NO. HHB CV14-6023464S	:	STATE OF CONNECTICUT
PEOPLE FOR THE ETHICAL TREATMENT OF ANIMALS, INC.	:	SUPERIOR COURT
v.	:	JUDICIAL DISTRICT OF NEW BRITAIN
FREEDOM OF INFORMATION COMMISSION, ET AL.	:	DECEMBER 18, 2014

FICAP # 2013-015
FIC # 2012-681
Atty: KKR

cc: CHH MES VRP CAC

Memorandum of Decision

The plaintiff, People for the Ethical Treatment of Animals, Inc., appeals from a ruling by defendant freedom of information commission (FOIC) holding that defendants commissioner of administrative services (commissioner) and University of Connecticut Health Center (health center) do not have to disclose the identities of and grant information from health center personnel who did not comply with research protocols in conducting publicly-funded research on animals. Based on the discussion that follows, the court reverses FOIC's decision and orders that the health center disclose the redacted information.

I

FOIC, after a hearing, found the following facts. On October 18, 2012, the plaintiff requested under the freedom of information act (the act); General Statutes § 1-200 et seq.; that the health center provide it with all of the health center's correspondence with the National Institutes of Health from January 1, 2009 forward concerning potential noncompliance with federal animal welfare guidelines. In response, the health center provided the plaintiff with sixty-one pages of records with nineteen redactions. Three of the redactions were the names of employees directly involved in animal research. The other redactions were federal grant

numbers, which is information that one could use to learn the names of the key personnel working on the grants. The health center informed the plaintiff that the redactions were based on a claim of exemption under § 1-210 (b) (19) of the act.[1]

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[1]Section 1-210 (b) (19) provides in full: "(b) Nothing in the Freedom of Information Act shall be construed to require disclosure of: (19) Records when there are reasonable grounds to believe disclosure may result in a safety risk, including the risk of harm to any person, any government-owned or leased institution or facility or any fixture or appurtenance and equipment attached to, or contained in, such institution or facility, except that such records shall be disclosed to a law enforcement agency upon the request of the law enforcement agency. Such reasonable grounds shall be determined (A) (i) by the Commissioner of Administrative Services, after consultation with the chief executive officer of an executive branch state agency, with respect to records concerning such agency; and (ii) by the Commissioner of Emergency Services and Public Protection, after consultation with the chief executive officer of a municipal, district or regional agency, with respect to records concerning such agency; (B) by the Chief Court Administrator with respect to records concerning the Judicial Department; and (C) by the executive director of the Joint Committee on Legislative Management, with respect to records concerning the Legislative Department. As used in this section, "government-owned or leased institution or facility" includes, but is not limited to, an institution or facility owned or leased by a public service company, as defined in section 16-1, a certified telecommunications provider, as defined in section 16-1, a water company, as defined in section 25-32a, or a municipal utility that furnishes electric, gas or water service, but does not include an institution or facility owned or leased by the federal government, and "chief executive officer" includes, but is not limited to, an agency head, department head, executive director or chief executive officer. Such records include, but are not limited to:

(i) Security manuals or reports;

(ii) Engineering and architectural drawings of government-owned or leased institutions or facilities;

(iii) Operational specifications of security systems utilized at any government-owned or leased institution or facility, except that a general description of any such security system and the cost and quality of such system, may be disclosed;

(iv) Training manuals prepared for government-owned or leased institutions or facilities that describe, in any manner, security procedures, emergency plans or security equipment;

(v) Internal security audits of government-owned or leased institutions or facilities;

(vi) Minutes or records of meetings, or portions of such minutes or records, that contain or reveal information relating to security or other records otherwise exempt from disclosure under this subdivision;

(vii) Logs or other documents that contain information on the movement or assignment of security personnel;

(viii) Emergency plans and emergency preparedness, response, recovery and mitigation plans, including plans provided by a person to a state agency or a local emergency management agency

