PICTOMETRY INTERNATIONAL CORPORATION *v.*
FREEDOM OF INFORMATION
COMMISSION ET AL.
(SC 18724)

DEPARTMENT OF ENVIRONMENTAL PROTECTION
v. FREEDOM OF INFORMATION
COMMISSION ET AL.
(SC 18725)

Rogers, C. J., and Norcott, Palmer, Zarella, Eveleigh and Harper, Js.*

Argued October 23, 2012—officially released January 29, 2013

Joseph P. Titterington, pro hac vice, with whom were *Emily E. Campbell*, pro hac vice, and, on the brief, *Timothy P. Jensen* and *Amy E. Markim*, for the appellant in Docket No. SC 18724 (plaintiff in the first case).

Matthew I. Levine, assistant attorney general, with whom, on the brief, were *George Jepsen*, attorney general, and *Kimberly Massicotte*, assistant attorney general, for the appellant in Docket No. SC 18725 (plaintiff in the second case).

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Opinion

ROGERS, C. J. The primary issue to be resolved in these appeals is whether public records that are protected by federal copyright law fall within the "otherwise provided by any federal law" exemption to the Freedom of Information Act (act), General Statutes § 1-200 et seq., set forth in General Statutes § 1-210 (a) (federal law exemption).[1] The named plaintiff in the first case, Pictometry International Corporation (Pictometry), contracted with the department of information technology (DOIT) to license the plaintiff in the second case, the department of environmental protection (DEP),[2] to use certain computerized aerial photographic images of sites within the state and associated data that are owned and copyrighted by Pictometry. The defendant Stephen Whitaker requested that the DEP provide him with, among other things, copies of the computerized images and associated data. The DEP responded that the images were not public records subject to the act because, as copyrighted materials, they fell into the federal law exemption. The DEP indicated, however, that Whitaker could obtain copies of the photographic images if he paid the $25 per image fee provided for in the licensing agreement. The DEP also stated that the disclosure of the images to Whitaker would be subject to a determination by the department of public works (DPW) that disclosure would not pose a public safety risk pursuant to § 1-210 (b) (19).[3]

Whitaker then filed a complaint against the DEP with the named defendant, the freedom of information commission (commission). The commission concluded that, pursuant to the act, the DEP was required to provide Whitaker with copies of the photographic images " 'at its minimum cost,' " but was not required to provide the associated data. It further concluded that disclosure of the images without the associated data would not pose a public safety risk. Pictometry and the DEP then filed separate appeals from the commission's decision in the trial court, which were subsequently consolidated.[4] The trial court affirmed the commission's decision and rendered judgments dismissing the appeals, and these appeals followed.[5] We conclude that, because the commission improperly ordered the DEP to provide copies of the images without first determining whether Whitaker wanted copies of the images stripped of the associated data, whether it was feasible for the DEP to provide such copies and whether doing so would pose a public safety risk, the matter must be remanded to the commission for further proceedings. We further conclude that, if the commission determines that Whitaker wants and is entitled to copies of the photographic images, the copying of the photographic images must be done in compliance with the provisions of the licensing agreement and federal copyright law, including payment by Whitaker of the $25 per image fee.

The record reveals the following undisputed facts and procedural history. Pictometry is a private corporation in the business of selling specialized aerial photographic services throughout the United States. Pictometry's processes are capable of capturing high-resolution oblique and orthographic aerial photographic images.[6] The images are owned by Pictometry and are protected by the federal Copyright Act, 17 U.S.C. § 101 et seq.[7] Pictometry's processes also generate metadata, or data that describes data, at the moment that a photographic image is taken. These metadata include the time that the image was captured, the angle at which it was captured and the latitude, longitude and altitude of the camera. The metadata is entered into Pictometry's proprietary software, which is protected by federal copyright and state trade secret laws. The software is capable of generating precise measurements of the photographed site.

In March, 2006, Pictometry entered into a contract with the DOIT pursuant to which Pictometry granted the DOIT and other authorized state agencies, including the DEP, a license to use its software, metadata and images for governmental purposes (licensing agreement) in exchange for a fee of $793,000. The DOIT also agreed that licensed users would not reproduce any of the licensed images for use by persons not covered by the licensing agreement unless the licensed user paid Pictometry a fee of $25 per image, which fee the licensed user was authorized to pass on to the person requesting the copy.[8]

On July 5, 2007, Whitaker sent a freedom of information request by e-mail to the DEP, requesting copies of all contracts with Pictometry, all imagery provided to the DEP by Pictometry and any software required to view the Pictometry images. In response, the DEP sent an e-mail to Whitaker to which it attached a copy of the licensing agreement between the DOIT and Pictometry, except for appendix C to the agreement, which Pictometry claimed was exempt trade secret information pursuant to § 1-210 (b) (5).[9] The DEP stated in the e-mail that the requested images were exempt from disclosure under the act pursuant to the federal law exemption because they were protected by federal copyright law. The DEP also stated that Whitaker could obtain copies of the images if he paid the $25 per image fee provided for in the licensing agreement. Because the DEP had 139,148 oblique images and 245,806 orthographic images on file, however, it suggested that Whitaker might want to narrow his request to images of certain geographic areas. Finally, the DEP stated that no images would be released to Whitaker until the DPW had determined that disclosure would not pose a safety risk. Whitaker then filed a complaint with the commission claiming that the DEP had violated the act by refusing to provide copies of the photographic images and meta-

data. Pictometry filed a petition to intervene in the matter, which the commission granted.

After Whitaker filed his complaint with the commission, the DEP sent a letter to the DPW asking whether release of the Pictometry images would pose a significant safety risk to the public pursuant to § 1-210 (b) (19). The commissioner of public works responded to the letter on January 24, 2008, indicating that Pictometry's proprietary software would enable a person to manipulate an image "to include displaying a location from all four directions . . . and measuring the height, width and length of features such as buildings, bridges, roads, towers, trees and walls." The commissioner of public works also stated that "the exemption of specific images itself may be a security risk. By redacting certain exempt images of important assets, we essentially provide a road map to those assets."[10] The commissioner of public works directed the DEP "to withhold from disclosure Pictometry's software and [geographic information system] data of critical infrastructure and key resources that are not available to the public" because disclosure would present a risk of harm to the state and its citizens.[11]

The commission conducted a hearing on Whitaker's complaint against the DEP on January 31, 2008. Thereafter, Whitaker filed a complaint against the DPW and a motion to consolidate the proceedings on that complaint with the pending proceeding against the DEP. The commission treated the complaint against the DPW as a motion to join the DPW as a respondent in the proceeding against the DEP, and granted the motion. Thereafter, the commission conducted additional hearings on the matter.

Ultimately, the commission concluded that Pictometry's software and metadata were trade secrets within the meaning of § 1-210 (b) (5) (A) and, therefore, were exempt from the act. It also concluded that the Copyright Act was not a "federal law" for purposes of the federal law exemption because copyright law does not require that copyrighted material be treated as confidential. In addition, the commission concluded that, because the DPW's determination that disclosure of some of the images could pose a safety risk was based on the assumption that the metadata would also be disclosed, and because the images alone revealed nothing that could not be observed by visible inspection or a photograph of a site, disclosure of the images did not pose a safety risk for purposes of the exemption set forth in § 1-210 (b) (19). Finally, the commission concluded that "the charge of $25 per image in addition to the approximately $700,000 two year licensing agreement would be an unreasonable charge and [that the] DEP is not entitled to recoup those costs by charging [Whitaker] for disclosure." Accordingly, the commission concluded that the DEP had violated the act

and ordered the DEP to provide Whitaker with copies of the images, without any associated metadata or software, at "its minimum cost."

Pictometry, the DEP and the DPW then filed separate appeals from the commission's decision in the trial court, which appeals were ultimately consolidated for trial. The trial court concluded that the commission's determination that the disclosure of the images to Whitaker would not pose a safety risk was supported by the evidence; the commission had properly determined that federal copyright law is not encompassed by the federal law exemption because it does not shield copyrighted material from disclosure;[12] and the commission properly determined that the DEP could not pass the $25 per image copying fee on to Whitaker because public agencies may not contract out of their obligations under the act. Accordingly, the trial court dismissed the appeals.

