CV 16 6033328 S	:	SUPERIOR COURT
NEW MILFORD EDUCATION ASSOCIATION, ET AL.	:	JUDICIAL DISTRICT
V.	:	OF NEW BRITAIN
FREEDOM OF INFORMATION COMMISSION, ET AL.	:	MARCH 13, 2017

MEMORANDUM OF DECISION

The plaintiffs, New Milford Education Association and Connecticut Education Association,[1] have appealed from an April 27, 2016 final decision of the freedom of information commission (the commission). The commission ruled in favor of the complainant, John Spatola, that he was entitled to "data-type records" filed with the state department of education, in the town's custody, that set forth statistical summaries of teacher evaluations in the town of New Milford. The plaintiffs contend that the final decision of the commission was erroneous as these statistical records were exempt from disclosure under § 10-151 (c), providing that "[a]ny records maintained or kept on file by the Department of Education or any local or regional board

[1]The complainant, John Spatola, named the respondent at the freedom of information commission (the commission) as the superintendent of schools of the town of New Milford; the plaintiffs were granted intervenor status by the commission. The plaintiff intervenors have appealed from an adverse order of the commission and are aggrieved. General Statutes § 4-183 (a).

of education that are records of teacher performance and evaluation shall not be deemed to be public records and shall not be subject to the provisions of section 10-210. . . ."

The final decision of the commission reads in relevant part as follows:

1. The Superintendent of Schools, New Milford Public Schools and the New Milford Public Schools ("respondents") are public agencies within the meaning of § 1-200(1), G.S.

2. It is found that on June 25, 2015, the complainant requested copies for the current and previous school years (i.e., 2013-2014 and 2014-2015) of "the aggregate date-type records that were filed with the State Department of Education (hereinafter "SDE") that contain the aggregate counts of educators in the respondents' school district by their final summative ratings i.e. 'Exemplary,' 'Proficient,' 'Developing,' and 'Below Standard.'"

3. It is found that the respondents denied the complainant's request, contending that the records he requested were not public records, pursuant to § 10-151c, G.S.

4. By letter filed July 10, 2015, the complainant appealed to this Commission, alleging that the respondents violated the Freedom of Information ("FOI") Act by failing to provide copies of the records he requested.

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10. It is found that each teacher for the New Milford Public Schools is evaluated according to guidelines set by the SDE. It is found that each teacher's evaluation is a months-long process and reflects ratings in two main areas: teacher practice and student outcomes. It is found that the ratings in the two main areas are based on numerous factors and information derived from various sources. It is found that the teacher is given a final summative rating that reflects the scores in the two main areas. It is found that the summative rating is one of four performance levels: exemplary, proficient, developing, and below standard. (It is found that the respondents use the word "accomplished" instead of "proficient.")

11. It is found that each teacher only has access to his or her evaluation, which is maintained in an electronic database. It is found that at least part of each teacher's evaluation, including his or her summative rating, is printed out and maintained in his or per personnel file.

12. It is found that the records sought by the complainant show the aggregate summative ratings in each of the four performance levels for all of the teachers in New Milford for each of the two years requested.

13. It is found that the records sought by the complainant consist of two single-page documents, one for each year requested. It is found that the complainant seeks a form completed by the respondent superintendent entitled "Educator Evaluation Data Collection, 2014-15, Part A" (for the previous year, the form would have the same title, except for the year: 2013-2014). It is found that the form requires the superintendent to enter the district name, the contact person, the contact email, and to sign and date the form. It is found that the substance of the information contained in the form is what is at issue in this matter: a table that indicates the "total count of educators" who received a "final rating" of "Exemplary," "Proficient," "Developing," and "Below Standard," as well as the total count who received an "In Process" rating or who were not rated.

14. It is found that the SDE requires a superintendent to complete the form and to send a copy of the completed form to the state. It is found that the respondents maintain the original completed form in the superintendent's office, and only the superintendent, the assistant superintendent and the director of Human Resources have access to the form. It is found that the director of Human Resources has access, because it is the director's responsibility to make sure that every teacher is evaluated.

