NO. HHB CV14-5015956S STATE OF CONNECTICUT

ALEXANDER WOOD SUPERIOR COURT

FIC# 2014-083
FIC# 2013-082
Atty: UDH

v. JUDICIAL DISTRICT OF NEW BRITAIN

FREEDOM OF INFORMATION COMMISSION

cc: CHM
DES
VLP
CAC

JANUARY 21, 2015

Memorandum of Decision

The narrow question raised in this appeal is whether an application for an absolute pardon, which ordinarily does not become subject to erasure until the applicant actually receives the pardon, is still subject to erasure when the applicant receives the pardon after the board of pardons and paroles erroneously denies a request for disclosure of the application under the freedom of information act. The defendant freedom of information commission (commission) held that these records are subject to erasure. The plaintiff, a journalist, appeals from the commission's decision. The court affirms the commission's decision and dismisses the appeal.

I

The commission, after a hearing, found the following facts. (Return of Record (ROR), pp. 764-65.) On January 23, 2013, the plaintiff and the Manchester Journal Inquirer newspaper requested under the freedom of information act; General Statutes §§ 1-200 et seq. (the act); copies of three pardon applications considered by the board of pardons and paroles (board) at the board's November 1, 2012 meeting as well as four pardon applications considered at the board's November 14, 2012 meeting.[1] The board provided some records and maintained that the

[1]The plaintiff also requested the written statement of reasons for the denial of pardons to six individuals. The commission ruled that these statements were not exempt from disclosure and

remaining responsive records were exempt from disclosure.

The plaintiff appealed to the commission on February 17, 2013. The commission held a hearing on August 6, 2013. In a January 30, 2014 decision, the commission initially determined that certain portions of the records were exempt from disclosure under a variety of authorities unrelated to the state erasure statutes codified at General Statutes §§ 54-142a et seq.[2]

With regard to the remaining portions of the records, the commission found that, at the time of the plaintiff's request on January 23, 2013, the board had voted to grant several absolute pardons but that the applicants for these pardons had not yet received the actual certificates of pardon. Instead, these applicants received their pardons after the plaintiff's request but before the

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they are no longer at issue in this appeal. (Return of Record (ROR), pp. 764, 788.)

[2]These authorities included: the act's exemption for records that invade personal privacy (ROR, pp. 775-76); the act's exemption for law enforcement records not otherwise available to the public that were compiled in connection with the detection or investigation of crime (ROR, p. 776); federal and state statutes concerning National Crime Information Center information (ROR, p. 778); state statutes prohibiting disclosure of victim information (ROR, pp. 778-81); state statutes prohibiting public access to protective orders maintained in an automated registry (ROR, pp. 781-82); state statutes prohibiting public access to information provided to the Court Services Support Division (ROR, pp. 782-83); a federal statute prohibiting public access to certain personal information contained in motor vehicle records (ROR, pp. 784-87); and Practice Book rules prohibiting disclosure of social security numbers and other personal identifying information. (ROR, p. 787.)

The commission also determined that the records were not completely exempt from disclosure under the act's exemption for records that invade personal privacy (ROR, pp. 769-71) and a state statute pertaining to written reports of investigations into pardons. (ROR, pp. 772-75, 785.) Finally, the commission determined that several authorities did not apply to any portion of the records in question: the act's exemptions for records that may create a safety risk (ROR, pp. 776-78); state statutes regarding "criminal record history information." (ROR, pp. 783-84); and a federal statute regarding records of patients involved in substance abuse education. (ROR, p. 787.)

These decisions are not at issue in this appeal.

commission hearing.[3]

The commission concluded that the erasure statute exempted from disclosure certain portions of the applications of those individuals. The commission reasoned that "the erasure provisions of § 54-142a(d), G.S., do not take effect until the subject of the records receives an absolute pardon, and any records that are open to the public must remain so until an absolute pardon is received." (ROR, p. 772.) The commission acknowledged that, at the time of the plaintiff's requests, the pardons had not been received by the applicants and that "the erasure statute did not yet apply to prohibit disclosure of such applications." (ROR, p. 788.) However, "by the time of the hearing in this matter certificates of pardon had issued in the appropriate cases and any pardon that the [board] voted to grant had been received." (ROR, p. 788.) The commission therefore concluded that the erasure statute prohibited the board at that point from disclosing portions of the granted applications "pertaining to [the charges]" that the commission now considered erased.[4] The commission nevertheless found that the board had violated the act by denying disclosure at the time of the request. (ROR, pp. 788-90.)