Pictometry and the DEP then filed these appeals. Pictometry claims that the commission improperly determined that the Copyright Act is not a "federal law" for purposes of the federal law exemption. The DEP also makes this claim, and further contends that the commission improperly reconfigured Whitaker's request to apply only to the photographic images, stripped of the associated metadata, without providing an opportunity for the DEP and Pictometry to respond to the request as reconfigured or to determine whether the release of the images stripped of the metadata would pose a safety risk. The commission disputes these claims, and also contends that the DEP lacks standing to challenge the trial court's determination that the commission properly concluded that disclosure of the images would not pose a safety risk because the DPW did not appeal from that determination.

I

We first address the DEP's claim that the commission improperly "reconfigured" Whitaker's request when it ordered the DEP to provide Whitaker with copies of the photographic images licensed for use by the DEP, stripped of any associated metadata. The DEP contends that the commission's order constituted an abuse of discretion because: (1) it is unclear whether Whitaker even wants the photographic images if they are stripped of any associated metadata; (2) the DEP has had no opportunity to determine whether it is feasible to strip the photographic images of the metadata; and (3) the DEP has had no opportunity to determine whether disclosure of the photographic images stripped of the metadata would pose a significant safety risk. We agree with the DEP.

We first address the DEP's claim that the commission improperly ordered it to provide copies of the photographic images stripped of the metadata to Whitaker

when it was unclear whether he wanted or could use the records in that format. The following additional facts are relevant to our resolution of this claim. In his initial request to the DEP, Whitaker requested "[a]ll contracts with [the] DEP and Pictometry . . . for Pictometry services, data and software. All Pictometry imagery and any software required to view the Pictometry images. Any DEP documents demonstrating compliance with [General Statutes § 1-211 (c)] . . . ." At the January 31, 2008 hearing before the commission, Whitaker was asked whether he was requesting that the commission order the DEP to give him the metadata. He responded: "Yes, [the imagery is] useless without it. The imagery, not knowing where it is, is a jigsaw puzzle with no matching curves." Whitaker also stated at a September 3, 2008 hearing before the commission, which was conducted after the commission had issued a proposed decision on the matter, that "I . . . don't like having images [that] I can't effectively use without licensing proprietary and expensive software from Pictometry." He further stated that "[t]he metadata which has been found to be proprietary in this proposal for decision is the data which actually references where the camera was in relation to the [object] on the ground, which direction it was facing, which actually makes it possible to properly identify the image. . . . [W]ithout the metadata being included with the imagery, it's actually built into the imagery, it wouldn't be possible to develop a different viewer to use these." Later during the hearing, Whitaker stated that "if you give me 400,000 images with no ability to go anywhere, or find which image relates to which spot on the land, it's useless."

General Statutes § 1-206 (b) (2) provides in relevant part: "In any appeal to the [commission] under subdivision (1) of this subsection or subsection (c) of this section, the commission may confirm the action of the agency or order the agency to provide relief that the commission, in its discretion, believes appropriate to rectify the denial of any right conferred by the Freedom of Information Act. . . ." Accordingly, we review the commission's ruling that the DEP must provide Whitaker with copies of the photographic images stripped of the metadata for abuse of discretion.[13]

In support of its position that it was within its discretion to order the DEP to provide copies of the photographic images stripped of any associated metadata, the commission relies on General Statutes § 1-211 (a),[14] which provides in relevant part: "Any public agency which maintains public records in a computer storage system shall provide, to any person making a request pursuant to the Freedom of Information Act, *a copy of any nonexempt data* contained in such records, properly identified, on paper, disk, tape or any other electronic storage device or medium requested by the person, if the agency can reasonably make any such copy or have any such copy made. . . ." (Emphasis

added.) The commission contends that this statute clearly authorizes it to deny a portion of a request for public records if some of the requested records are exempt.

The commission also relies on this court's decision in *Hartford Courant Co.* v. *Freedom of Information Commission*, 261 Conn. 86, 801 A.2d 759 (2002), for the proposition that it can order a public agency to separate exempt computerized data from nonexempt data and to produce only the nonexempt data. See id., 94–95 (when person submits request pursuant to § 1-211 for nonexempt data contained in computerized record that contains both exempt and nonexempt data, "the disclosing agency must comply with such a request either by developing a program or contracting with an outside entity to develop a program" to separate exempt data from nonexempt data).

We conclude that neither § 1-211 nor our decision in *Hartford Courant Co.* supports the commission's position. *Hartford Courant Co.* is distinguishable from the present case because, in that case, the plaintiff had requested "an electronic copy of *the public portion* of all of the [department of public safety's] criminal history records for all of the adults in those records." (Emphasis added.) Id., 89. Thus, the plaintiff's request was clearly limited to nonexempt records. In contrast, in the present case, Whitaker requested "[a]ll Pictometry imagery and any software required to view the Pictometry images." During the course of the proceedings on Whitaker's complaint, it became clear that Whitaker's request for "Pictometry imagery" encompassed the metadata embedded in the computerized images. It also became clear that he believed that the images stripped of the associated metadata would be useless to him. Thus, unlike in *Hartford Courant Co.*, the record in the present case supports the conclusion that Whitaker requested both exempt information and nonexempt information and that the requests were inextricably intertwined because the copies of the nonexempt images would be worthless to him without access to the exempt metadata. We agree with the proposition that, under some circumstances, the commission has the discretion to redact exempt information from otherwise public records requested pursuant to the act, and that it can order a party to produce computerized nonexempt records in a format other than the format in which they are maintained by the public agency. Under the facts of this case, however, we conclude that it was an abuse of discretion for the commission to require the DEP to provide copies of approximately 400,000 photographic images stripped of the associated metadata to Whitaker in the absence of any evidence that he wants them or that he has any use for them in the format provided.

The DEP also claims that the commission improperly

ordered it to provide copies of the photographic images without providing an opportunity for the DEP to determine whether it has the technical capability to strip the metadata from the computerized photographic images in its possession. The following additional facts are relevant to our resolution of this claim. At an August 27, 2008 hearing before the commission, one of the commissioners stated that "the testimony was that the [DEP] couldn't strip out . . . all that data from the visual image and provide it to . . . Whitaker, only Pictometry could do that." Counsel for Pictometry confirmed that that was the case. When the commission inquired what it would cost to strip the metadata from the images, counsel for Pictometry responded that he did not know. A member of the commission then indicated that, if Pictometry were required to produce the images "all on one disk," the cost "would be the cost of doing the disk." The chairperson of the commission then asked Whitaker in what format the images could be produced. Whitaker responded that he believed that stripping the images of the metadata was inappropriate because it might require the DEP "to contract back with Pictometry for tens of thousands of dollars to strip out the metadata, and you're going to have created such a high cost hurdle that none of these records are ever going to be disclosed." The commission did not respond to this argument, however, and never made a finding as to whether or how the DEP could produce the copies.

Thus, there is no evidence in the record that the DEP has the capability to provide copies of the photographic images stripped of the metadata. Indeed, the record supports the conclusion that only Pictometry would be able to do so. Accordingly, it may be impossible for the DEP to comply with the commission's order.[15] We conclude, therefore, that the commission abused its discretion by ordering the DEP to produce copies of the images stripped of the metadata without providing an opportunity for the parties to determine whether or how the DEP could comply with the order.

