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GENCONN ENERGY, LLC *v.* PUBLIC UTILITIES
REGULATORY AUTHORITY
(SC 20716)

Robinson, C. J., and McDonald, D'Auria, Mullins,
Ecker, Alexander and Moll, Js.

Syllabus

Pursuant to statute (§ 16-243u), “in an annual retail generation rate contested case,” a peaking generation facility “shall be entitled to recover its prudently incurred costs,” and the Public Utilities Regulatory Authority (PURA) “shall review such recovery of costs consistent with the principles set forth in sections 16-19, 16-19b and 16-19e”

Pursuant further to statute (§ 16-19e (a) (4)), PURA shall examine and review a peaking generation facility’s recoverable costs to ensure “that the level and structure of rates be sufficient, but no more than sufficient,” to cover the facility’s operating costs.

The plaintiff electric supplier, G Co., appealed to the trial court from the final decision of the defendant, PURA, which reduced G Co.’s proposed return on capital with respect to two of G Co.’s peaking generation facilities that were designed to provide additional electric supply to Connecticut consumers at times of increased demand. G Co., as a peaking generation provider, is required to submit its Annual Fixed Revenue

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Requirements application (application) to PURA every year to set out the recoverable capital it seeks for the upcoming year. In determining the allowable recoverable capital, PURA first determines the peaking generation facility's rate base, which represents the value of the property on which the facility is permitted to earn a rate of return. The rate base is then divided based on the debt-to-equity ratio to find the portion of the rate base that is attributable to each. Finally, the portion of the rate base that is attributable to debt and the portion that is attributable to equity are multiplied by the applicable rate to find the total amount the facility should be allowed to recover. For each of G Co.'s applications for 2010 through 2020, it sought and was allowed to recover, as part of the recoverable capital, its actual annual financing costs. When G Co. submitted its 2021 application, PURA concluded that G Co. was not entitled to recover the entire \$8.573 million actual interest expense and determined that a reduction was warranted. PURA found that there were certain inaccuracies in both the debt-to-equity ratio and the debt rate proposed by G Co., and that G Co.'s miscalculations would lead to an overrecovery of costs. PURA's solution was to maintain G Co.'s proposed debt-to-equity ratio but to reduce the debt rate, ultimately reducing G Co.'s recoverable capital by approximately \$2.861 million. According to PURA, this result would be more in line with the recovery contemplated by § 16-19e (a) (4), in that the rates paid by consumers would be "sufficient, but no more than sufficient," to cover G Co.'s capital costs. PURA therefore approved G Co.'s 2021 application but only authorized a return on interest of approximately \$5.712 million rather than the \$8.573 million that G Co. sought. The trial court rendered judgment dismissing G Co.'s administrative appeal, concluding that PURA was authorized to adjust G Co.'s overall recovery as it did. On appeal from the trial court's judgment, G Co. claimed, inter alia, that § 16-243u required PURA to use the statute's specific rate-making methodology applicable to peaking generation and not the general rate-making principles found in § 16-19e, and that the plain language of § 16-243u did not give PURA the authority to lower the recovery of G Co.'s actual annual financing costs. *Held:*

1. The trial court correctly determined that PURA had acted within its statutory authority to lower G Co.'s debt rate in its decision on G Co.'s 2021 application, PURA having acted pursuant to its authority under § 16-243u when it reviewed G Co.'s recovery of costs consistent with the general rate-making principles of § 16-19e:

Because § 16-243u incorporates § 16-19e by reference, the plain meaning of § 16-243u must be determined by considering § 16-19e alongside of it, and, when the two statutes are considered together, it is clear that § 16-243u directs PURA to review a peaking generation facility's recoverable costs pursuant to § 16-19e (a) (4) to ensure that the rates are "suffi-

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cient, but no more than sufficient,” to allow a peaking generation facility to cover its operating costs.

Moreover, there was no merit to G Co.’s claim that § 16-243u’s reference to § 16-19e authorizes PURA only to consider the principles in § 16-19e for the recovery of costs but not for the setting of rates, as cost recovery and rate setting are interrelated in that a peaking generation facility recovers its costs only through the setting of rates.

Furthermore, G Co.’s contention that PURA must allow a full recovery of costs for any costs that were previously deemed “prudent,” without any additional evaluation, would render the language in § 16-243u requiring an “annual retail generation rate contested case” and a review by PURA of “recovery of costs consistent with the principles set forth in [§] . . . 16-19e” meaningless.

In addition, although it was undisputed that PURA previously determined that the interest costs that G Co. had incurred from a 2012 refinancing of its debt were prudent, PURA had the authority, under § 16-243u, to reevaluate and recharacterize costs that were previously deemed prudently incurred in a prior year and to determine that they nevertheless may not properly be recovered from consumers in a subsequent year.

There also was no merit to G Co.’s claim that PURA had violated the plain language of § 16-243u by preventing G Co. from recovering a reasonable rate of return on equity when it disallowed some of G Co.’s recovery of costs and thus effectively reduced the rate of return on equity to less than the amount on which the parties had previously agreed, as the reduction in G Co.’s recoverable capital resulted from a reduction in the debt rate rather than a reduction of the rate of return on equity, and, accordingly, PURA allowed a reasonable rate of return on equity pursuant to the same rate of return on equity that had previously been agreed on by the parties.

This court concluded that G Co.’s interpretation of the statutory scheme, if applied, would leave PURA powerless to fix excess recoveries, which would conflict with the plain meaning of § 16-243u and with the broad authority granted to PURA in § 16-19e to set rates.

2. PURA’s action in lowering the debt rate in its decision on G Co.’s 2021 application after not doing so for more than one decade was not arbitrary and capricious, as the administrative record contained substantial evidence to support PURA’s conclusion that a reduction in G Co.’s debt rate was necessary:

The evidence presented and examined by PURA provided a substantial basis from which PURA reasonably could infer that G Co. had sought an overrecovery of costs, that finding supported PURA’s conclusion that an adjustment was necessary to ensure that the rates set by G Co. were,

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pursuant to § 16-19e (a) (4), “no more than sufficient” to allow G Co. to recover its costs, and PURA provided an adequate and full explanation in both its final decision and subsequent briefs for the reasons behind the change.

(One justice dissenting)

Argued September 8, 2023—officially released February 27, 2024

Procedural History

Appeal from the decision of the defendant reducing the plaintiff’s proposed return on capital with respect to certain peaking generation facilities, brought to the Superior Court in the judicial district of New Britain, where the court, *Klau, J.*, granted the motion to intervene filed by the Office of Consumer Counsel; thereafter, the court, *Cordani, J.*, rendered judgment dismissing the appeal, from which the plaintiff appealed. *Affirmed.*

Jennifer M. DelMonico, with whom were *Marilyn B. Fagelson* and, on the brief, *Proloy K. Das* and *Daniel J. Sorger*, for the appellant (plaintiff).

Seth Hollander, assistant attorney general, with whom were *Scott Muska*, general counsel, and, on the brief, *William Tong*, attorney general, for the appellee (defendant).

Thomas H. Wiehl, staff attorney, with whom were *William E. Dornbos*, legal director, and, on the brief, *Jessica Gouveia*, staff attorney, for the appellee (intervenor Office of Consumer Counsel).

Opinion

McDONALD, J. This case concerns the authority of the defendant, the Public Utilities Regulatory Authority (PURA), to review and set the rates for peaking generation facilities within the state. The plaintiff, GenConn Energy, LLC, operates two peaking generation facilities, which are designed to provide additional electric energy to Connecticut consumers at times of increased demand.

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Each year, GenConn is required to submit an Annual Fixed Revenue Requirements (AFRR) application to PURA proposing the revenue that it believes is required to recover its allowed costs¹ and for it to receive a reasonable rate of return on equity. When GenConn submitted its 2021 AFRR application, PURA found, under the general rate-making principles of General Statutes § 16-19e, that GenConn sought to overrecover from electric ratepayers. As a result, PURA lowered GenConn's overall recovery of revenue to ensure that "the level and structure of rates be sufficient, but no more than sufficient, to allow public service companies to cover their operating costs" General Statutes § 16-19e (a) (4).

On appeal to this court, GenConn argues that the trial court erred in concluding that PURA had acted within its authority. GenConn contends that PURA acted outside the scope of its authority under General Statutes § 16-243u, which specifically addresses peaking generation facilities, when it applied the general rate-making principles from § 16-19e in adjusting GenConn's recovery. GenConn also contends that PURA's change in methodology in evaluating the 2021 AFRR application was arbitrary and capricious. For its part, PURA contends that § 16-243u expressly affords it the authority to use the rate-making principles in § 16-19e, and, because it is statutorily obligated to review GenConn's recovery each year, its decision to lower GenConn's recovery was not arbitrary and capricious.² We

¹ The allowed recoverable costs include the projected capital costs, operations and maintenance costs, and administrative and general expenses. Capital costs include the cost of debt. See, e.g., *Federal Power Commission v. Hope Natural Gas Co.*, 320 U.S. 591, 603, 64 S. Ct. 281, 88 L. Ed. 333 (1944).