The plaintiff now appeals to this court.

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[3]Although the commission does not mention it, there is no dispute that, of the seven applications considered by the board, the board denied or granted conditional pardons in three cases and granted absolute pardons in the four others. The commission ordered disclosure of the nonexempt portions of the three denials or conditional pardons and they are no longer at issue in this appeal. (ROR, pp. 788, 790.) Thus, this appeal focuses on the four pardon applications that the board granted unconditionally.

[4]The commission carefully identified the portions of the applications "pertaining to [the charges]" that it believed were subject to the erasure statutes. (ROR, p. 789.) At oral argument, the plaintiff confirmed that he had received the remaining portions of the applications: those portions that did not pertain to the erased charges or were not subject to the other applicable statutes prohibiting disclosure.

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

The statutory framework of the issue on appeal is not contested. General Statutes § 1-210

(a) provides in part that: "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." "[T]he overarching legislative policy of the [act] is one that favors the open conduct of government and free public access to government records." (Internal quotation marks omitted)." *Chairperson, Connecticut Medical Examining Board v. Freedom of Information Commission,* supra, 310 Conn. 283-84.

Both parties agree that the introductory exception to the act for situations "otherwise provided by any federal law or state statute" includes the state erasure statutes found in General Statutes §§ 54-142a et seq. The "fundamental purpose of the records erasure and destruction scheme embodied in § 54-142a is to erect a protective shield of presumptive privacy for one whose criminal charges have been dismissed." *State v. Anonymous*, 237 Conn. 501, 516, 680 A.2d 956 (1996).

The erasure statutes extend, however, not only to persons whose charges have been dismissed by the court, but also to people who have received absolute pardons.[5] Thus, § 54-142a (d) provides that: "(1) Whenever prior to October 1, 1974, any person who has been convicted of an offense in any court of this state has received an absolute pardon for such offense, such person or any one of his heirs may, at any time subsequent to such pardon, file a petition with the

[5]"The board shall have authority to grant pardons, conditioned, provisional or absolute, for any offense against the state at any time after the imposition and before or after the service of any sentence." General Statutes § 54-130a (b).

superior court at the location in which such conviction was effected, or with the superior court at the location having custody of the records of such conviction or with the records center of the Judicial Department if such conviction was in the Court of Common Pleas, Circuit Court, municipal court or by a trial justice court, for an order of erasure, and the Superior Court or records center of the Judicial Department shall direct all police and court records and records of the state's or prosecuting attorney pertaining to such case to be erased. (2) Whenever such absolute pardon was received on or after October 1, 1974, such records shall be erased." Therefore, under the statute, when an absolute pardon is "received," all records "pertaining to such case," as provided in subsection (d) (1), "shall be erased."

Our statutes explain the effect of erasure as follows: "The clerk of the court or any person charged with retention and control of erased records by the Chief Court Administrator or any criminal justice agency having information contained in such erased records shall not disclose to anyone the existence of such erased records or information pertaining to any charge erased under any provision of this part, except as otherwise provided in this chapter." General Statutes § 54-142c (a). Section 54-142g (b) defines "[c]riminal justice agency" to include the board. Thus, under the statutory scheme, the board "shall not disclose" to anyone erased records, which would include records pertaining to the case in which the applicant has received an absolute pardon.

B

There is no dispute that, if the board receives a request under the act for the application for, or for other records pertaining to, a pardon, and the applicant has not received an absolute pardon, then the records are not erased and, by law, the board must disclose them unless they are otherwise exempt under the act. This result is true regardless of whether the applicant is likely

to receive an absolute pardon in the future, or has already received a pardon that is not absolute. There is also no dispute that, under this standard, the board wrongfully denied the plaintiff's request for records because, as of the plaintiff's January 23, 2013 request, no one in the group in question had actually received his or her absolute pardon.

The issue in this case therefore becomes one of what the commission should do when the board has in fact wrongfully denied such a request under the act but the applicant then receives an absolute pardon before the commission hears the case on appeal from the board's denial. Contrary to the plaintiff's suggestion, this issue is not purely one of statutory construction. There is no disagreement that the plain language of the statutes dictates that an application for a pardon is not subject to erasure until the applicant actually receives an absolute pardon. The question instead is one of whether the commission has ordered the appropriate remedy when the board violates the statute initially but the records later become subject to erasure. On that sort of issue, which involves fashioning a remedy, the appropriate standard of review is whether the commission's actions were not "arbitrary, unreasonable, illegal, or in abuse of her discretion." See *Chairperson, Connecticut Medical Examining Board v. Freedom of Information Commission,* supra, 310 Conn. 281-82.[6]