Finally, we address the DEP's claim that the commission improperly ordered it to provide Whitaker with copies of the photographic images stripped of associated metadata without providing an opportunity for the DEP and the DPW to determine whether doing so would pose a safety risk for purposes of § 1-210 (b) (19).[16] That statute provides that, if the commissioner of public works, in consultation with the chief executive officer of a state agency, finds reasonable grounds to believe that disclosure of public records may result in a safety 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," the act does not require disclosure of the records. General Statutes § 1-210 (b) (19); see footnote 3 of this opinion. As we previously have indicated in this opinion, Whitaker's request encom-

passed both the photographic images and the associated metadata, and the DPW's assessment of the safety risk was premised on the assumption that both the metadata and software were subject to disclosure. Accordingly, the DPW did not have an opportunity to consider whether the disclosure of the photographic images stripped of metadata would pose a safety risk. Under § 1-210 (b) (19), this safety determination is to be made by the DPW in consultation with the head of the relevant state agency, not by the commission. We conclude, therefore, that the commission abused its discretion by ordering the DEP to provide copies of the photographic images stripped of the associated metadata to Whitaker without first providing the DEP and the DPW with an opportunity to determine whether their disclosure would pose a safety risk. Accordingly, we conclude that the matter must be remanded to the commission for further proceedings at which these issues may be addressed.

II

Because the issue will arise on remand if the commission determines that Whitaker wants and is entitled to receive copies of the photographic images stripped of the metadata from the DEP, we next address the plaintiffs' claim that the commission improperly determined that federal copyright law is not a "federal law" for purposes of the federal law exemption set forth in § 1-210 (a).[17] We agree.

Before addressing the merits of the plaintiffs' claim that the commission improperly construed the federal law exemption set forth in § 1-210 (a), it is necessary for us to address an apparent inconsistency in the commission's decision. Specifically, the commission stated in its decision that "the charge of $25 per image in addition to the [fee for the] two year licensing agreement would be an unreasonable charge and [the] DEP is not entitled to recoup those costs by charging the complainant for disclosure." In addition, it found that "a public agency may not contract away its statutory obligations under the . . . [a]ct." In support of this conclusion, the commission cited *Lieberman* v. *State Board of Labor Relations*, 216 Conn 253, 271, 579 A.2d 505 (1990), in which this court invalidated an agreement that was in conflict with certain provisions of the act. These statements would appear to suggest that the commission concluded that the licensing agreement was void to the extent that it authorized Pictometry to charge the DOIT or the DEP $25 for each copy of a photographic image provided to a member of the public pursuant to the act. Indeed, the commission argues on appeal that the provision of the licensing agreement requiring the DOIT or the DEP to pay Pictometry a copying fee of $25 per image is "in violation of the [act]" and is therefore "null and void." Moreover, Pictometry's appeal is premised on its belief that the

commission's decision "will serve to abrogate [its] rights under federal copyright law by preventing it from placing lawful restrictions on the copying and dissemination of its copyrighted materials."

The trial court stated, however, that "Pictometry's rights and remedies for injunctive relief and damages under 17 U.S.C. §§ 502 and 504, respectively, remain intact. So too, its contractual rights and remedies."[18] The commission does not dispute this conclusion on appeal. Indeed, at oral argument before this court, the commission stated that Pictometry would have a private cause of action against the DOIT or the DEP for copyright infringement if the DEP provided copies of the photographic images to Whitaker without paying the $25 per image fee pursuant to the licensing agreement.[19]

Thus, the commission appears to have concluded *both* that the act abrogates Pictometry's rights under federal copyright law and the licensing agreement, *and* that Pictometry would be entitled to bring an action against the DOIT or the DEP to enforce those rights if the DEP provided copies of the photographic images to Whitaker and failed to pay Pictometry the $25 per image fee provided for in the licensing agreement.[20] Because we are unable to reconcile these apparently conflicting rulings, we treat them for purposes of this opinion as alternate rulings. In other words, we assume that the commission intended to invalidate or to limit Pictometry's rights under the licensing agreement and federal copyright law when it concluded that the DEP was required to provide copies of the photographic images to Whitaker, and that payment of the $25 per image copying fee to Whitaker in addition to the licensing fee would be "unreasonable." We also assume, however, that the commission further concluded that, even if the act does not abrogate Pictometry's rights under federal copyright law, the act prohibits the DEP from passing on to Whitaker the $25 per image copying fee that it must pay to Pictometry.

We begin our analysis of these issues with the standard of review. "As we frequently have stated, [a]n agency's factual and discretionary determinations are to be accorded considerable weight by the courts. . . . Cases that present pure questions of law, however, invoke a broader standard of review than is ordinarily involved in deciding whether, in light of the evidence, the agency has acted unreasonably, arbitrarily, illegally or in abuse of its discretion. . . . 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 . . . . Consequently, an agency's interpretation of a statute is accorded deference when the agency's interpretation has been formally articulated and applied for

an extended period of time, and that interpretation is reasonable." (Citations omitted; internal quotation marks omitted.) *Longley* v. *State Employees Retirement Commission*, 284 Conn. 149, 163–64, 931 A.2d 890 (2007).

With respect to the issue before us in the present case, the commission previously concluded in an advisory opinion in another matter that copyrighted materials are exempt from the copying provisions of the act under the federal law exemption. Advisory Opinion, Freedom of Information Commission, No. 62 (1985) p. 2, available at http://www.state.ct.us/foi/Advisory_Opinions_&_Dec/AO_62.htm (last visited January 18, 2013) (materials "that are properly copyrighted under federal statute are generally exempt from the copying provisions of the [act]"). Accordingly, because the commission's position in the present case that the Copyright Act is not a "federal law" for purposes of the federal law exemption has not previously been subjected to judicial scrutiny and is not time-tested, but, indeed, is inconsistent with the position previously taken by the commission, our review is plenary.[21] See *Office of Consumer Council* v. *Dept. of Public Utility Control*, 252 Conn. 115, 121, 742 A.2d 1257 (2000). "In making such determinations, we are guided by fundamental principles of statutory construction. See General Statutes § 1-2z;[22] *Testa* v. *Geressy*, 286 Conn. 291, 308, 943 A.2d 1075 (2008) ([o]ur fundamental objective is to ascertain and give effect to the apparent intent of the legislature . . .)." (Internal quotation marks omitted.) *In re Matthew F.*, 297 Conn. 673, 688, 4 A.3d 248 (2010).

Section § 1-210 (a) provides in relevant part: "Except as otherwise provided by any federal law . . . 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. . . ." None of the parties claim that the phrase "otherwise provided by any federal law" either plainly and unambiguously encompasses or excludes federal copyright law, and we conclude that it does not. "Accordingly, we may consider the statute's legislative history, the circumstances surrounding its enactment and the legislative policy that it was designed to implement in determining the meaning of that phrase." *State* v. *Jenkins*, 288 Conn. 610, 621, 954 A.2d 806 (2008).

This court repeatedly has held that "[t]he overarching legislative policy of the [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 this court consistently has interpreted that expression to require diligent protection of the public's right of access to agency proceedings. Our construction of the [act] must be guided by the policy favoring disclosure and exceptions to disclosure must be narrowly construed." (Internal quotation marks omitted.) *Stamford* v. *Freedom of Information Commission*, 241 Conn. 310, 314, 696 A.2d 321 (1997). "[T]he burden of proving the applicability of an exemption rests upon the agency claiming it." (Internal quotation marks omitted.) *Commissioner of Consumer Protection* v. *Freedom of Information Commission*, 207 Conn. 698, 701, 542 A.2d 321 (1988).

A

With these general principles in mind, we first address the plaintiffs' claim that the commission improperly determined that, because the Copyright Act is not a "federal law" for purposes of the federal law exemption, to the extent that the DEP's obligations under the licensing agreement and federal copyright law conflict with its obligations under the act, its obligations under the act are controlling. This court previously has recognized that the federal law exemption embodies the legislature's "willingness to defer to federal laws barring disclosure of otherwise disclosable information . . . ." *Commissioner of Correction* v. *Freedom of Information Commission*, 307 Conn. 53, 81, 52 A.3d 636 (2012). It is reasonable to conclude that this willingness stemmed from the legislature's awareness of the constitutional principle that, when a federal law and a state law conflict and compliance with both laws is impossible, the federal law will preempt the state law.[23] *Crosby* v. *National Foreign Trade Council*, 530 U.S. 363, 372–73, 120 S. Ct. 2288, 147 L. Ed. 2d 352 (2000) ("[w]e will find preemption where it is impossible for a . . . party to comply with both state and federal law . . . and where under the circumstances of [a] particular case, [the challenged state law] stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress" [citation omitted; internal quotation marks omitted]). In other words, it is reasonable to conclude that, when the legislature enacted the federal law exemption, it intended, in the spirit of comity and deference to the supreme law of the land, to forestall any such preemption claims by providing in the first instance that the act does not apply to public records to the extent that any such application would conflict with federal law.