² The Office of Consumer Counsel (OCC) is an intervenor in this matter and, as such, filed a brief in this appeal. The OCC is an independent government agency designated by statute as the advocate for all consumers of the state's regulated electric, natural gas, water, and telecommunications utilities, as well as the customers of electric suppliers. See General Statutes § 16-2a (a). Section 16-2a (a) authorizes the OCC "to appear in and participate in any regulatory or judicial proceedings, federal or state, in which such

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conclude that § 16-243u authorized PURA to determine GenConn’s recovery using the general rate-making principles found in § 16-19e and that the “change” in PURA’s methodology does not constitute an arbitrary and capricious decision. Accordingly, we affirm the judgment of the trial court.

An overview of certain aspects of this state’s electric supply industry and relevant statutes is necessary to understand the issues in this appeal. Historically, during times of peak demand, the state had to procure additional electricity from out-of-state providers to satisfy the demand of electric consumers within the state. See 50 S. Proc., Pt. 15, 2007 Sess., p. 5066, remarks of Senator Donald E. Williams, Jr. Importing electricity in this manner was expensive and resulted in higher prices for ratepayers year-round. See *id.* In 2007, in an effort to reduce electric rates for Connecticut consumers, the General Assembly passed No. 07-242 of the 2007 Public Acts (P.A. 07-242), titled “An Act Concerning Electricity and Energy Efficiency” (act). The purpose of the act was to encourage investment in peaking generation facilities by assuring investors that they would recover their costs. See 50 S. Proc., *supra*, pp. 4960–62, remarks of Senator John W. Fonfara. By incentivizing the development of these peaking generation facilities, the state would not have to purchase out-of-state electricity at a premium, thereby reducing the cost of electricity for Connecticut ratepayers. See *id.*, p. 5066, remarks of Senator Williams. Section 50 of P.A. 07-242 provides in relevant part that, “[f]rom January 1, 2008, until February 1, 2008, any person may . . . submit a plan to build peaking generation . . . to be heard in a contested case proceeding before the Department of Public Utility

interests of Connecticut consumers may be involved” Unless otherwise noted, the arguments made by the OCC largely track those of PURA.

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Control. . . .”³ The act was later codified at General Statutes (Supp. 2008) § 16-243u, which provides that the selected peaking generators would fully recover the “prudently incurred costs” of the selected projects, including “capital costs, operation and maintenance expenses, depreciation, fuel costs, taxes and other governmental charges,” as well as “a reasonable rate of return on equity.” For the purposes of this opinion, the “prudently incurred costs” and the “reasonable rate of return on equity” referenced in § 16-243u will be referred to collectively as the “recoverable capital.”

With this background in mind, we turn to the facts and procedural history specific to this case. In February, 2008, GenConn submitted a proposal to PURA with multiple options to construct peaking generation facilities. Included in the proposal were options to construct facilities in the Devon neighborhood of Milford and in Middletown. PURA ultimately selected GenConn to develop, finance, and construct both facilities. The Devon facility became operational in June, 2010, and the Middletown facility became operational in June, 2011. The initial capitalization for GenConn’s facilities was 50 percent equity and 50 percent debt.⁴ Then, in June, 2012, as required by PURA,⁵ GenConn applied to

³ The Department of Public Utility Control is PURA’s predecessor. See Public Acts 2011, No. 11-80, § 1; see also, e.g., *Kleen Energy Systems, LLC v. Commissioner of Energy & Environmental Protection*, 319 Conn. 367, 370 n.1, 125 A.3d 905 (2015). For convenience, we hereafter refer to the Department of Public Utility Control as PURA.

⁴ The “capitalization” or “capital structure” is a representation of how the facility has financed its investment. Federal Energy Regulatory Commission, Cost-of-Service Rates Manual (1999) p. 15, available at <https://www.ferc.gov/sites/default/files/2020-08/cost-of-service-manual.pdf> (last visited February 20, 2024). It is represented as a ratio of debt to equity. See *id.* “For example, a [generator that] has financed its investment with \$6 million debt and \$4 million in common equity, is referred to as having a 60 [percent]/40 [percent] debt-equity capitalization ratio.” *Id.* “A utility’s capital structure is used as a basis in determining the overall rate of return on a utility’s investment.” *In re Zia Natural Gas Co.*, 128 N.M. 728, 731, 998 P.2d 564 (2000).

⁵ PURA’s criteria decision, which established the criteria that would be used to “evaluate the proposals” to build the peaking generation facilities,

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refinance its outstanding debt, which at the time totaled \$236.5 million. PURA approved the refinance, which had a coupon rate of 4.73 percent.⁶ The interest expense for this refinancing is amortized and fixed each year from 2013 through 2041. The actual interest expense for the refinancing in 2021 was \$8.573 million.

GenConn, as a peaking generation provider, is required to submit its AFRR application to PURA each year to set out the recoverable capital it seeks for the upcoming year. In determining the allowable recoverable capital, PURA first determines the rate base for the peaking generation facility. The rate base represents the total investment of the generation facility, or, in other words, the value of the property on which the facility is permitted to earn a rate of return. See Federal Energy Regulatory Commission, *Cost-of-Service Rates Manual* (1999) pp. 8–9, 15, available at <https://www.ferc.gov/sites/default/files/2020-08/cost-of-service-manual.pdf> (last visited February 20, 2024). The rate base is then divided based on the debt-to-equity ratio to find the portion of the rate base that is attributable to each. In the present case, PURA and GenConn agreed that the 2021 rate base was \$225.315 million, and, because GenConn had put forth a 50 percent/50 percent debt-to-equity ratio, the rate base for both debt and equity was approximately \$112.658 million. The portion of the rate base that is attributable to debt and the portion that is attributable to equity are then multiplied by the applicable rate—in this case, GenConn sought a debt rate of 7.61 percent and an equity rate of 9.85 percent—to find the total amount the facility should be allowed to recover (recoverable capital).⁷

provides that all refinancings sought by a peaking generation facility “will be required to be approved by [PURA].”

⁶ The coupon rate is the fixed interest rate of the loan.

⁷ In the AFRR decision, PURA accepted GenConn’s proposed rate of return on equity of 9.85 percent. In its decision, PURA stated that, “[p]ursuant to the [2007 criteria decision], GenConn is permitted a [return on equity] determined by the average of The Connecticut Light and Power Company’s

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For each of GenConn's AFRR applications for 2010 through 2020, it sought and was allowed to recover, as part of the recoverable capital, its actual annual financing costs, which included interest on its long-term and short-term debt. When GenConn submitted its 2021 AFRR application, it sought to recover the \$8.573 million actual interest expense for the 2021 refinancing. PURA disagreed that GenConn was entitled to recover the entire actual interest expense for 2021 and determined that a reduction was warranted.

PURA concluded that there were inaccuracies in both the debt-to-equity ratio and the debt rate proposed by GenConn. Regarding the debt-to-equity ratio, PURA found that GenConn had incorrectly determined its debt-to-equity ratio to be 50 percent/50 percent based on its internal balance sheets, when the actual ratio was closer to 75 percent/25 percent. PURA based this finding on the fact that GenConn was financing its rate base with a debt of \$172.485 million rather than with \$112.658 million, as indicated by the rate base. Regarding the debt rate, PURA found that, although GenConn's coupon rate on its debt was only 4.73 percent, GenConn was calculating the proposed debt rate using the actual interest owed, \$8.573 million, which represented the interest on the \$172.485 million in debt rather than on the \$112.658 million. This resulted in the higher debt rate of 7.61 percent proposed by GenConn.

PURA determined that the effect of the miscalculations by GenConn in its proposal would result in approval of recoverable capital appropriate for a rate base of

(Eversource Energy) and The United Illuminating Company's (UI) currently allowed [return on equities] plus 67.5 basis points. Neither Eversource Energy nor UI [has] had a rate proceeding since the 2020 AFRR [application]; hence, the [return on equity] base remains the same. Specifically, Eversource Energy has a [return on equity] of 9.25 [percent], and UI has a [return on equity] of 9.10 [percent]. The resulting average [return on equity] of 9.175 [percent] is added to 67.5 basis points for a total of 9.85 [percent]."

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\$285.143 million rather than the agreed \$225.315 million rate base. The solution imposed by PURA was to keep GenConn’s proposed 50 percent/50 percent debt-to-equity ratio but to reduce the debt rate from 7.61 percent to 5.07 percent,⁸ ultimately reducing GenConn’s recoverable capital by approximately \$2.861 million. According to PURA, this result would be more in line with the recovery contemplated by § 16-19e (a) (4), in that the rates paid by customers would be “sufficient, but no more than sufficient,” to cover GenConn’s capital costs. PURA therefore approved GenConn’s AFRR application but only authorized a return on interest of approximately \$5.712 million rather than the \$8.573 million requested by GenConn. It is this reduction that is at issue in this appeal.

GenConn appealed PURA’s final decision, claiming that PURA was not authorized to lower GenConn’s debt rate. The trial court dismissed the appeal after concluding that PURA was authorized to adjust GenConn’s overall recovery as it did. GenConn appealed from the judgment of the trial court to the Appellate Court, and we transferred the appeal to this court. On appeal, GenConn asks this court to overturn the trial court’s decision on the grounds that it violates the plain meaning of § 16-243u to allow PURA to consider the rate-making principles in § 16-19e and that PURA’s change in methodology after more than one decade of evaluating GenConn’s AFRR applications constituted an arbitrary and capricious decision.

Judicial review of an administrative agency’s determinations is governed by the Uniform Administrative Procedure Act, General Statutes § 4-166 et seq., and is ordinarily restricted in scope, with the court’s “ultimate

⁸ PURA found the 5.07 percent debt rate to be the “all-in cost of debt,” explaining that this rate “accounts for the coupon rate of GenConn’s long-term debt, recoverable fees and costs, and interest from short-term letter of credit (LOC) debt.”