The plaintiff appealed to FOIC on December 6, 2012. On February 6, 2013, the health center notified the commissioner of the request pursuant to § 1-210 (d) of the act.[2] On March 8, 2013, the commissioner directed the health center not to disclose the redacted information because he had determined that there were reasonable grounds to believe that disclosure of the

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or official; and

(ix) With respect to a water company, as defined in section 25-32a, that provides water service: Vulnerability assessments and risk management plans, operational plans, portions of water supply plans submitted pursuant to section 25-32d that contain or reveal information the disclosure of which may result in a security risk to a water company, inspection reports, technical specifications and other materials that depict or specifically describe critical water company operating facilities, collection and distribution systems or sources of supply;"

[2]Section 1-210 (d) of the act provides: "Whenever a public agency, except the Judicial Department or Legislative Department, receives a request from any person for disclosure of any records described in subdivision (19) of subsection (b) of this section under the Freedom of Information Act, the public agency shall promptly notify the Commissioner of Administrative Services or the Commissioner of Emergency Services and Public Protection, as applicable, of such request, in the manner prescribed by such commissioner, before complying with the request as required by the Freedom of Information Act and for information related to a water company, as defined in section 25-32a, the public agency shall promptly notify the water company before complying with the request as required by the Freedom of Information Act. If the commissioner, after consultation with the chief executive officer of the applicable agency or after consultation with the chief executive officer of the applicable water company for information related to a water company, as defined in section 25-32a, believes the requested record is exempt from disclosure pursuant to subdivision (19) of subsection (b) of this section, the commissioner may direct the agency to withhold such record from such person. In any appeal brought under the provisions of section 1-206 of the Freedom of Information Act for denial of access to records for any of the reasons described in subdivision (19) of subsection (b) of this section, such appeal shall be against the chief executive officer of the executive branch state agency or the municipal, district or regional agency that issued the directive to withhold such record pursuant to subdivision (19) of subsection (b) of this section, exclusively, or, in the case of records concerning Judicial Department facilities, the Chief Court Administrator or, in the case of records concerning the Legislative Department, the executive director of the Joint Committee on Legislative Management."

information may create a risk of harm within the meaning of § 1-210 (b) (19). The plaintiff then filed an amended complaint with FOIC, adding the commissioner and the department of administrative services (the department) as respondents.

In its decision, FOIC first found that the health center had violated the act by failing to notify the commissioner more promptly, as required by § 1-210 (d). FOIC also found that the plaintiff had seasonably moved to join the department as a respondent and that FOIC had jurisdiction to hear the plaintiff's appeal. These rulings are not challenged in this appeal. (Return of Record, (ROR), pp. 1871-75.)

FOIC then made the following findings that are the subject of this appeal:

"31. With respect to the claim of exemption pursuant to §1-210(b)(19), G.S., it is found that the commissioner of DAS relied heavily on risk assessments performed by the commissioner of the former Department of Public Works ("DPW") [footnote 2] in 2008 and 2010 concerning requests by PETA, individuals associated with PETA, or another animal rights organizations for similar or identical records as those requested by PETA in this matter. It is found that in 2010, the commissioner of DPW detailed numerous incidents nationwide, mostly between 2003 and 2009, of violence, threats of violence and harassment directed at individual researchers, their families, homes and property.

"[footnote 2] The former DPW was the predecessor agency to DAS for purposes of determinations pursuant to §1-210(b)(19), G.S.

"32. It is found that, according to sources relied on by the commissioner of DAS, that

[sic] in 2008, Connecticut was considered to be a "low-medium incidents state," and New York, New Jersey, Pennsylvania and Washington, DC were considered "high incidents states." It is found that in 1989, an animal rights extremist placed a radio-controlled pipebomb on the premises of U.S. Surgical Corporation in Norwalk, Connecticut, which was successfully disarmed.