In the present case, the commission concluded that the DEP could not "contract away its statutory obligations under the [act]" by agreeing to give Pictometry the right to determine whether and under what conditions the copyrighted materials could be copied. Thus, the commission concluded that the provision of § 1-210 (a) conferring an unconditional right on "every person

[to] . . . copy [public] records . . . or . . . [to] receive a copy of such records" conflicts with the provisions of 17 U.S.C. § 106 mandating that "the owner of copyright under this title has the exclusive rights . . . (1) to reproduce the copyrighted work in copies [and] . . . (3) to distribute copies . . . of the copyrighted work to the public by sale . . . or by rental, lease, or lending," or to authorize these activities.[24] As we have explained, however, the legislature intended that, to the extent that the application of the act conflicts with applicable federal law, *the act* does not apply. We conclude, therefore, that, to the extent that the act and the Copyright Act impose conflicting legal obligations, the Copyright Act is a "federal law" for purposes of the federal law exemption. Accordingly, although the federal law exemption does not entirely exempt copyrighted public records from the act, it exempts them from copying provisions of the act that are inconsistent with federal copyright law.

In support of its conclusion to the contrary, the commission relies on this court's decision in *Lieberman* v. *State Board of Labor Relations*, supra, 216 Conn 253.[25] In *Lieberman*, this court considered the validity of an agreement between a public employee union and a town to destroy a union member's employment record. This court observed that the retention of public records is subject to a comprehensive statutory scheme intended primarily to protect the rights of the public under the act. Id., 268. Under that scheme, "[o]nly certain independent library officials have been vested by the legislature with the authority to approve the destruction of public records." Id., 271. Accordingly, this court concluded that "the destruction of a public employee's discipline record is an illegal subject of collective bargaining"; id., 261; and the agreement was, therefore, null and void. Id., 271.

The commission contends that, because Pictometry's photographic images are public records subject to the act, the principle that contracts that interfere with the public's rights under the act are null and void is equally applicable to the provisions of the licensing agreement placing conditions on the DEP's use of the images, and the provisions are therefore null and void. The short answer to this contention is that *Lieberman* does not control the present case because the public records at issue in that case did not come within the federal law exemption. As we have explained, the licensing agreement does not interfere with the public's rights under the act because copyrighted records are *exempt* under the federal exemption from the copying provisions of the act that conflict with federal copyright law, which the licensing agreement embodies.

The commission also relies on this court's decision in *Chief of Police* v. *Freedom of Information Commission*, 252 Conn. 377, 746 A.2d 1264 (2000), to support

its position. In that case, the commission ordered the plaintiff to disclose certain records that were the subject of discovery proceedings in a separate federal action, to which the plaintiff was also a party. Id., 383. The plaintiff contended on appeal that the records were exempt under the federal law exemption "because the Federal Rules of Civil Procedure already provide a legal process for [their] disclosure . . . ." (Internal quotation marks omitted.) Id., 399. This court rejected that claim. In doing so, this court stated that "linking a total federal exemption from the disclosure provisions of the act with a parallel reference to state statutes strongly suggests that the reference to 'federal law' was not intended to encompass federal litigation engendered issues of discovery. It suggests, instead, a reference to federal and state laws that, by their terms, provide for confidentiality of records or some other similar shield from public disclosure." Id. The court then emphasized that "the only references in the entire legislative history of the act to the language in question are consistent with the suggestion that it was intended to refer to other federal and state laws that by their terms shield specific information from disclosure.[26] There is nothing therein, therefore, that suggests that the legislature intended this very general language to encompass the kinds of individualized and possibly hypothetical determinations under federal discovery rules that the plaintiff's argument would suggest." Id., 399–400.

The commission contends that *Chief of Police* supports the proposition that the federal law exemption applies only to federal statutes that, by their terms, bar the *disclosure* of certain public records, not to a federal statute, like the Copyright Act, that permits disclosure, but prohibits or places limits on the *copying* of public records subject to that law. We disagree. In *Chief of Police*, this court did not distinguish federal laws that exempt documents from the right to *disclosure* under the act from federal laws that exempt documents from the unconditional right to *copy* them. Rather, this court distinguished between federal laws that, by their terms, shield certain general *types* of documents from disclosure under freedom of information laws, such as laws barring the disclosure of individual tax returns; see footnote 26 of this opinion; and federal laws that are used to make "individualized and possibly hypothetical determinations" as to whether certain documents are disclosable, such as federal discovery rules. *Chief of Police* v. *Freedom of Information Commission*, supra, 252 Conn., 399–400. Accordingly, *Chief of Police* does not support the proposition that a federal law, like the Copyright Act, that, by its terms, shields a certain class of documents from the public's unconditional right under the act to copy public records, does not fall within the federal law exemption.[27]

The commission also relies on a number of cases from other jurisdictions in which the court has consid-

ered the relationship between freedom of information laws and federal copyright law. The commission first cites the decision of the United States District Court for the District of Columbia in *Venetian Casino Resort* v. *Equal Employment Opportunity Commission*, 453 F. Sup. 2d 157 (D.D.C. 2006). The plaintiff in that case claimed, inter alia, that the defendant's internal policy of releasing documents obtained during the course of proceedings before the defendant violated federal copyright law. Id., 160. The court held that "while the Copyright Act proscribes infringement of copyrighted material, nothing in the [Copyright] Act requires confidential treatment by the government of copyrighted material. The [Copyright] Act provides an express remedy for alleged copyright violations: a private right of action for infringement. 17 U.S.C. § 501. Nothing in the [Copyright] Act requires the establishment of particular internal agency procedures. As such, the Copyright Act affords [the plaintiff] no legal basis to challenge the [defendant's] disclosure policy." *Venetian Casino Resort* v. *Equal Employment Opportunity Commission*, supra, 166.

The District Court's decision was ultimately reversed, however, by the United States Court of Appeals for the District of Columbia Circuit. *Venetian Casino Resort, LLC* v. *Equal Employment Opportunity Commission*, 530 F.3d 925 (D.C. Cir. 2008). Although the commission contends that the Court of Appeals' decision did not affect the portion of the District Court's decision on which it relies, we are not persuaded. The United States Court of Appeals stated that the District Court's statements concerning the Copyright Act were "true but not dispositive because the [Copyright] Act does entitle a copyright holder to an injunction barring infringement of its copyright. 17 U.S.C. § 502. Disclosure is not an act of infringement but reproduction is." *Venetian Casino Resort, LLC* v. *Equal Employment Opportunity Commission*, supra, 935 n.4. Thus, although the Court of Appeals concluded that the plaintiff's copyright claim was not ripe for adjudication because the record did not reveal the precise nature of the materials that were subject to disclosure under the defendant's policy; id.; the court clearly believed that the defendant would not be entitled to reproduce copyrighted documents in a manner that would be inconsistent with the copyright holder's rights under federal copyright law. Accordingly, even if it is assumed that the reasoning of this case involving the validity of a federal agency's internal disclosure policy is somehow applicable to the act, the United States Court of Appeals' decision does not support the commission's position that a public agency may ignore the provisions of federal copyright law when dealing with copyrighted public records. Rather, it supports the conclusion that the questions of whether and under what conditions a public agency may reproduce copyrighted public records must be determined under

federal copyright law.