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duty” being to decide, “in view of all of the evidence, whether the agency, in issuing its order, acted unreasonably, arbitrarily, illegally or in abuse of its discretion.” (Internal quotation marks omitted.) *Murphy v. Commissioner of Motor Vehicles*, 254 Conn. 333, 343, 757 A.2d 561 (2000). However, when a case presents a pure question of law, the court’s review of the agency’s decision is plenary. See, e.g., *1st Alliance Lending, LLC v. Dept. of Banking*, 342 Conn. 273, 280–81, 269 A.3d 764 (2022).

I

STATUTORY INTERPRETATION CLAIM

GenConn argues that the plain language of § 16-243u does not give PURA the authority to lower the recovery of GenConn’s actual annual financing costs. It asserts that § 16-243u requires PURA to use “the specific rate-making methodology applicable to peaking generation set forth [in § 16-243u]” and not “the general rate-making principles found in . . . § 16-19e.” PURA argues that the plain language of § 16-243u requires it to “review a peaking [generation] facility’s capital costs in accordance with traditional regulatory principles, including those set forth in § 16-19e.”

Whether § 16-243u authorizes PURA to utilize the rate-making principles set forth § 16-19e is a question of statutory interpretation. Because neither party in this case argues that PURA’s interpretation has been time-tested or previously subjected to judicial scrutiny, “the traditional deference accorded to an agency’s interpretation . . . is unwarranted,” and, therefore, our review is plenary. (Internal quotation marks omitted.) *1st Alliance Lending, LLC v. Dept. of Banking*, supra, 342 Conn. 280–81. Review of § 16-243u and the relevant statutory scheme must be in accordance with General Statutes § 1-2z and the familiar principles of statutory construction. See, e.g., *Sena v. American Medical*

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Response of Connecticut, Inc., 333 Conn. 30, 45–46, 213 A.3d 1110 (2019). The meaning of § 16-243u must, “in the first instance, be ascertained from the text of the statute itself and its relationship to other statutes.” General Statutes § 1-2z.

Section 16-243u sets forth the law applicable only to peaking generation facilities and provides in relevant part that a peaking generation facility “shall only recover the just and reasonable costs of construction of the facility and, in an annual retail generation rate contested case, shall be entitled to recover its prudently incurred costs of such project, including, but not limited to, capital costs, operation and maintenance expenses, depreciation, fuel costs, taxes and other governmental charges and a reasonable rate of return on equity. *The authority shall review such recovery of costs consistent with the principles set forth in sections 16-19, 16-19b and 16-19e, provided the return on equity associated with such project shall be established in the initial annual contested case proceeding under this section and updated at least once every four years. . . .*” (Emphasis added.)

Section 16-19e, which is expressly referenced in the text of § 16-243u, sets forth general rate-making principles applicable to all energy generators in this state. It provides in relevant part that PURA “shall examine and regulate . . . the establishment of the level and structure of rates in accordance with the following principles . . . (4) that the *level and structure of rates be sufficient, but no more than sufficient, to allow public service companies to cover their operating costs including, but not limited to, appropriate staffing levels, and capital costs, to attract needed capital and to maintain their financial integrity . . .* (5) that the level and structure of rates charged customers shall reflect prudent and efficient management of the franchise operation” (Emphasis added.) General Statutes § 16-19e (a).

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In short, § 16-243u provides in relevant part that a peaking generation facility “shall be entitled to recover its prudently incurred costs” and that “[t]he authority shall review such recovery of costs consistent with the principles set forth in sections 16-19, 16-19b and 16-19e” “As a general rule, [when] one statute specifically cites another statute, it is incorporating by reference the other statute, and the other statute must be considered in determining the plain language.” 73 Am. Jur. 2d 251, Statutes § 13 (2023); see, e.g., *State v. Bemer*, 339 Conn. 528, 541–42, 262 A.3d 1 (2021) (when one statute explicitly referenced another, this court considered provisions of each in tandem to determine plain meaning under § 1-2z analysis). Section 16-243u incorporates § 16-19e by reference, and the plain meaning of § 16-243u must therefore be found by considering § 16-19e alongside it. In doing so, it is clear that § 16-243u directs PURA to review a peaking generation facility’s recoverable costs to ensure that “the level and structure of rates be sufficient, but no more than sufficient, to allow public service companies to cover their operating costs” General Statutes § 16-19e (a) (4).

GenConn argues that § 16-243u references § 16-19e only to the extent that PURA may consider the principles in the latter statute for the recovery of costs but not the setting of rates. We agree with PURA that such a distinction fails to consider the interrelated nature of cost recovery and rate setting. In the energy field, rates are “set at a level designed to recover the company’s prudently incurred costs, plus an adequate return on investment.” Report of the State Commission Practice & Regulation Committee, 30 Energy L.J. 765, 769 (2009). In other words, “[o]nce a [peaking generation facility] establishes its revenue requirement, the [facility] must then spread the revenue requirement to several established classes of ratepayers, and set rates, based on

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historical data, that the [facility] expects to generate its required revenue.” *Commonwealth Edison Co. v. Illinois Commerce Commission*, 16 N.E.3d 713, 720 (Ill. App. 2014). GenConn’s argument fails because a peaking generation facility recovers its costs through the setting of rates.

The plain meaning of § 16-243u, then, directs PURA to use the principles of § 16-19e in determining the generator’s appropriate recoverable costs each year, and that amount is used to set the rates. To hold otherwise, as GenConn suggests—that PURA is authorized to look to § 16-19e only in determining the recovery of costs but must disregard that analysis in setting the rates—would lead to an absurd result. PURA determines the recoverable capital, which includes the recovery of costs and return on equity, in order to set the rates for the peaking generation facility. The facility can recover its costs only through the setting of rates. GenConn’s interpretation of the statute would require PURA to determine the recoverable capital but then discard that number when setting the rates and instead set the rates using whatever costs had been deemed “prudently incurred” pursuant to § 16-243u. There would be no purpose, then, for PURA to determine the recovery of costs consistent with § 16-19e because it would serve no purpose in setting the rates. We decline to read the statutory scheme in a way that would lead to such an absurd result. See, e.g., *Raftopol v. Ramey*, 299 Conn. 681, 703, 12 A.3d 783 (2011) (court “construe[s] a statute in a manner that will not . . . lead to absurd results” (internal quotation marks omitted)).

Furthermore, GenConn’s contention that PURA must allow a full recovery of costs for any costs that were previously deemed “prudent,” without any additional evaluation, would make the mandatory annual rate contested case required by § 16-243u meaningless. “It is a basic tenet of statutory construction that the legislature

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[does] not intend to enact meaningless provisions. . . . [I]n construing statutes, we presume that there is a purpose behind every sentence, clause, or phrase used in an act and that no part of a statute is superfluous. . . . Because [e]very word and phrase [of a statute] is presumed to have meaning . . . [a statute] must be construed, if possible, such that no clause, sentence or word shall be superfluous, void or insignificant.” (Internal quotation marks omitted.) *Lopa v. Brinker International, Inc.*, 296 Conn. 426, 433, 994 A.2d 1265 (2010). Section 16-243u provides in relevant part that there shall be an “annual retail generation rate contested case” It is this annual rate case that forecasts the recoverable costs for the upcoming year. If PURA had no power to review the recoverable capital at these annual rate cases and was merely required to allow recovery of any cost that had already been deemed prudent, there would be no purpose for the annual review. Moreover, such a construction would render the phrase in § 16-243u that “[t]he authority shall review such recovery of costs consistent with the principles set forth in [§] . . . 16-19e,” meaningless. Because we presume that the legislature had a purpose behind every phrase it includes in a statute, we decline to conclude that the legislature deemed an annual review necessary but intended that PURA have no authority to make determinations about a peaking generation facility’s recovery based on that review.

GenConn advances two additional arguments in support of its contention that PURA’s decision violates the plain language of § 16-243u. First, GenConn argues that PURA’s decision “illegally depriv[es] GenConn of its statutory right to recover prudently incurred costs.” It reasons that, because PURA approved the 2012 refinancing of GenConn’s debt as being in the best interest of consumers, the limitation set by § 16-243u, that only “prudently incurred costs” may be recovered, is fully

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satisfied.⁹ GenConn asserts that PURA’s decision to the contrary creates a bizarre result because costs that were already “deemed prudently incurred” in 2008 and 2012 can “be reevaluated and potentially recharacterized as not prudently incurred on an annual basis” and essentially “reads [the directives about prudently incurred costs and return on equity] out of the statute,” making it meaningless legislation.