"33. In addition, in 2008, the president of the University of Connecticut was the recipient of an e-mail campaign demanding that UConn cease using live animals in connection with intubation courses. It is found that six of the thousands of e-mails received in a two-week span advocated physical harm to those who perform animal research.

"34. The complainant contends, reasonably, that UCHC disclosed NIH grant numbers to PETA in similar or identical records provided to PETA in 2010, and that even though PETA could use the numbers to identify the principal investigators and other researchers, no harm resulted to any person referenced in the records disclosed to PETA. The complainant also contends that the respondents failed to provide any evidence of harm or threat of harm due to disclosure of the names of animal researchers who violated treatment protocols. The complainant contends, therefore, that there is no nexus between disclosure of the names and grant numbers and the risk of harm described by the respondents.

"35. The complainant also observes that DAS relied on a safety review performed in 2008 and 2010, and that the respondents failed to provide evidence of any significant harm or threat of harm to animal researchers since 2009. In essence, PETA claims that the evidence that DAS used to support its claim of exemption is stale and not descriptive of the state of affairs in 2013.

"36. The respondents contend that the decline of the number and severity of incidents of

violence against animal researchers since 2010 may be due to new legislation targeting such attacks, the use of the courts, and increased vigilance by law enforcement. The respondents suggest, also, that the lack of incidents may be the result of successful deterrence, rather than, as PETA suggests, the absence of threat.

"37. It is concluded that §1-210(b)(19), G.S., requires the commissioner of DAS to prove that there are reasonable grounds for his belief that disclosure of names and grant numbers may create a safety risk. 'The FOIC's role is to determine whether the [commissioner's] reasons were pretextual and not bona fide, or irrational.' *Commissioner, Department of Correction v. FOI Commission*, Superior Court, judicial district of New Britain at New Britain, Docket No. CV074015438 and CV084016766 (November 3, 2008) (2008 Conn. Super. 2724) *13.

"38. It is found that DAS's reasons were not irrational, and that the commissioner of DAS acted in good faith and without pretext in believing that disclosure of the redacted information may result in a risk of harm.

"39. It is found, therefore, that the commissioner of DAS has reasonable grounds to believe that disclosure of the names and grant numbers of researchers reported for failing to comply with animal welfare guidelines may create a safety risk, including a risk of harm to any person, any government-owned or leased institution or facility or any fixture or appurtenance and equipment attached to, or contained in, such institution or facility, within the meaning of §1-210(b)(19), G.S.

"40. It is concluded, accordingly, that DAS did not violate §1-210(d), G.S., by directing UCHC not to disclose the names and NIH grant numbers from the records requested by PETA." (ROR, pp. 1875-76.)

Accordingly, FOIC dismissed the plaintiff's complaint.

The plaintiff now appeals to this court.

II

Under the Uniform Administrative Procedure Act (UAPA), General Statutes § 4-166 et seq., judicial review of an agency decision is "very restricted." (Internal quotation marks omitted.) *MacDermid, Inc. v. Dept. of Environmental Protection*, 257 Conn. 128, 136-37, 778 A.2d 7 (2001). Section 4-183 (j) of the General Statutes provides as follows: "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." Stated differently, "[j]udicial review 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." (Internal quotation marks omitted.) *Schallenkamp v. DelPonte*, 229 Conn. 31, 40, 639 A.2d 1018 (1994). "It is fundamental that a plaintiff has the burden of proving that the [agency], on the facts before [it], acted contrary to law and in abuse of [its] discretion." (Internal quotation marks omitted.) *Murphy v. Commissioner of Motor Vehicles*, 254 Conn. 333, 343, 757 A.2d 561 (2000).