The commission's reliance on the court's statement in *Weisberg* v. *United States Dept. of Justice*, 631 F.2d 824, 825 (D.C. Cir. 1980), that "the mere existence of copyright, by itself, does not automatically render [the federal Freedom of Information Act] inapplicable to materials that are clearly agency records" is also misplaced. After making this statement, the court in *Weisberg* stated that "[d]eciding that copyrighted materials are subject to [the federal Freedom of Information Act] . . . does not resolve whether any particular . . . request should be granted, and if so, under what terms." Id., 828. The court ultimately recognized that federal copyright law could impose limits on the use of copyrighted public records that are subject to the federal Freedom of Information Act.[28] Id., 829–30; see also footnote 18 of this opinion.

In addition, the commission cites a number of opinions issued by various public officials in other jurisdictions that have concluded that copyrighted materials are not exempt from freedom of information laws. One advisory opinion concluded that, if a private entity licensed its copyrighted documents for use by a public agency, the public agency "would 'own' them and . . . they would be [public] 'property' " subject to all of the provisions of state freedom of information law.[29] Advisory Opinion, Committee on Open Government, New York Dept. of State, No. FOIL-AO-14966 (October 26, 2004) p. 1, available at http://docs.dos.ny.gov/coog/ftext/f14966.htm (last visited January 18, 2013). That advisory opinion further concluded that, "once a record is maintained by or for an agency, there can be no restriction on its use." Id., p. 2. The opinion does not indicate whether the New York law at issue contained a federal law exemption analogous to that contained in § 1-210 (a), however, and it also does not address the questions of whether and how principles of federal preemption might affect the application of the New York law to copyrighted documents. Accordingly, we find the advisory opinion of little persuasive value. None of the other opinions relied on by the commission expressly states that federal copyright law cannot impose conditions or restrictions on the use of copyrighted public records.[30] Indeed, a number of the opinions expressly recognize that federal copyright law may preempt open records provisions that otherwise would confer an unconditional right to copy public records. Letter of James L. Coggeshall, Assistant Attorney General, Texas Office of the Attorney General, Open Records Division, No. OR2006-07559 (July 14, 2006), available at Https://www.oag.state.tx.us/opinions/openrecords/50abbott/orl/2006/htm/or200607559.htm (last visited January 18, 2013) ("[a] custodian of public records must comply with the copyright law and is not required to furnish copies of records that are copyrighted"); Opinions, Va. Atty. Gen. No. 1998 #005 (Sep-

tember 23, 1998) p. 3, available at http://www.opengovva.org/component/vcogopins/index.php?option+com_content&view=article&id=443&Itemid=4 (last visited January 18, 2013) (copyright law does not preclude copying of copyrighted public records if copyright owner has given consent); United States Dept. of Justice, Office of Information Policy Guidance, FOIA Update, Vol. IV, No. 4 (1983), p. 3, available at http://www.usdoj.gov/oip/foia_updates/Vol_IV_4/page3.htm (last visited January 18, 2013) (competitive harm exemption to federal Freedom of Information Act "should protect [copyrighted] materials in the same instances in which copyright infringement would be found"); Memorandum of Hugh R. Jones, Staff Attorney, Hawaii Dept. of the Attorney General, Office of Information Practices (June 12, 1990) p. 8, available at http://www.state.hi.us/oip/opinionletters/opinion%2090-20.PDF (last visited January 18, 2013) ("[t]wo attorney general opinions from other states . . . have concluded that the federal Copyright Act . . . preempts state open records laws which, like [the Hawaii law], permit the duplication of public records by members of the public"). Accordingly, these opinions cited by the commission do not support its position.

Finally, the commission contends that, even if the act does not override federal copyright law, providing copies of Pictometry's copyrighted photographic images to Whitaker "may be" a fair use of the materials under federal copyright law.[31] Neither the commission nor this court, however, has jurisdiction to determine whether a particular use of copyrighted materials infringes on the copyright holder's rights under federal copyright law or, instead, constitutes a fair use of the materials. Rather, that determination must be made in federal court.[32] *Penguin Group (USA), Inc.* v. *American Buddha*, 640 F.3d 497, 498 n.3 (2d Cir. 2011) (federal courts have "original and exclusive jurisdiction over actions alleging copyright infringement pursuant to 17 U.S.C. § 501; see 28 U.S.C. § 1338 (a)"[33] [internal quotation marks omitted]). We conclude, therefore, that the commission improperly determined that federal copyright law is not a "federal law" for purposes of the federal law exemption and, therefore, places no limits or conditions on an agency's authority under the act to provide the public with copies of copyrighted public records.

B

We next consider the commission's alternative ruling that, even if the DEP is bound by federal copyright law and must comply with the provision of the licensing agreement requiring it to pay Pictometry $25 for each copy of a photographic image, the act prohibits the DEP from passing that fee on to Whitaker. The DEP contends that, to the contrary, the act expressly authorizes it to charge Whitaker for the actual costs of copy-

ing computerized public records. Although we disagree with the DEP's reasoning, we conclude that the DEP is not barred from passing on to Whitaker the $25 per image fee that it is required to pay Pictometry to reproduce the copyrighted photographic images.

Both the commission and the DEP rely on General Statutes §§ 1-211 (a) and 1-212 (b) in support of their respective positions. Section 1-211 (a) provides in relevant part: "Except as otherwise provided by state statute, the cost for providing a copy of [a public record maintained in a computer storage system] shall be in accordance with the provisions of section 1-212." General Statutes § 1-212 (b) provides in relevant part: "The fee for any copy provided in accordance with subsection (a) of section 1-211 shall not exceed the cost thereof to the public agency. In determining such costs for a copy . . . an agency may include . . . (3) [t]he actual cost of the storage devices or media provided to the person making the request in complying with such request . . . ."[34] In addition, § 1-212 (b) (4) provides that the department of administrative services "shall monitor the calculation of the fees charged for copies of computer-stored public records to ensure that such fees are reasonable and consistent among agencies."

The DEP contends that § 1-212 (b) (3) authorizes it to pass on to Whitaker the $25 per image copying fee that it must pay to Pictometry under the licensing agreement. The commission contends that, to the contrary, such a fee would not be reasonable, as required by § 1-212 (b) (4). We conclude, however, that the $25 per image copying fee is not a fee for the disclosure or copying of "public records in a computer storage system" and, therefore, is not governed by §§ 1-211 (a) and 1-212 (b) (3), even though the records in the present case happen to be stored in a computer. Rather, it is a fee for copying a *copyrighted* public record. It would be anomalous to conclude §§ 1-211 (a) and 1-212 (b) (3) govern the fee that may be charged for copying a copyrighted record if the record is stored in a computer, but other rules govern the fee that can be charged for copying other copyrighted records.[35] Indeed, although the commission relies on § 1-212 (b) (4) in support of its position, its arguments are not premised on the fact that the photographic images are *stored in a computer*, but on the fact that they are *public records*. Specifically, it contends that Whitaker is entitled to receive copies of the photographic images at "minimal cost" because they "are not [Pictometry's] 'private' works; they are public records purchased at considerable expense with taxpayer money and used for an important governmental purpose." Accordingly, we conclude that the issue before us is not whether § 1-212 (b) specifically authorizes the DEP to charge Whitaker for the cost of copying the copyrighted photographic images pursuant to the licensing agreement, but whether § 1-212 was intended to bar the DEP from charging Whitaker for fees incurred

pursuant to federal copyright law in addition to the fees specifically authorized by that statute.

We conclude that § 1-212 was not intended to bar public agencies from charging for the cost of copying copyrighted materials in addition to the fees specifically authorized by § 1-212. First, we conclude that the $25 fee that the DEP is required to pay Pictometry for reproducing its photographic images for use by a nonlicensed user is not a fee for a "copy" in the sense that that word is used in § 1-212. That statute clearly was intended to place limits on the mechanical, material and labor costs of preparing copies that a public agency may pass on to the person requesting the copy. The $25 per image fee provided for in the licensing agreement is not, however, a fee for the mechanical, material or labor costs of reproducing copies of the copyrighted materials. Rather, it is a *licensing* fee, i.e., a fee for the use of another entity's private property. Nothing in § 1-212 suggests that it was intended to prohibit state agencies from passing on licensing fees.