In its brief, PURA clarified that it does not dispute that the interest costs that GenConn incurred from the 2012 refinancing were prudent but that “[t]he relevant question is whether PURA is authorized to determine the prudently incurred capital costs [*that may be recovered from consumers . . .*]” (Emphasis added.) In other words, can a situation arise in which PURA deems a peaking generator’s costs to be prudent at some point prior to the AFRR application, but then subsequently finds that the entire cost, though prudent, may nonetheless not be properly recovered from consumers? We conclude, based on the clear directives within § 16-243u, that PURA does have this authority. Section 16-243u sets out the categories of “prudently incurred costs” that the peaking generation facility is entitled to recover. It then explicitly states that this recovery of prudently incurred costs will be reviewed consistent with § 16-19e. See General Statutes § 16-243u. Therefore, although GenConn is correct in stating that § 16-243u allows it to recover its “prudently incurred costs,”

⁹ The dissent, accepting GenConn’s invitation, also argues that the language of § 16-243u “indicates a mandatory entitlement” to recovery of GenConn’s prudently incurred costs. As we explained in part I of this opinion, the relationship between §§ 16-243u and 16-19e is essential to understanding what power PURA has to adjust GenConn’s recovery of costs. The language of § 16-243u directs PURA to review the recovery of prudently incurred costs consistent with the principles of § 16-19e, which, in turn, gives PURA the authority to set rates so that they are “no more than sufficient” to allow GenConn to “cover [its] operating costs” General Statutes § 16-19e (a) (4).

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it ignores the subsequent sentence, which directs PURA to “review such recovery of costs” that may be recoverable from consumers according to § 16-19e. General Statutes § 16-243u.

Second, GenConn argues that PURA’s decision violates the plain language of § 16-243u by preventing it from recovering a reasonable rate of return on equity. Section 16-243u provides in relevant part that a peaking generation provider “shall be entitled to recover . . . a reasonable rate of return on equity. . . .” The statute further provides in relevant part that the return on equity “shall be established in the initial annual contested case proceeding under this section and updated at least once every four years. . . .” General Statutes § 16-243u. The rate of return on equity proposed by GenConn and accepted by PURA for 2021 was 9.85 percent. GenConn argues that PURA, by disallowing some of GenConn’s recovery of costs, reduced the rate of return on equity to less than 9.85 percent because GenConn now must “absorb the \$2.861 million in direct costs that should have been recovered,” resulting in “an effective rate of return [on equity] of 7.59 [percent]” This argument is unpersuasive. The rate of return on equity was not lowered by PURA. It is true that GenConn’s recoverable capital is lower than what it requested in its AFRR application by a total of \$2.861 million, but this is a result of a reduction in the debt rate. The rate of return on equity remains 9.85 percent, which, when multiplied by the portion of the rate base designated as equity (\$112.658 million), totals a return of approximately \$11 million. Simply because GenConn’s overall recoverable capital was lowered as a result of the reduction in the debt rate does not mean that the return on equity has been altered. See, e.g., *Duquesne Light Co. v. Barasch*, 488 U.S. 299, 312, 109 S. Ct. 609, 102 L. Ed. 2d 646 (1989) (discussing rate of return on equity as separate and distinct from total

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overall return and noting that rate of return on equity can be one figure, while “overall return” may be lower one). PURA did not violate the plain language of § 16-243u because it allowed a reasonable rate of return on equity pursuant to the same rate of return that previously had been agreed on by the parties.

PURA and the Office of Consumer Counsel (OCC) also point out, and we agree, that GenConn’s interpretation, if applied, would leave PURA powerless to fix excess recoveries, which would conflict with not only the plain meaning of § 16-243u, but also with the broad authority granted to PURA in § 16-19e to set rates. The OCC emphasizes the importance of PURA’s “flexibility” in examining an AFRR application and notes that PURA must be able to do so “in light of the entire universe of facts and circumstances available to it” (Footnotes omitted.) PURA is “[statutorily charged] with ensuring that Connecticut’s [investor owned] utilities, including the state’s electric . . . companies, provide safe, clean, reliable, and affordable utility service and infrastructure.” Public Utilities Regulatory Authority, Dept. of Energy & Environmental Protection, About PURA (2024), available at <https://portal.ct.gov/PURA/About/About-PURA> (last visited February 20, 2024). It is for this reason that § 16-243u directs PURA to review the peaking generation facility’s recovery of costs consistent with § 16-19e to ensure that “the level and structure of rates be sufficient, but no more than sufficient, to allow public service companies to cover their operating costs” General Statutes § 16-19e (a) (4). Given this clear purpose, PURA must be able to protect the interests of ratepayers, and, when it determines that a company is overrecovering, it must be allowed to adjust the rates. Furthermore, this court has repeatedly held that PURA has broad authority to regulate electric utilities and to set rates. See, e.g., *Greenwich v. Dept. of Public Utility Control*, 219 Conn. 121, 126, 592 A.2d

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372 (1991) (“[PURA’s] enabling statute . . . evinces a legislative intent to rely on [PURA] to regulate and supervise public utilities, and to establish rates that are not unreasonable. . . . [W]e conclude that the language of the enabling statute is sufficiently flexible to permit [PURA] to create necessary policies, including rate equalization, to guide its rate-making decisions.” (Footnote omitted.)). Indeed, the United States Supreme Court has repeatedly emphasized the importance of the discretion afforded to regulatory agencies. See, e.g., *Duquesne Light Co. v. Barasch*, supra, 488 U.S. 313 (“[w]e have never doubted that state legislatures are competent bodies to set utility rates”); *Minnesota Rate Cases*, 230 U.S. 352, 433, 33 S. Ct. 729, 57 L. Ed. 1511 (1913) (“[t]he rate-making power is a legislative power and necessarily implies a range of legislative discretion”); see also, e.g., *Permian Basin Area Rate Cases*, 390 U.S. 747, 767, 88 S. Ct. 1344, 20 L. Ed. 2d 312 (1968) (discussing broad responsibility given to regulatory agency and stating that “it must be free, within the limitations imposed by . . . statutory commands, to devise methods of regulation capable of equitably reconciling diverse and conflicting interests”). We see no reason, given the importance and purpose of PURA’s regulatory authority, to change course now.

Accordingly, we conclude that PURA was within its authority afforded by § 16-243u to review GenConn’s requested recovery of costs and to adjust the debt rate, thereby lowering GenConn’s return on financing costs.¹⁰

¹⁰ The dissent maintains that PURA was authorized to adjust GenConn’s recovery through other mechanisms available to it. We note that we agree, as does PURA, that PURA likely could have reduced GenConn’s recovery even more than it did in this case. Specifically, as the dissent suggests, PURA could have reduced GenConn’s recovery by adjusting the debt-to-equity ratio and the debt rate. Such adjustments would have resulted in a recovery of around \$14 million for GenConn, a recovery that is approximately \$5.6 million less than that which was originally requested. Our disagreement with the dissent lies in its reading of § 16-243u as precluding PURA from adjusting the cost of debt to disallow an overrecovery, which we found to be an authorized action.

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II

ARBITRARY AND CAPRICIOUS CLAIM

GenConn also contends that PURA’s 2021 decision was “arbitrary and capricious” because it changed the methodology PURA had used for one decade in determining recovery for peaking generation facilities. In response to this contention, PURA explains that it first discovered GenConn’s “rate-making artifice,” which had led to one decade of overrecovery, in 2021. PURA argues that, after this discovery, it “fixed the problem” by adjusting GenConn’s recovery to reflect “the just and reasonable capital costs allowable under traditional rate-making principles.”

GenConn’s claim that PURA’s decision was arbitrary and capricious requires this court to determine whether there is “substantial evidence in the administrative record to support [PURA’s] findings of basic fact and whether the conclusions drawn from those facts are reasonable.” (Internal quotation marks omitted.) *Murphy v. Commissioner of Motor Vehicles*, supra, 254 Conn. 343. “An administrative finding is supported by substantial evidence if the record affords a substantial basis of fact from which the fact in issue can be reasonably inferred.” (Internal quotation marks omitted.) *Commissioner of Mental Health & Addiction Services v. Freedom of Information Commission*, 347 Conn. 675, 708, 299 A.3d 197 (2023). When an agency “has stated its reasons for its actions, the court should determine only whether the assigned grounds are reasonably supported by the record and whether they are pertinent to the considerations [that] the [agency] was required to apply under the . . . regulations.” (Internal quotation marks omitted.) *R & R Pool & Patio, Inc. v. Zoning Board of Appeals*, 257 Conn. 456, 470, 778 A.2d 61 (2001).

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We conclude that there is substantial evidence in the record to support PURA’s final decision. The evidence presented and examined by PURA—the actual coupon rate of GenConn’s debt, the agreed on rate base, the agreed on debt-to-equity ratio, and the actual debt-to-equity ratio as supported by GenConn’s balance sheets—provides a substantial basis from which PURA reasonably inferred that GenConn sought an overrecovery of costs. See part I of this opinion. PURA’s finding, in turn, supported its conclusion that an adjustment was necessary to ensure that the rates set by the agency were “no more than sufficient” to allow GenConn to recover its costs. General Statutes § 16-19e (a) (4). The evidence examined by PURA and reflected in the administrative record provides substantial support for both its findings of fact and subsequent action in lowering the debt rate.

Furthermore, PURA’s “change in methodology” is not a failure to abide by its own rules but, rather, an attempt to protect ratepayers from bearing the financial burden of GenConn’s overrecovery. PURA failed to notice the overrecovery that GenConn had benefited from in prior years by incorrectly increasing its debt rate, and, once PURA discovered the issue, course corrected. Moreover, even if we were to consider this change to be a failure by PURA to follow its own rules, PURA provides an adequate and full explanation in both its final decision and subsequent briefs for the reasons behind the change. See *R & R Pool & Patio, Inc. v. Zoning Board of Appeals*, supra, 257 Conn. 459–60. As such, PURA’s action in lowering the debt rate after one decade of neglecting to do so can in no way be said to be arbitrary and capricious. See *id.*, 470, 479–80. Rather, it avoids an unjust windfall on the part of GenConn at the ratepayers’ expense.

