Department of Correction. Further, for the Department to have introduced the policy at the hearing below, the issue of text messages on personal cell phones would need to have been squarely in issue, which it was not. Lastly, the court is capable to taking judicial notice of such an official policy of a state agency[4]. In any case, even without the policy, it is clear that the record contains no substantial evidence that such text messages, that exist only on personal cell phones, are disclosable public records under FOIA[5].

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[4] The policy is in fact reflective of General Statute § 53a-174b which provides "(b) Conveyance or use of an electronic wireless communication device in a correctional institution is a class A misdemeanor."

[5] The FOIC cites a string of cases to support the FOIC's proposition that "if the content of the emails relates to the conduct of the public's business, such records [on employees' personal electronic devices] are "public records", within the meaning of General Statute § 1-200(5). The FOIC's proposition is clearly too broad. It is certainly possible for an employee of a public agency to make private comments in a personal email or text on his or her personal electronic device that "relate to the conduct of public business" and for such personal email or text not to be a public record. Clearly every comment or text sent by a public employee that merely relates to public business is not necessarily a public record, for if that were the case, then every text of a public employee to their spouse informing them that they will be late for dinner because of public business would be a public record. Such is clearly not the case. Further, there is no substantial evidence in the record establishing that these Department employees in question conducted Department business on their personal cell phones.

The FOIC appears to be requiring that the Department prove that texts contained solely on personal cell phones are not disclosable public records under FOIA. However, the complainant in this matter has made no showing that employees of the Department conduct official Department business on personal cell phones[6]. In fact, the issue of texts on personal cell phones was not squarely at issue in the hearings below. Further, in recognition of the lack of evidence, the Commission made no supportive findings that Department employees were conducting Department business on their personal cell phones, or even that any of the referenced employees used personal cell phones at work in any regard. On the record, it was not reasonable to require the Department to disprove an alleged fact that was not squarely at issue, and for which the complainant made no showing.

To the extent that FOIC's order requires the Department to search the personal cell phones of its employees[7], the FOIC went too far on the record before it as noted above. The Department's employees have a reasonable expectation of privacy in their personal cell phones and in the text messages contained on their personal cell phones. See *State v. Boyd*, 295 Conn. 707 (2010). How the search of employee personal cell phones is conducted is really beside the

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[6] The complainant's view that he observed texting and his mere suspicion that the texts might concern Department business and him are deeply insufficient to make a showing that texts on personal cell phones are public records and to provoke a search of the personal cell phones.

[7] The FOIC states in the conclusion section of their brief that "The order to "search" in this context is meant to "**direct** your employees to search". [emphasis added]

point. Whether the employer seizes the cell phones and searches them, or orders the employees to search and report the results to the employer, the employees' right to privacy in their personal cell phones and texts contained thereon would be inappropriately violated. The FOIC in their brief state: "There is a big difference between asking an employee to check his or her own cellphone for the existence of public records and an order that directs an agency to seize and search a personal cell phone ...". Although there may be a difference, both proposals inappropriately invade the privacy of employees and are unauthorized by the record here. A fishing expedition for the unsupported possibility of public records on the personal cell phones of employees[8] on this record clearly goes beyond the authority of the FOIC[9].

In view of the foregoing, the court concludes that, to the extent that the FOIC's order required the plaintiff to search, or to direct their employees to search, their employees' personal cell phones for text messages, such order is (1) in violation of constitutional or statutory

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[8] It should be noted the no Department employee is a party to this this litigation. Attempting to litigate and decide the rights of individual citizens to privacy in their personal cell phones without notice to them and an ability for the individuals to participate in the litigation raises the specter of a violation of the due process rights of those individuals.

[9] The FOIC clearly admits the fishing expedition nature of their order in stating the following in their brief: "However, in the underlying matter, neither party knows of the existence of any public records because the plaintiffs failed to make a simple inquiry of their employees". On this record, even a simple inquiry of employees to search their personal cell phones goes too far and exceeds the FOIC's authority. The mere alleged foreseeability that an employee might possibly mix work and personal business on one device does not create an obligation to search employees personal devices. Should the Department order their employees to search their homes as well for public records based upon the mere asserted view that it is foreseeable that employees might create public records at home without any evidentiary showing that such is the case? Clearly such is not the case.

provisions; (2) in excess of the statutory authority of the agency; (3) affected by error of law; (4) clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record. As such the court respectfully sustains the appeal.

ORDER:

The appeal is sustained. The plaintiffs appealed the final FOIC decision only to the extent that it required a search of Department employees' personal cell phones for texts. To the extent that the FOIC's order required the plaintiffs to search, or to direct their employees to search, their employees' personal cell phones for text messages, the FOIC's order is vacated, and no violation of FOIA arose from the fact that the plaintiff did not search the personal cell phones of their employees.

John L. Cordani, Judge