In addition, it is apparent to us that a rule barring public agencies from passing on such costs would constitute an effective prohibition, or a least a drastic limitation, on their use of copyrighted materials. For example, in the present case, if the commission determines on remand that Whitaker wants and is entitled to copies of all of the 400,000 photographic images stripped of the metadata, the DEP would be required to pay Pictometry more than $9 million to provide them.[36] Needless to say, the state is not in a financial position to expend millions of dollars to provide private individuals with copies of copyrighted public records for their personal use, and the commission has pointed to no evidence that the legislature intended such a drastic and unrealistic result when it enacted the act.

The commission contends that this conclusion is inconsistent with this court's decision in *Hartford Courant Co.* v. *Freedom of Information Commission*, supra, 261 Conn. 86. In that case, the plaintiffs requested from the department of public safety an electronic copy of the public portion of the department's criminal history records for all adults pursuant to the act. Id., 89. The department indicated that it would provide the records for a fee of $25 per record, pursuant to General Statutes § 29-11 (c). Id. The total cost would be $20,375,000. Id. The plaintiff filed a complaint with the commission claiming that the fee was not governed by § 29-11 (c), but by the provisions of §§ 1-211 (a) and 1-212 (b). Id. The commission concluded that § 29-11 (a) applied, and the trial court affirmed that decision. Id., 90–91. On appeal, this court concluded that § 29-11 (c) did not apply because the statute "establishes the fee for a 'criminal history record information *search* . . . .' " (Emphasis in original.) Id., 100. Because the plaintiff had not requested a search of the criminal records, but

had requested *all* criminal records, §§ 1-211 and 1-212 (b) applied. Id., 100–101. We stated, in the language that the commission relies on in the present case, that, "[w]ere we to hold otherwise, the fee for the plaintiff's request would be $20,375,000, a result that would have the practical effect of denying the plaintiff access to records that, by statute, must be made available to the public. Such a result would be inconsistent both with the act's broad policy favoring the disclosure of information and with the well established canon of statutory construction that those who promulgate statutes or rules do not intend to promulgate statutes or rules that lead to absurd consequences or bizarre results." (Internal quotation marks omitted.) Id., 101.

We conclude that *Hartford Courant Co.* is distinguishable from the present case because there was no claim in that case that the public records fell within any statutory exemption to the act. In addition, the case did not involve a situation where, if the state agency were barred from charging a fee in addition to the copying fee allowed by § 1-212, the agency itself would be required to incur the fee. Although we recognize that, as in *Hartford Courant Co.*, allowing the DEP to charge Whitaker $25 per photographic image might have the same practical effect as a denial of his request for copies, it is also clear to us that prohibiting state agencies from passing fees incurred pursuant to federal copyright law on to the person who requested the copy would have the practical effect of barring, or at least drastically limiting, the use of copyrighted materials by state agencies. Such a rule would not advance the underlying policy of the act favoring "the open conduct of government and free public access to government records." (Internal quotation marks omitted.) *Stamford* v. *Freedom of Information Commission*, supra, 241 Conn. 314. Rather, it would subject state agencies to virtually limitless financial exposure, thereby chilling their ability to obtain the information that they require to perform vital public services, a result that the legislature could not have intended. See *Hartford Courant Co.* v. *Freedom of Information Commission*, supra, 261 Conn. 101 ("those who promulgate statutes or rules do not intend to promulgate statutes or rules that lead to absurd consequences or bizarre results" [internal quotation marks omitted]).

The judgments are reversed and the cases are remanded to the trial court with direction to sustain the plaintiffs' appeals and to remand the cases to the freedom of information commission for further proceedings in accordance with this opinion.

In this opinion the other justices concurred.

* The listing of justices reflects their seniority status on this court as of the date of oral argument.

[1] General Statutes § 1-210 (a) provides in relevant part: "Except as otherwise provided by any federal law . . . 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. . . ."

We note that subsequent to the relevant proceedings here, § 1-210 (a) has been amended, however, none of the changes are relevant to these appeals. For purposes of convenience, references herein to § 1-210 (a) are to the 2011 revision of the statute.

[2] We note that the names of the DOIT and the DEP, as well as the department of public works, which is also referenced later in this opinion, have changed since the relevant proceedings in these appeals. DOIT is now the bureau of enterprise systems and technology, DEP is now the department of energy and environmental protection, and the department of public works is now the bureau of properties and facilities management.

[3] General Statutes § 1-210 (b) provides in relevant part: "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 . . . . Such reasonable grounds shall be determined (A) (i) by the Commissioner of Public Works, after consultation with the chief executive officer of an executive branch state agency, with respect to records concerning such agency . . . ."

We note that subsequent to the relevant proceedings here, § 1-210 (b) has been amended, however, none of the changes are relevant to these appeals. For purposes of convenience, references herein to § 1-210 (b) are to the 2011 revision of the statute.

[4] The DPW, which had been joined as a respondent to Whitaker's complaint against the DEP, also filed a separate appeal from the commission's decision, which was consolidated with the DEP's appeal and Pictometry's appeal. The DPW is not a party to this appeal.

[5] Pictometry and the DEP appealed separately from the judgment of the trial court to the Appellate Court and we transferred the appeals to this court pursuant to General Statutes § 51-199 (c) and Practice Book § 65-2. We subsequently consolidated the appeals.

[6] The oblique images are taken at an angle and provide a three-dimensional type view of the photographed site. The orthogonal images are taken from a perspective directly above the photographed site.

[7] The Copyright Act provides in relevant part: "[T]he owner of copyright under this title has the exclusive rights to do and to authorize any of the following:

"(1) to reproduce the copyrighted work in copies . . .

"(2) to prepare derivative works based upon the copyrighted work;

"(3) to distribute copies . . . of the copyrighted work to the public by sale or other transfer of ownership, or by rental, lease, or lending . . . ." 17 U.S.C. § 106.

[8] Schedule B of the licensing agreement provided: "1. All [l]icensed [i]mages provided pursuant to this [l]icense [a]greement are and shall remain the property of Pictometry . . . and shall contain Pictometry's copyright notices. This is a license to use the images and software.

"2. Any reproductions of the [l]icensed [i]mages using the [l]icensed [s]oftware, or reproduction or copying of the [l]icensed [i]mages in any form by any other means by [l]icensee or an [a]uthorized [s]ubdivision thereof, shall be for [s]tate use or use by '[p]roject [p]articipants' for '[l]icensee [p]rojects' as covered in [s]ection 4.1 [(b) (2) of this agreement] of the [l]icensee or an [a]uthorized [s]ubdivision thereof, unless a fee is paid by [l]icensee to Pictometry as follows:

"A. For each [h]ard [c]opy of an [i]mage, a fee of $25 shall be paid to Pictometry. All such fees shall be remitted monthly to Pictometry.

"B. For each [d]igital [c]opy of an [i]mage, a fee of $25 shall be paid to Pictometry. All such fees shall be remitted monthly to Pictometry.

"3. Licensee may pass these fees on to the authorized persons or entities receiving the [i]mages and charge additional fees for work [l]icensee performs in preparing, annotating and/or copying the [i]mages."

[9] General Statutes § 1-210 (b) provides in relevant part: "Nothing in the Freedom of Information Act shall be construed to require disclosure of . . .

"(5) (A) Trade secrets, which for purposes of the Freedom of Information Act, are defined as information, including formulas, patterns, compilations, programs, devices, methods, techniques, processes, drawings, cost data,

customer lists, film or television scripts or detailed production budgets that (i) derive independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable by proper means by, other persons who can obtain economic value from their disclosure or use, and (ii) are the subject of efforts that are reasonable under the circumstances to maintain secrecy; and

"(B) Commercial or financial information given in confidence, not required by statute . . . ."

[10] The commissioner of emergency management and homeland security had submitted a letter to the commissioner of public works in which he stated that the release of the images to Whitaker "would necessarily and inappropriately include detailed images of certain of the state's critical infrastructure assets and key resources." In addition, the commissioner of emergency management and homeland security stated that blurring the images or withholding images of critical infrastructure would not solve the security problem because doing so "would create a 'road map' regarding the location of those critical assets and resources . . . ." The commissioner of correction and the chairman of the department of public utility control also submitted letters to the commissioner of public works expressing similar safety concerns.