CONCLUSION

The trial court correctly determined that PURA acted within its statutory authority to lower GenConn’s debt

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rate in its 2021 AFRR decision. Specifically, we conclude that PURA acted pursuant to its authority under § 16-243u when it reviewed GenConn's recovery of costs consistent with the general rate-making principles of § 16-19e. We also conclude that, because the administrative record contains substantial evidence to support PURA's conclusion that a reduction in the debt rate was necessary, its decision does not constitute an arbitrary and capricious one.

The judgment is affirmed.

In this opinion ROBINSON, C. J., and D'AURIA, MULLINS, ALEXANDER and MOLL, Js., concurred.

ECKER, J., dissenting. I disagree with the majority's conclusion that the Public Utilities Regulatory Authority (PURA) acted within the scope of its authority under General Statutes § 16-243u when it applied the general rate-making principles of General Statutes § 16-19e to adjust the return on capital of GenConn Energy, LLC (GenConn). In my view, § 16-243u requires GenConn to recover its actual, prudently incurred cost of debt in full, a result that is wholly consistent with the principles of cost recovery set forth in § 16-19e. My analysis is based on the pertinent statutory text and is bolstered by two prior decisions of PURA and its predecessor, the Department of Public Utility Control (DPUC), that relate specifically to the project at issue and provide direct support for the conclusion that GenConn is entitled to recover its actual cost of prudently incurred debt.¹

I hasten to add that my statutory analysis ultimately may leave GenConn in a worse position than does the

¹ Specifically, I rely on (1) PURA's final decision, dated December 23, 2020, on GenConn's 2021 Annual Fixed Revenue Requirements application, and (2) DPUC's criteria decision, dated December 14, 2007, setting forth how costs and debt would be reviewed by DPUC and recovered by peaking generators.

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result reached by the majority. Although I do not believe that, on this record, PURA has discretion to deny GenConn its prudently incurred cost of debt, the agency is not powerless to utilize other means to prevent GenConn from obtaining an unfair and unjustified return on capital. More particularly, GenConn is entitled to recover its actual, prudently incurred cost of debt, but it cannot obtain an excessive return on capital. The issue in the present case, however, is limited to whether PURA is authorized by statute to regulate GenConn's return by denying the recovery of its actual, prudently incurred cost of debt. I would answer that question "no."

The majority and I agree that the text of § 16-243u controls the outcome of this case. In relevant part, the statute provides: "From January 1, 2008, until February 1, 2008, any person may, and an electric distribution company shall, submit a plan to build peaking generation, or the electric distribution companies may submit a joint ownership plan to build peaking generation, to be heard in a contested case proceeding before the Public Utilities Regulatory Authority. . . . Any plan approved by the authority shall . . . include a requirement that the owner of the peaking generation is compensated at cost of service plus reasonable rate of return as determined by the authority *Such person shall only recover the just and reasonable costs of construction of the facility and, in an annual retail generation rate contested case, shall be entitled to recover its prudently incurred costs of such project, including, but not limited to, capital costs, operation and maintenance expenses, depreciation, fuel costs, taxes and other governmental charges and a reasonable rate of return on equity. The authority shall review such recovery of costs consistent with the principles set forth in sections 16-19, 16-19b and 16-19e, provided the return on equity associated with such project*

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shall be established in the initial annual contested case proceeding under this section and updated at least once every four years. . . .” (Emphasis added.) General Statutes § 16-243u.

The only reasonable interpretation of this language entitles the generator to recover its prudently incurred cost of debt without reduction by PURA.² Several considerations lead me to this conclusion. First, the statute expressly provides that the generator “shall be entitled to recover its prudently incurred costs [of debt],” language that indicates a mandatory entitlement. General Statutes § 16-243u; see, e.g., *KeyBank, N.A. v. Yazar*, 347 Conn. 381, 392, 297 A.3d 968 (2023) (use of term “shall” in statute generally indicates mandatory requirement and will be interpreted as mandatory if prescribed action is matter of substance rather than convenience). Although “shall” can mean “may” if the statutory context reflects a permissive intention,³ we can be certain that the legislature, in drafting § 16-243u, intended to use the word “shall” to mean something different from “may” because it used both words in the same statute in a manner demonstrating that it was acutely aware of their different meanings.⁴ See, e.g., *Lostritto v. Com-*

² Capital costs include the cost of debt. See, e.g., *Federal Power Commission v. Hope Natural Gas Co.*, 320 U.S. 591, 603, 64 S. Ct. 281, 88 L. Ed. 333 (1944).

³ See, e.g., *Statewide Grievance Committee v. Rozbicki*, 219 Conn. 473, 480–81, 595 A.2d 819 (1991) (noting that, “in the interpretation of statutes the word shall may have a meaning that is directory rather than mandatory” and that “whether a statute is mandatory or directory [hinges on] whether the prescribed mode of action is the essence of the thing to be accomplished, or in other words, whether it relates to a matter of substance or a matter of convenience” (internal quotation marks omitted)), cert. denied, 502 U.S. 1094, 112 S. Ct. 1170, 117 L. Ed. 2d 416 (1992).

⁴ The first sentence of § 16-243u illustrates the point: “From January 1, 2008, until February 1, 2008, any person *may*, and an electric distribution company *shall*, submit a plan to build peaking generation, or the electric distribution companies *may* submit a joint ownership plan to build peaking generation, to be heard in a contested case proceeding before the Public Utilities Regulatory Authority.” (Emphasis added.)

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munity Action Agency of New Haven, Inc., 269 Conn. 10, 20, 848 A.2d 418 (2004).

None of this means that PURA must allow a generator to recover every documented cost of debt incurred in connection with such a project. To the contrary, § 16-243u is crystal clear that the generator is entitled to recover only “prudently incurred” costs. My disagreement with the majority lies with its conclusion that, *once costs are determined by PURA to be prudently incurred*, recovery may nonetheless be disallowed by PURA upon a finding that the costs, though prudently incurred, are somehow inconsistent with the principles set forth in § 16-19e. I read the statute to require recovery of actual costs determined by PURA to be prudently incurred. Because PURA concedes that the cost of debt at issue in the present case was actually and prudently incurred, GenConn is entitled to recover that cost as a matter of law.⁵

The majority reasons that, “[i]f PURA had no power to review the recoverable capital at these annual rate cases and was merely required to allow recovery of any cost that had already been deemed prudent, there would be no purpose for the annual review. Moreover, such a construction would render [meaningless the provision in § 16-243u requiring that] [t]he authority shall review such recovery of costs consistent with the principles set forth in . . . [§] 16-19e’” Part I of the majority opinion. This argument refers to the fact that the relevant portion of § 16-243u contains two adjacent sentences, the first entitling the generator to recover its prudently incurred costs, the second requiring PURA

⁵ To be clear, I do not contend that PURA is without authority to reduce the generator’s debt *rate*, so long as the generator is allowed to recover its actual and prudently incurred cost of debt for the year at issue. Thus, in the present case, I agree that PURA did not act improperly when it decided to reduce GenConn’s debt rate to 5.07 percent.

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to review cost recovery consistent with the principles in § 16-19e.

Unlike the majority, I discern no tension that would compel us to choose between these two provisions by creating a category of prudently incurred costs under § 16-243u that nonetheless are inconsistent with (and therefore not recoverable under) the principles set forth in § 16-19e. Indeed, the majority never explains why the legislature would create such a category of costs. Nor does the majority identify any coherent principle that would justify disallowance of a cost that PURA has deemed prudently incurred within the meaning of § 16-243u. A far more cogent interpretation understands these two sentences to create a harmonious and complementary scheme under which prudently incurred costs are recoverable, with any question as to whether the costs are prudent to be resolved by PURA consistent with the principles set forth in the designated statutes. Once (as in the present case) the costs are deemed prudent, PURA can still use those principles to adjust a generator's return, so long as that adjustment permits recovery of the costs already deemed prudently incurred. This interpretation adheres most closely to the rule obligating courts to search for a construction that makes a harmonious whole of a statute's constituent parts. See, e.g., *Harpaz v. Laidlaw Transit, Inc.*, 286 Conn. 102, 130, 942 A.2d 396 (2008).

The majority's construction fares no better upon examination of the specific provisions of § 16-19e that it claims provide PURA the authority to deny GenConn's entitlement under § 16-243u to recover its prudently incurred cost of debt. The majority, following PURA's lead, locates PURA's authority in § 16-19e (a) (4) and (5), which authorize PURA to regulate "the level and structure of rates in accordance with the following principles . . . (4) that *the level and structure of rates be sufficient, but no more than sufficient, to allow public*

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service companies to cover their operating costs including, but not limited to, appropriate staffing levels, and capital costs, to attract needed capital and to maintain their financial integrity . . . [and] (5) that the level and structure of rates charged customers shall reflect prudent and efficient management of the franchise operation” (Emphasis added.)