Our Supreme Court has stated that "[a]n agency's factual and discretionary determinations are to be accorded considerable weight by the courts. . . ." (Internal quotation marks omitted.) *Longley v. State Employees Retirement Commission*, 284 Conn. 149, 163, 938 A.2d 890 (2007). "Even for conclusions of law, [t]he court's ultimate duty is only to decide whether, in light of the evidence, the [agency] has acted unreasonably, arbitrarily, illegally, or in abuse if its discretion. . . . [Thus] [c]onclusions of law reached by the administrative agency must stand if the court determines that they resulted from a correct application of the law to the facts found and could reasonably and logically follow from such facts. . . . [Similarly], this court affords deference to the construction of a statute applied by the administrative agency empowered by law to carry out the statute's purposes. . . . Cases that present pure questions of law, however, invoke a broader standard of review than is . . . involved in deciding whether, in light of the evidence, the agency has acted unreasonably, arbitrarily, illegally or in abuse of its discretion. . . . Furthermore, when a state agency's determination of a question of law has not previously been subject to judicial scrutiny . . . the agency is not entitled to special deference. . . . We have determined, therefore, that the traditional deference accorded to an agency's interpretation of a statutory term is unwarranted when the construction of a statute . . . has not previously been subjected to judicial scrutiny [or to] . . . a governmental agency's time-tested interpretation. . . . [When the agency's] interpretation has not been subjected to judicial scrutiny or consistently applied by the agency over a long period of time, our review is de novo." (Citation omitted; internal quotation marks omitted.) *Chairperson, Connecticut Medical Examining Board v. Freedom of Information Commission,* 310 Conn. 276, 281-83, 77 A.3d 121 (2013).

III

A

Exemption (b) (19) provides in part that the following are exempt from disclosure: "Records when there are reasonable grounds to believe disclosure may result in a safety risk, including the risk of harm to any person, any government-owned or leased institution or facility or any fixture or appurtenance and equipment attached to, or contained in, such institution or facility . . . ." General Statutes § 1-210 (b) (19). This language does not create an unreasonably high standard for state agencies to satisfy in appropriate cases. The exemption uses terms of moderation such as "reasonable grounds," "may" result, and safety "risk." The exemption does not require more emergent dangers such as "imminent use of physical force,"; General Statutes § 53a-19 (a); or "continuous threat of physical pain or physical injury." General Statutes § 46b-15 (a).[3] On the other hand, exemption (b) (19) clearly does not allow the commissioner to authorize withholding of records from disclosure without finding some level of security concern.

Given that the commissioner's determinations must fall within these broad parameters, the first issue in this case becomes one of the proper standard that FOIC should employ to review determinations by the commissioner under exemption (b) (19). FOIC relied on a Superior Court decision holding that FOIC's role is to "'determine whether the [commissioner's] reasons were pretextual and not bona fide, or irrational.'" (ROR, p. 1876, para. 37, quoting *Commissioner,*

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[3]The fact that § 1-210 (b) (19) expressly exempts certain records, such as security manuals and architectural drawings, from disclosure without the need for any specific showing of harm, also suggests that the standard for showing "reasonable grounds to believe disclosure may result in a safety risk" is not overly stringent.

Department of Correction v. FOI Commission, Superior Court, judicial district of New Britain, Docket Nos. CV07 4015438 and CV08 4016766 (November 3, 2008.)) While that standard may be relevant, it is not the standard set by our Supreme Court.[4]

The most recent and relevant Supreme Court decision interpreting exemption (b) (19) is *Director, Dept. of Information Technology v. Freedom of Information Commission,* 274 Conn. 179, 874 A.2d 785 (2005). In that case, the Court invoked the general standard for exceptions to disclosure under the act. Thus, the Court observed that "[t]he burden of proving the applicability of an exception [to disclosure under the act] rests upon the party claiming it. In particular, [t]his burden requires the claimant of the exemption to provide more than conclusory language, generalized allegations or mere arguments of counsel. Rather, a sufficiently detailed record must reflect the reasons why an exemption applies to the materials requested." (Citations omitted; internal quotation marks omitted.) Id., 191-92. FOIC erred in failing to cite or apply this standard. Id., 193.[5]

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[4]The *Department of Correction* case arose under exemption (b) (18). General Statutes § 1-210 (b) (18). The exemption is worded similarly to (b) (19). It provides in part that the following are exempt: "Records, the disclosure of which the Commissioner of Correction, or as it applies to Whiting Forensic Division facilities of the Connecticut Valley Hospital, the Commissioner of Mental Health and Addiction Services, has reasonable grounds to believe may result in a safety risk, including the risk of harm to any person or the risk of an escape from, or a disorder in, a correctional institution or facility under the supervision of the Department of Correction or Whiting Forensic Division facilities. . . ."