15. It is found that the form is not maintained in any teacher's personnel file, nor is it considered by the respondents to be part of any teacher's personnel file.

16. The respondents and the interveners claim that the requested records are "records of teacher performance and evaluation," within the meaning of § 10-151c, G.S., and therefore are deemed not to be public records that must be disclosed pursuant to § 1-210(a), G.S. The respondents and intervener claim that because a teacher's summative, or final, rating is part of that teacher's evaluation, the aggregate number of teachers in each rating category is a record of teacher performance and evaluation.

17. The complainant, however, contends that § 10-151c, G.S., applies only to individual teacher evaluations, not to aggregate numbers on a form submitted to SDE that does not identify any individual teacher.

18. It is concluded that the sole issue in this matter is whether the phrase "records of teacher performance and evaluation" as used in § 10-151c, G.S., encompasses the four numbers representing the aggregate number of teachers in each of the four performance levels.

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22. Applying a "functional review" of the records requested in this matter, it is found that the records are forms completed by the superintendent to provide to the SDE. It is found that the forms are not used to make employment decisions about any individual teacher, and they are not even maintained in any teacher's personnel file. It is found that the form does not identify any teacher. It is found that the nature of the requested records is quite different from an individual teacher's performance evaluation as set forth in § 10-151b, G.S., which documents a months-long, in-depth focus on an individual employee's development, achievements and adherence to established practice goals and guidelines.

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31. It is concluded that § 10-10a, G.S., authorized the SDE to collect student and teacher data, but shields only "student information" in the system database from disclosure as a public record under the FOI Act. Section 10-10A, G.S., does not similarly provide that teacher information shall not be considered a public record.

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39. It is concluded that, contrary to the respondents' and the interveners' claim, nothing in either the language or history of P.A. 13-122 demonstrates that the legislature intended to limit access to public records by expanding the definition of teacher performance and evaluation beyond that construed by the courts.

40. It is also concluded, moreover, that had the legislature intended to protect aggregate teacher data from disclosure, it could have done so in the same manner as it specifically requires the SDE to maintain the confidentiality of *individual* teacher data in § 10-10a, G.S.

41. It is concluded, based on the plain language of § 10-151c, G.S., and the statute's history, that § 10-151c, G.S., ensures parity, so that as the SDE collects any kind of teacher data pursuant to any data system, records of teacher performance and evaluation that are deemed not

to be public records in the hands of local and regional boards of education are similarly shielded when provided to and maintained by the SDE.

42. It is found that the requested records are not records of teacher performance and evaluation within the meaning of § 10-151c, G.S.

43. It is also found that the records are public records within the meaning of §§ 1-210(a) and 1-212(a), G.S.

44. Accordingly, it is concluded that the respondents violated §§ 1-210(a) and 1-212(a), G.S., by failing to provide such records to the complainant.

The following order by the Commission is hereby recommended on the basis of the record concerning the above-captioned complaint:

1. Forthwith, the respondents shall provide to the complainants, free of charge, a copy of the requested records described in paragraph 2 of the findings of fact, above.

In reviewing this final decision, the court is instructed by the standard of review set forth by our Supreme Court, recently summarized as follows : "By way of background, we cite briefly the policy of the act. The act provides in relevant part that '[e]xcept 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 . . . or (3) receive a copy of such records. . . .'

General Statutes § 1-210 (a).

"The overarching legislative policy of the act is one that favors the open conduct of government and free public access to government records. It is well established that the general rule under the act is disclosure, and any exception to that rule will be narrowly construed in light of the general policy of openness expressed in the act.

"Thus, the burden of proving the applicability of an exception to disclosure under the act rests upon the party claiming it.