The majority appears to assume that the applicability of these provisions to the particular circumstances of this case is self-evident, and it provides no explanation as to why or how the foregoing language allows PURA to deny recovery of GenConn’s prudently incurred cost of debt under the framework established by § 16-243u. Section 16-19e (a) (4) requires PURA to ensure that the cost recovery “be sufficient, but no more than sufficient, to allow [generators] to cover their . . . costs [of debt] . . . to attract needed capital and to maintain their financial integrity” PURA has made no finding that permitting GenConn to recover its proposed cost of debt was somehow “more than sufficient” to cover the actual cost, to attract needed capital, or to maintain its financial integrity. To the contrary, all parties agree that the cost item at issue *is* a prudently incurred cost; indeed, the record indisputably demonstrates that PURA approved the refinancing precisely because the expenditure enabled GenConn to obtain needed capital in a manner that redounded to the benefit of ratepayers as well as the generator.⁶

The same analysis applies to § 16-19e (a) (5), which articulates the principle that rates reflect the “prudent

⁶ We can be certain that the level and structure of the rates that PURA approved in its final decision were insufficient to allow GenConn to cover its capital costs because recovery of its cost of debt was reduced below the \$8,573,000 that both parties agree GenConn was required to pay to its lender in 2021. The “financial integrity” of GenConn plainly is not put at risk by allowing the cost recovery, and PURA never suggested otherwise. GenConn alleges that the opposite is true—its financial integrity was impaired by PURA’s decision not to allow the cost recovery. General Statutes § 16-19e (a) (4).

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and efficient management of the franchise operation” Again, there is no suggestion that the cost of debt at issue manifested imprudent or inefficient management of the peaking generation facility. There is no claim that GenConn’s actual cost of debt increased at any time after the refinancing—in fact, the cost was lower than projected⁷—and PURA concedes that the costs were prudently incurred. Rather, PURA’s concern is that GenConn sought to overrecover from ratepayers because the generator applied to recover not only its actual cost of debt but also a return on equity premised on a capital structure that GenConn failed to maintain despite its obligation to do so.⁸ PURA may have a legitimate grievance in this regard, and, if so, PURA would appear to have jurisdiction to remedy the problem through corrective measures that it is authorized to take with respect to GenConn’s return on equity. It is clear, however, that the legislature did not intend such measures to include allowing PURA to override the express, specific provision in § 16-243u entitling the generator to recover its actual and prudently incurred cost of debt.

In my view, the single sentence in § 16-243u relied on by the majority to import the entire rate-making apparatus of § 16-19e cannot bear the heavy weight assigned to it. The provision states only that PURA shall review the generator’s recovery of costs “consistent with the principles” set forth in §§ 16-19, 16-19b and 16-19e. General Statutes § 16-243u. If the legislature had

⁷ When GenConn completed the refinancing and sent PURA its compliance filing in 2013, the interest costs for 2021 were projected at approximately \$8,908,000. These costs ultimately amounted to \$8,573,000.

⁸ PURA argues that denying GenConn’s full cost of debt is justified because its 2021 proposal sought an excessive return on its capital (its return on debt and equity combined). In its final decision, PURA found that GenConn sought both to recover its full cost of debt and to “simultaneously earn [a return on equity] based on a different debt-to-equity ratio” than that approved by the agency or actually maintained in the project by GenConn.

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intended this language to mean that, notwithstanding the specific provisions of § 16-243u expressly entitling the generator to recover its prudently incurred costs, PURA nonetheless may in its discretion disallow recovery of any such costs on the basis of the general rate-making principles set forth in § 16-19e, then it is a grossly imprecise and confusing way to express that grant of authority. I would not construe this language to encroach any more than necessary on the far more specific directive of the preceding sentence, which employs plain language to entitle the generator to recover its prudently incurred costs.

In the same regard, it is also clear to me that the majority misapprehends the statutory scheme when it concludes that, “[i]f PURA had no power to review the recoverable capital at these annual rate cases and was merely required to allow recovery of any cost that had already been deemed prudent, there would be no purpose for the annual review.” Part I of the majority opinion. This argument loses all force when we recognize that the annual review operates to consider *forecasted* costs on a *prospective* basis, as PURA made clear in the criteria decision: “[PURA] will use a forecasted rate year. All costs will be forecasted at the time of the annual rate case for the upcoming ‘rate year’ subject to the provisions described below.” The purpose of the prospective approach is to incentivize generators to control their costs in the upcoming year. This is why the criteria decision provides that “[g]enerators will be allowed to keep any over earnings and will be at risk for any underrecovery during the rate year.” The process, in other words, is premised on the fact that the contemplated costs are projected costs that have not yet been reviewed or approved by PURA as prudently incurred. To name a few, these costs will typically include operation and maintenance expenses, fuel costs, and other as yet approved costs for which the generator seeks

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recovery. Depending on the circumstances, the review may also include cost of debt—but not in the present case in connection with costs incurred in the 2012 refinancing, which already have been deemed to be prudently incurred.

Two decisions of PURA and its predecessor, DPUC, bolster my conclusion that GenConn is entitled to recover its prudently incurred cost of debt. See footnote 1 of this opinion. The first is the criteria decision issued by DPUC in 2007. When DPUC issued the criteria decision, the agency anticipated that generators may seek to obtain refinancing in the future and specifically addressed a generator’s entitlement to recover its cost of debt after a refinancing—the context of the present case. The criteria decision assures all prospective generators as to how the agency would proceed with respect to the cost of debt incurred in connection with a refinancing: “All refinancings will be required to be approved by the [agency]. *Projects will recover the actual interest expense, subject to prudence investigation, if the actual costs exceed the costs included in their proposal.*” (Emphasis added.) I take this to confirm that the generator is entitled to recover its prudently incurred cost of debt and, in the case of a refinancing approved by the agency, that the generator will be entitled to recover the prudently incurred interest expenses associated with the refinancing, even if the cost exceeds those originally approved.

With this assurance, GenConn subsequently requested PURA’s approval to refinance the project in 2012 due to advantageous market conditions. PURA approved that request in its August 8, 2012 refinancing decision, thereby authorizing GenConn to incur the attendant costs consistent with the refinancing proposal. GenConn obtained its refinancing on September 17, 2013, and PURA does not contend that the actual costs thereby incurred exceed the costs that GenConn had

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included in its proposal⁹ or “dispute that the costs GenConn incurred from its 2012 refinancing were prudent.”

Second, my interpretation of the statute also finds support, ironically, in a concession made in PURA’s final decision under review in this very appeal, which identifies the operative principle of cost recovery in clear and certain terms and recognizes that PURA must allow GenConn to recover its cost of debt. The final decision provides that “[a] primary component to ‘just and reasonable cost-of-service compensation’ [required by § 16-243u] is the return on capital employed to finance the facilities used to provide service. The return is designed to *pay interest on debt* and provide a fair return on equity.” (Emphasis added.) I am unable to reconcile this acknowledgment of the statutory mandate with PURA’s decision denying GenConn the funds needed to pay the interest on its debt.

It also is important to understand that GenConn’s decision to refinance was highly advantageous to ratepayers. In approving the refinancing proposal, PURA observed that GenConn pledged only to execute the refinancing if it was “economically favorable to Connecticut ratepayers at the then current market conditions, *including interest costs*” (Emphasis added.) PURA further noted that GenConn’s proposal was “premised on refinancing the present [l]oan [f]acility to lower costs to Connecticut ratepayers. . . . [S]ince interest rates are at historic lows, GenConn believes that it is important to refinance the [l]oan [f]acility if it can access the capital markets and or bank markets to obtain a lower rate on the proposed financing which will benefit Connecticut ratepayers.” PURA itself concluded that, “based on the assumptions

⁹ After refinancing, GenConn submitted its compliance filing on November 15, 2013, containing schedules of its projected interest costs from 2013 to 2041. PURA permitted GenConn to recover these interest costs each year from 2013, when the refinancing went into effect, until 2020. Only in 2021, the year presently at issue, did PURA deny GenConn’s recovery of these costs.

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. . . savings [should be] produced through refinancing,” and that the “approvals are in the public interest” After refinancing, GenConn submitted its compliance filing to PURA, “demonstrat[ing] that the [refinancing] resulted in a benefit to the ratepayers of approximately \$23.4 million, or 85 basis points, on an all-in cost basis over the life of the debt.” PURA has never contended that the refinancing was not “economically favorable to Connecticut ratepayers” as required.

There is no reason to believe that the legislature would enact legislation that would permit PURA to reverse course eight years after formally approving the refinancing and its attendant costs, and after accepting the benefits flowing to ratepayers as a result of the refinancing. PURA knew that the refinancing required GenConn to incur interest costs, and PURA’s decision to approve the refinancing necessarily means that it deemed the benefits to justify those costs. Again, PURA has never suggested otherwise and, to this day, deems those costs prudently incurred.

This interpretation of the statutory scheme also makes sense of a statute that permits private businesses to participate and compete in a newly created in-state market for the construction and operation of peaking electric generation facilities on a cost of service basis.¹⁰ As GenConn argues, “[f]or generators to be willing to invest hundreds of millions of dollars in Connecticut’s critical energy infrastructure, and for Connecticut residents to benefit from the resulting reliable electric service, generators need to have confidence that PURA will enforce the project terms set by the Connecticut legislature and PURA itself.” In a single paragraph of statutory text, the Connecticut legislature assures prospective generators that they will recover their costs of service. Specifically with respect to costs recovered

¹⁰ See 50 H.R. Proc., Pt. 20, 2007 Sess., pp. 6591–92, remarks of Representative Vickie Orsini Nardello.

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as part of the annual retail generation rate contested case review, the generator is assured that it is legally entitled to recover its “prudently incurred costs” General Statutes § 16-243u.