[5]The *Director* Court also held that a trial court should not mandate proof of a connection between disclosure and criminal or terrorist activity in the form of statistical data. Id., 193. The plaintiff claims that *Director* additionally concluded that the proper standard for review of a commissioner's decision on safety risk includes a determination that there is a "nexus between [disclosure] and the conclusion that the release of the data would pose a safety risk." Id., 193. While such a "nexus" is undoubtedly relevant in resolving a dispute under exemption (b) (19), the *Director* Court did not specifically adopt that standard. Rather, in using the term "nexus," the Court merely quoted the trial court's findings. Id., 191, 193.

B

In this case, most of the evidence presented by the commissioner, as summarized in paragraphs 31-33 of FOIC's decision, shows that, over the past decade, there have occasionally been threats of danger to the general community of animal researchers, including some researchers in Connecticut. The plaintiff observes, however, that the risk to the general community of animal researchers from disclosure is not the relevant risk. It points out that it is not seeking the identities of all persons who conduct animal research at the health center, along with the details of their experiments, because that information is routinely published and is already in the public domain. (Plaintiff's brief, p.1; Plaintiff's reply brief, p. 1.)[6] Rather, the plaintiff seeks the identities of only those health center researchers who did not comply with research protocols in conducting publicly funded animal research. The plaintiff maintains that the risk to this group is the relevant risk. The department agreed at the commission hearing that the relevant issue was the existence of an "elevated concern that was expressed by [the department] with regard to animal researchers who failed to comply with the research protocols being at a higher – or elevated risk from personal injury or damage to their research facilities."

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[6]The department's evidence confirms that the names of animal researchers who have obtained grants and published studies are in fact public. Its evidence also showed, however, that the names of junior faculty and staff who have not obtained grants or published studies are not public. (ROR, p. 303-04). The plaintiff sought to introduce additional evidence of the names of animal researchers at the health center disclosed on its website, but the department objected and the hearing officer sustained the objection on the ground of lack of reliability. (ROR, pp. 331-34.) In any event, the plaintiff is not seeking the identities of persons not involved in publicly-funded grant research. Further, the health center website information that the plaintiff did introduce contains the names, phone numbers, and email addresses not only of the principal researcher but also of his laboratory staff members. (ROR, pp. 690, 695.) Thus, the department has no reasonable argument that the names that it has declined to disclose are not already in the public domain as being involved in animal research.

(ROR, p. 333.)

The plaintiff argues that there is no specific evidence showing that disclosure poses any higher risk to those animal researchers who violate research protocols than to animal researchers generally, whose names are already public despite the existence of some level of threat to them. The plaintiff cites the following as examples of noncompliance with protocols: weighing rabbits less often than required, failing to sterilize instruments, failing to submit certain forms in a timely manner, killing animals by using CO2 gas instead of by decapitation, and anesthetizing animals using a different procedure than that described by protocol. (Plaintiff's brief, p. 17.)

Review of FOIC's decision reveals that it identified no evidence of a threat to researchers because they have violated these protocols. Its decision cites no study, incident, or testimony even suggesting that there are reasonable grounds to believe that disclosure of the names of animal researchers who did not comply with federal guidelines will pose any greater risk of harm than has already occurred from the disclosure of the names of the broader set of all animal researchers.