[11] The DPW stated that "[c]ritical infrastructure and key resources include, but are not limited to: agriculture and food; banking and finance; dams; drinking water and waste treatment facilities; defense industry facilities; commercial facilities; energy and utility related functions such as substations or tank farms and pipelines; nuclear reactors, materials and waste; chemical facilities; telecommunications and informational technology systems; transportation systems; postal and shipping facilities; public health and healthcare centers; federal, state and local government buildings including corrections facilities; emergency services; and [n]ational and [s]tate monuments and icons."

[12] The trial court also stated that "[r]equiring disclosure under the [act] of the digital images does not conflict with the rights of Pictometry under the . . . Copyright Act or its contractual rights under the licensing agreement . . . [because] Pictometry's rights and remedies for injunctive relief and damages under [the Copyright Act] remain intact. So too, its contractual rights and remedies."

[13] We conclude in part II of this opinion that, as a matter of statutory interpretation, the Copyright Act is a "federal law" for purposes of the federal law exemption and, therefore, that the DEP must comply with the copying provision of the licensing agreement and federal copyright law if it provides copies of the photographic images to Whitaker. The sole question before us in this part of the opinion is whether it was within the commission's discretion to reconfigure Whitaker's request to apply only to copies of the photographic images stripped of the metadata.

[14] We note that subsequent to the relevant proceedings here, § 1-211 (a) has been amended, however, none of the changes are relevant to these appeals. For purposes of convenience, references herein to § 1-211 (a) are to the 2011 revision of the statute.

[15] It is possible that the commission intended that the DEP would obtain copies of the photographic images stripped of the metadata from Pictometry. The parties did not have an opportunity, however, to address the question of whether the commission has the authority to require a public agency to produce copies of materials that are not in its possession.

[16] The commission contends that its ruling on the safety issue cannot be challenged on appeal to this court because the DPW failed to appeal from the trial court's ruling and the DEP lacks standing to raise the claim. We disagree. Although the commissioner of the DPW has the ultimate authority to make the safety determination under § 1-210 (b) (19), the statute implicitly recognizes that the interests of the DPW and of other state agencies in protecting the safety of the state and its citizens are intertwined. Accordingly, we conclude that the DEP had standing to raise the issue on appeal from the commission's ruling. *Canty* v. *Otto*, 304 Conn. 546, 557, 41 A.3d 280 (2012) ("particular legislation grants standing to those who claim injury to an interest protected by that legislation" [internal quotation marks omitted]); cf. *In re Christina M.*, 280 Conn. 474, 487, 908 A.2d 1073 (2006) (because rights of parents and rights of children are "inextricably intertwined," parents have standing to raise children's rights in appeal from proceeding on petition to terminate parental rights).

The commission also contended at oral argument before this court that the DPW and the DEP should have foreseen that the commission would

order the disclosure of the photographic images without the associated metadata and that they waived any claim that such disclosure would pose a safety risk by not raising it in the prior proceedings. Again, we disagree. As we have indicated, the record would support a finding that Whitaker wanted both the photographic images and the associated metadata, and that he did not want and could not use the images stripped of the metadata. The commission gave no indication that it might order the DEP to provide something that Whitaker had not asked for and had indicated that he could not use. Accordingly, the DPW and the DEP reasonably could have believed that the commission would not order the disclosure of the images alone.

[17] Both Pictometry and the DEP concede that the photographic images in the DEP's possession are public records for purposes of the act and that the images may be freely disclosed to members of the public. They claim only that federal copyright law imposes conditions on the authority of public agencies to provide copies of copyrighted public records to the public.

[18] The trial court suggested that Pictometry's rights under federal copyright law were enforceable both against the DEP and against Whitaker, but that any claim that Whitaker intends to use the images in a manner prohibited by federal copyright law is not ripe.

[19] We further note that the commission stated in its decision that "the charge of $25 per image in addition to the [fee for the] two year licensing agreement would be an unreasonable charge . . . ." Because the commission concluded that it was unreasonable to charge the per image fee *in addition* to the licensing fee, the "unreasonable charge" referred to by the commission could only be the copying fee that Pictometry is entitled to charge the DEP pursuant to the licensing agreement. The commission expressly argues in its brief to this court, however, that it is unreasonable for the DEP to charge *Whitaker* the $25 per image copying fee.

[20] The conflict between these two positions is illustrated by the decision of the United States Court of Appeals for the District of Columbia Circuit in *Weisberg* v. *United States Dept. of Justice*, 631 F.2d 824 (D.C. Cir. 1980). In that case, the plaintiff sought copies of certain copyrighted photographs in the possession of the Federal Bureau of Investigation. Id., 825. The United States District Court had concluded that the photographs were " 'agency records' " subject to disclosure under the federal Freedom of Information Act. Id., 826. It had further concluded the Copyright Act did not come within an exemption to the federal Freedom of Information Act for materials that are " 'specifically exempted from disclosure by statute.' " Id., 826 n.27. Accordingly, it ordered the Federal Bureau of Investigation to provide prints of the photographs to the plaintiff. Id., 826. On appeal, the United States Court of Appeals agreed with the District Court that the photographs were " 'agency records' "; id., 828; and concluded that "the mere existence of copyright, by itself, does not automatically render [the federal Freedom of Information Act] inapplicable to materials that are clearly agency records." Id., 825. The court also concluded, however, that "[d]eciding that copyrighted materials are subject to [the federal Freedom of Information Act] . . . does not resolve whether any particular . . . request should be granted, and if so, under what terms." Id., 828. The court then recognized that the trial court's ruling had "vitally affect[ed] the value of [the] alleged copyright." Id., 829. Because the owner of the copyright, Time, Inc. (Time), had not been made a party to the case, "[t]he possibility . . . remain[ed] that a separate action by [Time] would be allowed to proceed, raising the prospect of conflicting legal obligations for the [g]overnment with respect to the disposition of [Time's photographs]." Id., 829–30. Accordingly, the Court of Appeals concluded that Time must be made a party to the case and remanded the matter to the trial court for that purpose. Id., 831. Thus, the court in *Weisberg* recognized that an order to a government agency to provide copies of public records that are protected by copyright in a manner that "invalidates or limits the scope of an interested party's copyright"; id, 830 n.39; would be in *conflict* with a later order enforcing the copyright holder's statutory and contractual rights. It is clear, therefore, that the commission in the present case could not reasonably have concluded *both* that the act abrogates Pictometry's rights under federal copyright law *and* that Pictometry may fully vindicate those rights in a private enforcement action.

[21] "[B]ecause the . . . appeal to the trial court [was] based solely on the record, the scope of the trial court's review of the [commission's] decision and the scope of our review of that decision are the same. . . . In other words, the trial court's decision in this administrative appeal is entitled to no deference from this court." (Citation omitted; internal quotation marks omitted.) *Commissioner of Correction* v. *Freedom of Information Commission*, 307 Conn. 53, 63–64 n.15, 52 A.3d 636 (2012).

[22] General Statutes § 1-2z provides: "The meaning of a statute shall, in the first instance, be ascertained from 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."

[23] The supremacy clause of the United States constitution provides in relevant part: "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof . . . shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby . . . ." U.S. Const., art. VI.

[24] We note that § 501 (a) of title 17 of the United States Code expressly provides that "any State, any instrumentality of a State, and any officer or employee of a State or instrumentality of a State acting in his or her official capacity" that infringes on the rights of a copyright owner may be subject to an action for infringement.

[25] In its brief, the commission cites *Lieberman* in support of its claim that it would not be reasonable for the DEP to charge Whitaker $25 per photographic image. It suggests, however, that the reason that charging the fee would be unreasonable is that the provision of the licensing agreement allowing Pictometry to charge the DEP $25 for each copy made of the photographic images, which provision is authorized by and enforceable under § 106 of title 17 of the United States Code; see footnote 6 of this opinion; is in conflict with the act and, therefore, is null and void under this court's decision in *Lieberman*.