"We begin by setting forth the standard of review. This court reviews the trial court's judgment pursuant to the UAPA. Under the UAPA, it is not the function of this court to retry the case or to substitute its judgment for that of the administrative agency. Even for conclusions of law, the court's ultimate duty is only to decide whether, in light of the evidence, the agency has acted unreasonably, arbitrarily, illegally, or in abuse of its discretion. Thus, conclusions of law reached by the administrative agency must stand if the court determines that they resulted from a correct application of the law to the facts found and could reasonably and logically follow from such facts. 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. Even if time-tested, we will defer to an agency's interpretation of a statute only if it is reasonable; that reasonableness is determined by application of our established rules of statutory construction.

"When construing a statute, our 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. The issue of statutory interpretation presented in this case is a question of law subject to plenary review." (Brackets omitted, citations omitted, internal quotation marks omitted.) *Lieberman* v. *Aronow*, 319 Conn. 754-757 (2015).

The plaintiffs' first contention is that FOIA exempts from disclosure records exempted by the general statutes. § 1-210 (b) (10). The plaintiffs' rely on § 10-151c, specifically exempting "any records maintained or kept on file by the Department of Education . . . that are records of teacher performance and evaluation . . . ."[2] While the requested statistical records

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[2]The records in this appeal were required to be filed with the department of education by a 2012 amendment to § 10-151b that mandated information on aggregate counts of teacher evaluation ratings.

have a tangental root in the teacher evaluation process, this does not answer the question of whether such records fall into the exemption of § 10-151c.

The exemption was recently considered by the Supreme Court in *Lieberman* v. *Aronow*, supra. The Court concluded that the phrase "records of teacher performance and evaluation" must be construed "narrowly." Id. at 761. The word "evaluation" in the phrase connotes a process of judging carefully or appraising. Id. at 759.

The facts as found by the hearing officer in this case support a factual finding that the exemption for teacher evaluations is inapplicable. Finding 13 finds that the information contained in the form is a table that indicates a total count of educators who received ratings of exemplary, proficient, developing and below standard. Findings 14 and 15 find that the form is retained in the superintendent's office and is not placed in any teacher's personnel file. Under the standard of review summarized above, the court cannot retry the factual conclusions of the commission.

From a public policy perspective, the commission may properly conclude that access to the aggregate data on teacher performance is useful as a community planning tool. This was the

complainant's position. He testified that he was not interested in any individual information. (Return of Record, ROR, p. 75). The superintendent also testified that the data illustrates " how the district is performing or how staff are performing within the district." (ROR, p. 63).

Secondly the plaintiffs contend that when the school districts in 2012 were required for the first time to furnish data to the state board of education, the exception of § 10-151c was also made applicable to the board of education for the first time. Since this was part of a sweeping renovation of teacher evaluations, it is argued that in making the exemption applicable to data supplied to the board of education, the intent of the legislature in applying the exemption in 2013 was to block release of "any" data supplied to the board of education. The court has compared § 10-151c both before and after the 2013 amendment and its plain language indicates that the change was only to add "Department of Education." The court cannot find that the *Lieberman* test, looking at the "evaluation" in a functional way, is any way changed by the addition of the phrase "Department of Education."

Finally the plaintiffs contend that the FOIC final decision in *Treat-Perry* v. *Superintendent*, #FIC 2014-034 is applicable here. In *Treat-Perry*, the commission applied the

§ 10-151c exemption to a request for parent surveys used in the evaluation process. There, however, the raw data included identification of individual teachers, a situation not present in this case.

The plaintiff Connecticut Education Association argues that it represents teachers in multiple school districts in this state and some of the districts have very few teachers. One district has only nine teachers. The Association states that there could be a situation where because of the small numbers, the statistics submitted to the department of education could be analyzed and individual teachers identified. In New Milford, it was represented to the court at oral argument, there are 1000 teachers. Therefore the issue as raised by the Association does not arise. The court does not disagree with the Association that another case on other facts could possibly lead to another outcome.

Having considered the arguments as raised by the plaintiffs, the court dismisses the appeal.

SO ORDERED.

BY THE COURT

Henry S. Cohn, J.T.R.