Again, my construction of the statute does not mean that PURA is without recourse if it believes that GenConn seeks to recover an overall return that is excessive in light of the project’s actual capital structure for the year at issue. The mechanism for addressing that concern, however, is not artificially to reduce the actual and prudently incurred cost of debt previously approved by the regulatory agency. Instead, PURA appears to be authorized by § 16-243u, consistent with the principles set forth in § 16-19b, to reduce GenConn’s return on equity to reflect the project’s actual capital structure in any given year. See General Statutes § 16-243u (authorizing PURA to update a generator’s return on equity at least once every four years). If, as PURA contends, GenConn impermissibly altered the project’s capital structure by reducing its equity investment beneath proper limits but still sought to recover a return on equity as if its capital structure remained unchanged, then PURA presumably has statutory authority to address that situation by reducing the generator’s return on equity to reflect the actual capital structure, or perhaps by other means. The appropriate alternative procedures and calculations PURA properly could use, however, are not issues before the court in the present case. The issue at this time is whether PURA is authorized by § 16-243u to deny GenConn’s recovery of its prudently incurred cost of debt. I would conclude that it cannot do so on this record.

For the foregoing reasons, I respectfully dissent. I would reverse the trial court’s judgment and direct that the case be remanded to PURA for further proceedings in accordance with this decision.

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Drumm *v.* Freedom of Information Commission

JOHN DRUMM, CHIEF OF POLICE, ET AL. *v.*
FREEDOM OF INFORMATION COMMISSION
(SC 20656)

Robinson, C. J., and McDonald, D'Auria, Mullins,
Ecker, Dannehy and Elgo, Js.*

Syllabus

Pursuant to a provision of the Freedom of Information Act (§ 1-210 (b) (3) (D)), records of law enforcement agencies not otherwise available to the public that were compiled in connection with the detection or investigation of a crime are exempt from disclosure if the disclosure of such records would result in the disclosure of “information to be used in a prospective law enforcement action if prejudicial to such action”

The plaintiffs, the town of Madison, its police department, and its chief of police, D, appealed to the trial court from the decision of the defendant, the Freedom of Information Commission, ordering the disclosure, pursuant to the Freedom of Information Act (FOIA), of certain documents contained in the police department’s homicide investigation files to the intervening defendant, N, a filmmaker who was the complainant before the commission. The requested documents related to the 2010 homicide of B. Immediately after the homicide, DNA evidence was recovered, but the case went unsolved. In 2013, N and B’s son, H, began working on a documentary about B’s unsolved homicide. Between 2013 and 2019, H met with members of the police department, including S, three times in an attempt to obtain information about the investigation. During those meetings, H was left with the impression that the police department had classified B’s homicide as a cold case. S indicated to H that, although the DNA evidence was sufficient to identify potential suspects, it was inadequate to prosecute any particular individual, and that the police department had had the same prime suspect since one week after the homicide. Nevertheless, D, citing the ongoing investigation, would not permit the police department to cooperate with the documentary project. As a result, N filed an FOIA request with the police department, which denied the request and declined to produce any of the requested documents on the ground that they were not subject to public disclosure pursuant to § 1-210 (b) (3) (D). N then filed a complaint with the commission. The only evidence the plaintiffs offered at the hearing before the commission was S’s testimony. S acknowledged that the case had gone

* This case originally was argued before a panel consisting of Chief Justice Robinson, Justices D’Auria, Mullins and Ecker, and Judge Elgo. Thereafter, Justices McDonald and Dannehy were added to the panel and have read the briefs and appendices, and listened to a recording of the oral argument prior to participating in this decision.

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cold by 2016 and that, with the technology available at that time, the DNA evidence could not lead to an arrest. S also testified, however, that the investigation remained open and active, that he was working on the case periodically throughout the year, and that the police periodically received new leads, which he then would investigate. S further testified that he monitored changes in forensic technology and suggested that new DNA technologies might help the police make an identification in the future. The commission ruled in favor of N with respect to most of the requested documents, ordering that the plaintiffs provide N with copies of those documents. The commission found that, although B's death continued to be investigated, the requested documents did not fall within the exception from disclosure of law enforcement records because the plaintiffs had failed to establish either prong of § 1-210 (b) (3) (D), namely, that the requested records would "be used in a prospective law enforcement action" and that their release would be prejudicial. The trial court upheld the commission's decision and dismissed the plaintiffs' appeal. In so doing, the trial court concluded that the law enforcement exception to the FOIA is governed by a reasonable possibility standard, articulated a list of seven, nonexclusive factors that the commission should use to determine whether a prospective law enforcement action is a reasonable possibility, and determined that the plaintiffs were unable to satisfy that standard. On the plaintiffs' appeal from the trial court's judgment, *held*:

1. The plaintiffs could not prevail on their claim that the commission arbitrarily and capriciously had failed to articulate and apply the correct legal standard that governs claims of exemption under § 1-210 (b) (3) (D):
 - a. The trial court correctly concluded that, under the first prong of § 1-210 (b) (3) (D), a "prospective law enforcement action" is a law enforcement action that is at least a reasonable possibility:

Insofar as the FOIA does not define the term "prospective," this court consulted dictionary definitions of the term and concluded that the statute was facially ambiguous, as plausible arguments could be made that the legislature, in enacting § 1-210 (b) (3) (D), may have intended "prospective" to have a probabilistic meaning, such as potential, anticipated, expected, likely or possible, or to mean in prospect or pertaining to a prospect, as in prospective buyers.

In resolving that ambiguity, this court adopted the probabilistic definition of "prospective" and agreed with the trial court's conclusion that a "prospective law enforcement action" refers to a future law enforcement action that has at least a reasonable possibility of occurring, meaning that the occurrence is more than theoretically possible but not necessarily likely or probable.

Moreover, although the law enforcement exception plausibly could be read to impose either a more exacting standard, such as by requiring

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that the police show that an arrest or prosecution is pending or likely, or a less demanding standard, such as by requiring that the police demonstrate only a speculative or theoretical possibility of some future law enforcement action, the reasonable possibility standard was the most reasonable reading of the law enforcement exception insofar as it struck a proper balance between the competing public interests underlying the FOIA, namely, fostering openness and transparency while protecting important governmental functions that demand a degree of confidentiality.

Furthermore, application of the rules of statutory interpretation to a related FOIA provision (§ 1-215 (b) (3)), which exempts from disclosure information relating to records of arrest that may “prejudice a pending prosecution or a prospective law enforcement action,” and the legislative history of § 1-210 (b) (3) (D) provided further support for the reasonable possibility standard and ruled out the most extreme readings of the term “prospective.”

b. This court clarified that, under the first prong of § 1-210 (b) (3) (D), a respondent before the commission must establish only that it is at least reasonably possible that the information contained in a requested document will “be used in” support of an arrest or prosecution:

In *Dept. of Public Safety v. Freedom of Information Commission* (51 Conn. App. 100), the Appellate Court stated in dictum that the law enforcement exception is satisfied when there is an evidentiary showing that the requested records are going to be used in a law enforcement action, and Superior Court judges and the commission have relied on that language to require a showing that it is at least probable, if not certain, that the subject records would be used for an arrest or prosecution.

Construing the statute to create a coherent and cohesive scheme, this court presumed that the same standard must govern both the “to be used” and the “prospective law enforcement action” elements of the first prong of the statutory law enforcement exception, and, accordingly, it overruled the Appellate Court’s dictum in *Dept. of Public Safety* to the extent that it imposed a standard in connection with the “to be used” element that was different from the reasonable possibility standard that applied to the “prospective law enforcement action” element.

c. This court rejected the policy arguments advanced by the plaintiffs and the amicus curiae, the Division of Criminal Justice:

The division’s claim that the reasonable possibility standard should be deemed satisfied when a law enforcement investigation is open, a suspect has been identified, and no insurmountable obstacles exist to a future arrest or prosecution was not supported by the language or legislative history of the statute, and that proposed rule followed a categorical

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approach that failed to account for the specific facts and context of each individual case, placed too much weight on the law enforcement side of the scale, precluded the public from exercising any effective oversight in all cases in which any applicable statute of limitations has not run, and did not account for the fact that, with the passage of time, it becomes increasingly likely that openness, rather than secrecy, is what will unearth the elusive lead that will help the police solve the case.

Moreover, the claim that, as a matter of public policy, courts and the commission should defer to the expertise of law enforcement agencies or officials when construing or applying the law enforcement exception was not supported by the statutory scheme or the legislative history, especially in view of the fact that the legislature, which has been clear in the context of exceptions to the disclosure of records when it intends to give the agency possessing the subject records increased deference, did not do so when it drafted § 1-210 (b) (3).

d. This court articulated various factors for determining, in the context of the crime of murder and other crimes that involve lengthy or no statutes of limitations, whether a future law enforcement action is reasonably possible:

This court agreed that the following seven, nonexclusive factors identified by the trial court were relevant to a determination of whether a future law enforcement action is reasonably possible: the length of time that has passed since the crime; the length of time that has elapsed since the law enforcement agency last obtained significant new evidence or leads; whether the investigation, even if officially open, is classified as a cold case; the number of investigators presently assigned to the investigation; the amount of time investigators are committing to the case; whether the agency has a suspect and, if so, whether the agency's suspicion is supported by more than speculation; and whether advances in science or technology, such as improvements in DNA analysis, may help solve the crime.