The plaintiff contends that the commission's decision, which concluded that the records became subject to erasure, encourages the board (or perhaps other agencies) improperly to delay

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[6]The plaintiff argues that, under *Commissioner of Public Health v. Freedom of Information Commission,* 311 Conn. 262, 280, 86 A.3d 1044 (2014), the relevant question in a freedom of information case is what the law required at the time of the request. Again, there is no question here that, at the time of the request, the law required the board to disclose the pardon applications in question. The issue in this case is instead what the commission should do when, in the interim, the applications have become subject to another law, here the erasure statute.

acting on or to deny requests for records under the act on the theory that the pardon applicants will eventually receive an absolute pardon and at that time the records will then be exempt from disclosure. Essentially, the plaintiff's concern is that the board will not scrupulously and promptly comply with the act.

The plaintiff's concern is unquestionably a valid one. The board should and must faithfully comply with the act. But the plaintiff's remedy for noncompliance is worse than the problem. The plaintiff proposes that, at the hearing, the commission should have ordered the disclosure of records that had by that time become erased. Such an approach eviscerates the policies behind the erasure statute. In particular, the plaintiff's proposal would negate the statutory right earned by the recipient of the pardon to know that, upon receipt of the pardon, his or her records "shall be erased." See General Statutes § 54-142a (d) (2).[7]

Further, there are other remedies for noncompliance by the board that would not negate the policies behind the erasure statute that the commission sought to further. In this case, the commission in fact made a finding that the board had violated the act and ordered that "[h]enceforth, the [board] shall comply with the promptness requirements of §§ 1-210(a) and 1-212(a), G.S." (ROR, p. 790.)[8] Presumably, this finding and warning will have a deterrent and

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[7]The plaintiff poses the question of what happens when a person receives a pardon after the commission hearing. That question is not before the court. In any case, the superior court hearing an administrative appeal can always remand the case to the commission to receive additional evidence under General Statutes § 4-183 (h).

[8]General Statutes § 1-210 (a), as mentioned, provides in relevant part: "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

enlightening effect, particularly in view of the fact that the commission's decision has now clarified a previously unsettled area of the law. If the board persists in noncompliance, the commission can exercise its authority under General Statutes § 1-206 (b) (2) to impose a civil penalty.[9] These remedies are narrowly tailored to address the problem of noncompliance by the board with the act without impairing the functioning of the erasure statute. This approach achieves a balance that harmonizes the goals of each statutory scheme, as favored by our rules of statutory construction. See *Commissioner of Public Safety v. Freedom of Information Commission*, 301 Conn. 323, 357, 21 A.3d 737 (2011). Therefore, in endorsing this approach, the commission's actions were not arbitrary, unreasonable, illegal, or in abuse of its discretion. See *Chairperson, Connecticut Medical Examining Board v. Freedom of Information Commission*, supra, 310 Conn. 281-82.

IV

The plaintiff claims that a second issue in the case is whether the commission erred in finding that he made his request for records on January 23, 2013 rather than November 29 and December 6, 2012. This issue is irrelevant because all three of these dates precede the receipt of the absolute pardons in this case. Thus, the legal question before the court is the same regardless

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section 1-212." General Statutes § 1-212 (a) provides in relevant part: "Any person applying in writing shall receive, promptly upon request, a plain, facsimile, electronic or certified copy of any public record."

[9]Section 1-206 (b) (2) provides in pertinent part: "In addition, upon the finding that a denial of any right created by the Freedom of Information Act was without reasonable grounds and after the custodian or other official directly responsible for the denial has been given an opportunity to be heard at a hearing conducted in accordance with sections 4-176e to 4-184, inclusive, the commission may, in its discretion, impose against the custodian or other official a civil penalty of not less than twenty dollars nor more than one thousand dollars."

of whether the commission correctly found when the plaintiff made his request.

The plaintiff suggests that, although the issue might be "moot," the court should review it under the theory that the issue is capable of repetition yet evading review. The capable of repetition doctrine is a basis for finding justiciability. See *State v. McElveen*, 261 Conn. 198, 208, 802 A.2d 74 (2002). There is no dispute here, however, that the plaintiff's appeal is justiciable. Thus, the mootness doctrine and the capable of repetition exception do not apply.

V

The court affirms the commission's decision and dismisses the appeal.

It is so ordered.

Schuman, J.

Carl J. Schuman
Judge, Superior Court