Of course, if "the specific evidence cited in support of an administrative officer's ultimate factual finding is inadequate to support that ultimate factual conclusion, a reviewing court should search the record of the entire proceedings to determine whether it does in fact contain substantial evidence from which the ultimate factual finding could reasonably be inferred." *Connecticut Building Wrecking Co. v. Carothers*, 218 Conn. 580, 600-01, 590 A.2d 447 (1991); accord *Dickman v. Office of State Ethics*, 140 Conn. App. 754, 771-72, 60 A.3d 297, cert. denied, 308 Conn. 934, 66 A.3d 497 (2013). To that end, FOIC now cites the following testimony of Raymond Philbrick. Philbrick is director of security for the department and has thirty years of

experience in the security profession, is a certified protection professional, and has attended numerous seminars and training sessions in his field. (ROR, p. 350.)

MR. WALSH [for the department]: "And based upon your review, is it your opinion, sir, that the release of the names of the animal researchers at the University of Connecticut who failed to follow the animal testing protocol, that the release of their names or the grant numbers would constitute a risk to those researchers or to the UCONN Health Center research facilities?"

MR. PHILBRICK: "Yes, I do." (ROR, p. 355.)

In addition, Philbrick testified as follows: "I'm saying that there could be a fringe group out there or individuals that would seek to target researchers who are thought to be less than – what – less than – you know, not – not – I'm trying to think of the word unfortunately – in other words, that they're not in full compliance potentially so they might become more of a target." (ROR, p. 300) He also testified: "[I]f someone is identified – a researcher is identified as being noncompliant or potentially noncompliant, that it might raise the level of security concern for that individual if that information is out there in the public for someone to act on." (ROR, p. 318.)

This testimony is insufficient to satisfy exemption (b) (19). It essentially consists of the opinion and, in the latter quotes, the conjecture, of one expert with no supporting studies or incidents. It does not provide "more than conclusory language, generalized allegations or . . . a sufficiently detailed record . . . ." as required by *Director.* (Internal quotation marks omitted.) *Director, Dept. of Information Technology v. Freedom of Information Commission,* supra, 274 Conn. 191-92. Indeed, none of the department's witnesses could identify a single incident of violence or threats that occurred because an animal researcher did not follow proper

protocol. (ROR, pp. 321-22, 344-45 (Philbrick); pp. 371-73 (Jeffrey Beckham); pp. 513-14, 526-27 (Scott Wetstone).)

Under *Director,* the department retained the burden of proving that the (b) (19) exemption should apply. FOIC does not identify, nor does the record reveal, any other evidence that the department produced to establish the existence of a greater safety risk to noncompliant researchers than to animal researchers generally.[7] Accordingly, not only did FOIC apply the wrong standard for review of the commissioner's decision, but the record of the hearing does not support its ultimate conclusion that the department had met its burden for nondisclosure under (b) (19).

[7]FOIC argues in its brief that, in view of the abundance of evidence of a connection between a safety risk and the disclosure of the names of animal researchers generally, the hearing officer "could reasonably infer from this evidence that the risk to animal researchers who violated protocol would be the same or potentially greater than the risk to animal researchers in general." (FOIC brief, p. 20.) The possibility that the risk of disclosure of noncompliant researchers is "the same" as the risk to animal researchers generally would not justify nondisclosure in view of the fact that the names of animal researchers generally are already in the public domain. The argument that the hearing officer "could reasonably infer" that the risk is "potentially greater" also does not meet the *Director* standard of providing a sufficiently detailed record. Further, it is questionable whether a hearing officer "could reasonably infer" that there is a greater risk of violence to noncompliant researchers when at least some of the ways in which animal researchers have been noncompliant – such as failure to weigh rabbits or failure to sterilize instruments – would not seem likely to provoke violence.

IV

The court sustains the appeal, reverses FOIC's decision, and orders that the department disclose the redacted information.

It is so ordered.

Schuman, J.

Carl J. Schuman
Judge, Superior Court