[26] "On the floor of the House of Representatives, Representative [Martin B.] Burke stated: 'In line 164, there is the word "TAX RETURNS" inserted in one of the exemptions for public records and it would read "records, tax returns, reports and statements exempted by federal law or state statute." Now the reason for this, the Tax Department called it to the Committee's attention . . . that under federal law, tax returns are to be confidential and did we not specifically exempt tax returns, we would probably have some problems so we did so, although, in my own personal opinion, that was the intention of the Committee all along when we said records, reports and statements exempted by federal law. . . .' . . . 18 H.R. Proc., [Pt. 8, 1975 Sess.], p. 3897.

"Thereafter, the following exchange occurred between Representatives Burke and Albert R. Webber:

" '[Representative Webber]: Through you Mr. Speaker, a question to the gentleman from the 56th. In line with the questioning developed by [Representative Gerald F.] Stevens, could one get information from a parole board? I speak particularly of the applicant for parole. Could he receive, under the terms of this Amendment, or the Bill, the detailed information as to his status and why from a board of pardons or parole board?

" '[Representative Burke]: Through you Mr. Speaker, there is a general exclusion in the Bill itself concerning records, reports and statements exempted by state statutes. There is a further exclusion concerning records of law enforcement agencies. It would be possibly, I guess on my part, but I would say that, because I don't know what the parole statutes say, we certainly didn't peruse every section of the General Statutes in dealing with this Bill. But if they are privileged and exempt from inspection, as they now exist, then they would continue to be so under the blanket exclusion, if you will, on lines 164 and 165 of the file copy.' 18 H.R. Proc., supra, pp. 3904–3905." *Chief of Police* v. *Freedom of Information Commission*, supra, 252 Conn. 399–400 n.26.

[27] Similarly, the trial court's determination in *Danaher* v. *Freedom of Information Act*, Superior Court, judicial district of New Britain, Docket No. 08-4016067-S (September 5, 2008), that the federal Freedom of Information Act is not a federal law for purposes of the federal law exemption because the federal act *does not prohibit* the *disclosure* of any public records does not support the proposition that a federal law that *does prohibit* or condition the *copying* of a public record is not a federal law within the meaning of the exemption.

[28] The commission also cites *St. Paul's Benevolent Educational & Missionary Institute* v. *United States*, 506 F. Sup. 822, 830 (1980), for the proposition that copyrighted materials are subject to the federal Freedom of Information Act because that act "does not provide any specific exemption for copyrighted materials, nor does the [C]opyright [A]ct meet the exemption standards under 5 U.S.C. § 552 (b) (3)." As the court stated in *Weisberg* v. *United States Dept. of Justice*, supra, 631 F.2d 828, however, "[d]eciding that copyrighted materials are subject to [the federal Freedom of Information

Act] . . . does not resolve whether any particular . . . request should be granted, and if so, under what terms."

[29] The advisory opinion also provided that, "if unnecessarily increasing a fee [for a copy of a copyrighted public record] results in a lesser opportunity for members of the public to gain access to records, such an action would tend to defeat the intent of the [freedom of information] law." Advisory Opinion, Committee on Open Government, New York Dept. of State, No. FOIL-AO-14966 (October 26, 2004) p. 2, available at http://docs.dos.ny.gov/coog/ftext/f14966.htm (last visited January 18, 2013). There is no evidence in the present case, however, that the fee agreed upon by Pictometry and the DEP was unreasonably or "unnecessarily" high. See footnote 25 of this opinion.

[30] One of the opinions cited by the commission concluded that freedom of information laws may limit the right of a public entity to copyright its own work. United States Dept. of Justice, Office of Information Policy Guidance, FOIA Update, Vol. IV, No. 4 (1983) p. 3, available at http://www.usdoj.gov/oip/foia_updates/Vol_IV_4/page3.htm (last visited January 18, 2013) ("the courts have over the years placed a 'judicial gloss' on the Copyright Act to generally preclude copyright status for works embodying statutes, opinions, and regulatory matters, based upon the general principle that such governmental matters should properly be in the public domain"); see also *Santa Clara* v. *Superior Court*, 170 Cal. App. 4th 1301, 1331–35, 89 Cal. Rptr. 374 (2009) (county had no statutory authority to copyright its own works, thereby bringing them within exemption from freedom of information law for copyrighted works); *Microdecisions*, *Inc.* v. *Skinner*, 889 So. 2d 871, 876 (Fla. App. 2005) (county property assessor had no statutory authority to copyright county's own works that were subject to freedom of information law). These authorities do not support the proposition that public entities are not bound by the protections afforded to works that are copyrighted.

[31] Title 17 of the United States Code, § 107, provides: "Notwithstanding the provisions of sections 106 and 106A, the fair use of a copyrighted work, including such use by reproduction in copies or phonorecords or by any other means specified by that section, for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright. In determining whether the use made of a work in any particular case is a fair use the factors to be considered shall include—

"(1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;

"(2) the nature of the copyrighted work;

"(3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and

"(4) the effect of the use upon the potential market for or value of the copyrighted work.

"The fact that a work is unpublished shall not itself bar a finding of fair use if such finding is made upon consideration of all the above factors."

[32] If the DEP believed that providing Whitaker with copies of the photographic images would be a fair use of them for purposes of § 107 of title 17 of the United States Code, it could do so subject to the risk that Pictometry could bring a copyright enforcement action against the DEP if it were to conclude otherwise. The commission cannot force the DEP to take that risk, however, by ordering the DEP to provide copies to Whitaker and nullifying its contractual obligation to Pictometry to pay for the copies, thereby subjecting the DEP to potentially conflicting legal obligations. See *Weisberg* v. *United States Dept. of Justice*, supra, 631 F.2d 829–30.

[33] Title 28 of the United States Code (Sup. 2011), § 1338 (a), provides in relevant part: "The district courts shall have original jurisdiction of any civil action arising under any Act of Congress relating to patents, plant variety protection, copyrights and trademarks. No State court shall have jurisdiction over any claim for relief arising under any Act of Congress relating to patents, plant variety protection, or copyrights. . . . "

[34] General Statutes § 1-212 (b) provides: "The fee for any copy provided in accordance with subsection (a) of section 1-211 shall not exceed the cost thereof to the public agency. In determining such costs for a copy, other than for a printout which exists at the time that the agency responds to the request for such copy, an agency may include only:

"(1) An amount equal to the hourly salary attributed to all agency employees engaged in providing the requested computer-stored public record, including their time performing the formatting or programming functions necessary to provide the copy as requested, but not including search or

retrieval costs except as provided in subdivision (4) of this subsection;

"(2) An amount equal to the cost to the agency of engaging an outside professional electronic copying service to provide such copying services, if such service is necessary to provide the copying as requested;

"(3) The actual cost of the storage devices or media provided to the person making the request in complying with such request; and

"(4) The computer time charges incurred by the agency in providing the requested computer-stored public record where another agency or contractor provides the agency with computer storage and retrieval services. Notwithstanding any other provision of this section, the fee for any copy of the names of registered voters shall not exceed three cents per name delivered or the cost thereof to the public agency, as determined pursuant to this subsection, whichever is less. The Department of Information Technology shall monitor the calculation of the fees charged for copies of computer-stored public records to ensure that such fees are reasonable and consistent among agencies."

We note that subsequent to the relevant proceedings here, § 1-212 (b) has been amended, however, none of the changes are relevant to these appeals. For purposes of convenience, references herein to § 1-212 (b) are to the 2011 revision of the statute.

[35] For public records that are not maintained in a computer storage system, § 1-212 (a) (A) provides that the agencies listed in that subparagraph cannot charge more than twenty-five cents per page for copies and § 1-212 (a) (B) provides that all other agencies cannot charge more than fifty cents per page.

[36] In addition, if Whitaker had the right to obtain copies of the images from the DEP at "minimal cost," every member of the public would have the same right.