This court also noted that those individual factors may vary in importance from case to case and are not intended to serve as a complete or mechanistic checklist, and sight should not be lost of the two fundamental issues that underlie the factors, namely, whether the law enforcement agency continues to investigate the crime actively and earnestly, and, if the investigation has gone cold, whether there remains a reasonable possibility that the investigation ultimately will culminate in some law enforcement action.

2. The existing administrative record was not sufficient to permit this court to apply the newly adopted reasonable possibility standard as a matter of law, and, accordingly, this court remanded the case for further proceedings before the commission:

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The commission's finding that the police had not identified a suspect was without support in the record and was contradicted by S's and H's testimony that the police department had enough DNA to develop suspects and that it had a prime suspect, the erroneous finding was apparently important to the commission's law enforcement exception analysis insofar as the commission had relied on that finding to distinguish the present case from previous cases in which it had found that release of requested records would be prejudicial to a prospective law enforcement action, and, accordingly, this court concluded that the commission must be afforded an opportunity on remand to consider what weight and importance, if any, to give to the testimony that the police department identified a prime suspect early in the investigation.

Moreover, the commission's final decision could be understood to require a probability, even a certainty, that the requested records will be used for an arrest or prosecution, a stringent standard that is not consistent with the plain language of the statute, and, because the commission's factual findings, such as that the plaintiffs' claims were wholly speculative, were conclusory and may be tied up with the legal standard that it applied, this court could not apply the new reasonable possibility standard to the existing record without running the risk of substituting its judgment for that of the commission as to the weight of the evidence on questions of fact, and, accordingly, the commission must be provided with the opportunity on remand to assess whether some law enforcement action still remains a reasonable possibility.

Furthermore, in concluding that a law enforcement action was not reasonably possible, the trial court relied on certain statistical evidence regarding the probability of a prosecution in cold murder investigations and the extent to which public disclosure of information in such cases would improve the likelihood of an arrest and prosecution rather than prejudice that outcome, but the commission was the fact finder, and it should have the opportunity on remand to review any available statistical data in the first instance, with the input from the parties and any expert testimony they wish to offer, before making relevant findings.

3. Although the trial court did not address the commission's determination that the plaintiffs had failed to establish that disclosure of the requested records would be prejudicial to a prospective law enforcement action, this court declined to give the trial court the opportunity on remand to consider the prejudice prong of § 1-210 (b) (3) (D) because, under the circumstances of the present case, further review by the trial court was unnecessary:

The two prongs of the law enforcement exception, although distinct, are not wholly unrelated, several of the factors that the trial court identified as relevant to the prospective law enforcement action prong of § 1-210 (b) (3) (D), such as the existence of a suspect and the availability of DNA

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evidence for future testing, also are relevant to the issue of prejudice, and the commission's reconsideration of these matters will necessarily bear on prejudice, as well.

Moreover, it seemed likely that the commission also applied the wrong legal standard to the prejudice prong insofar as it improperly conflated the two prongs of the statutory exception and improperly relied on S's offhand statement that he could "go on with speculating" as to how the requested information might be used, and, on remand, any documents that the plaintiffs submit for in camera review as containing potentially prejudicial information should be reviewed by the commission under its established standards.

Argued October 19, 2022—officially released February 27, 2024

Procedural History

Appeal from the decision of the defendant ordering the disclosure of certain records, brought to the Superior Court in the judicial district of New Britain, where the court, *Klau, J.*, granted the motion to intervene as a defendant filed by Anike Niemeyer; thereafter, the case was tried to the court, *Klau, J.*; judgment for the defendant, from which the plaintiffs appealed. *Reversed; further proceedings.*

Floyd J. Dugas, for the appellants (plaintiffs).

Valicia Dee Harmon, commission counsel, with whom, on the brief, was *Colleen M. Murphy*, general counsel, for the appellee (defendant).

Stephanie Rice, law student intern, with whom were *David A. Schulz* and, on the brief, *Emile Shehada*, law student intern, for the appellee (intervenor Anike Niemeyer).

Matthew A. Weiner, former assistant state's attorney, and *Sarah Hanna*, former senior assistant state's attorney, filed a brief for the Division of Criminal Justice as amicus curiae.

Dan Barrett and *Elana Spungen Bildner* filed a brief for the American Civil Liberties Union Foundation of Connecticut as amicus curiae.

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Opinion

MULLINS, J. This appeal arises from the 2010 homicide of Barbara Beach Hamburg and the ensuing efforts of her son, Madison Hamburg, and the intervener, Anike Niemeyer, a filmmaker who was the complainant before the defendant, the Freedom of Information Commission (commission), to produce a documentary film exploring the victim’s death and the failure of the plaintiffs and respondents before the commission—the town of Madison, its police department, and its chief of police, John Drumm (respondents)—to solve the crime.¹ In 2019, Niemeyer filed a request under the Freedom of Information Act (FOIA), General Statutes § 1-200 et seq., with the Madison Police Department to review the victim’s case file. The police department denied the request, which led Niemeyer to file a complaint with the commission.

After a contested hearing, the commission ruled in favor of Niemeyer and ordered the respondents to provide copies of the police department’s investigation files. Specifically, the commission rejected the respondents’ contention that the request fell within the exception from disclosure of law enforcement records pursuant to General Statutes § 1-210 (b) (3), which exempts from disclosure “records . . . compiled in connection with the detection or investigation of crime, if the disclosure of such records would not be in the public interest because it would result in the disclosure of . . . (D) information *to be used in a prospective law enforcement action if prejudicial to such action . . .*” (Emphasis added.)

¹ Because of the potential for confusion—several members of the Hamburg family are involved in this case, as is the town of Madison and its police department—we refer to Barbara Beach Hamburg as the victim, to Madison Hamburg as Hamburg, and to other members of the Hamburg family by their full name.

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The trial court affirmed the decision and disclosure order of the commission and dismissed the respondents' appeal. In doing so, the trial court clarified that the statutory phrase " 'prospective law enforcement action' . . . refers to a future law enforcement action, i.e., an arrest [or] prosecution, the occurrence of which is at least a reasonable, not a mere theoretical, possibility." Then, after applying this standard, the trial court rejected the respondents' contentions that the decision of the commission (1) was arbitrary and capricious, insofar as the legal standard applied by the commission was novel, incorrect, or insufficiently articulated, and (2) rested on factual findings that were clearly erroneous and not supported by substantial evidence. We agree with the trial court that, in order to satisfy their burden of showing that the law enforcement exception applies, the respondents were required to demonstrate that a future law enforcement action was a reasonable possibility. We also conclude that the case must be remanded to the commission for further proceedings to allow the commission to apply that standard. Accordingly, we reverse the judgment of the trial court.

I

The record reveals the following relevant facts and procedural history. On March 3, 2010, the victim's sister, Conway Beach, and her daughter, Barbara Alexandra Hamburg, discovered the victim's dead body outside the victim's home on Middle Beach Road West in Madison. Barbara Alexandra Hamburg called 911 to report the death.

The medical examiner determined that the victim died from multiple blunt and sharp force injuries, leading the examiner to deem her death a homicide. DNA matching the male Hamburg lineage was found under the victim's fingernails. After the crime, the police department issued press reports stating that it was look-

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ing for a Hamburg relative for questioning. That relative submitted DNA for testing, but the police did not consider the DNA match strong enough to justify an arrest warrant. The victim's homicide has yet to be solved, and the case remains open. The department has not held any press conferences, published any press releases, publicly named or cleared any suspects, or otherwise updated the public on the case since March, 2010.

In 2013, Hamburg and Niemeyer began working on a documentary film about the victim. In connection with that documentary, Hamburg met with representatives of the police department in 2013, 2016, and 2019 in an ongoing attempt to obtain information about the homicide investigation. At the initial, February, 2013 meeting, two Madison police detectives, Detective Sergeant Neal Mulhern and Detective Christopher Sudock, indicated that they were still pursuing leads and actively working on the case. At that time, they indicated that, if the case ever went cold, they might be open to doing an interview or releasing a statement regarding the investigation in cooperation with the documentary.

In October, 2016, Hamburg again met with Mulhern and Sudock, as well as with Drumm and two cold case detectives. At that time, Hamburg was under the impression that the police department had run out of resources and leads and, therefore, had classified the victim's homicide as a "cold case." The officers indicated that the cold case unit of the Office of the Chief State's Attorney was reviewing the case.² The detectives again inquired about Hamburg's male relative.

² Sudock testified that, during a cold case review, "another group of individuals . . . look at a case, evaluate what investigative steps have [been taken, and potentially suggest] a different route to go or other evidence to send . . . to the [state forensic science laboratory] . . ." See Connecticut Division of Criminal Justice, Cold Case Investigations (2024), available at <https://portal.ct.gov/DCJ/Programs/Programs/Cold-Case-Investigations> (last visited February 16, 2024) (describing cold case unit).

Whereas other jurisdictions variously define a cold case homicide as one that has not been solved after a period of time ranging from one to five

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In June, 2019, Hamburg requested and was granted a third meeting, this time with only Sudock. Sudock indicated that the police department had no unidentified DNA related to the case, that the DNA test kits that had been used were faulty or expired, and that the department lacked the resources to run additional tests. He also indicated that, although the existing DNA evidence was sufficient to identify potential suspects, it was inadequate to initiate a prosecution against any particular individual. Sudock further indicated that the cold case review had not led to any new interviews and that the department had had the same “number one” suspect since the week after the homicide. That suspect’s telephone—presumably a cell phone—had been turned off during a twenty-four hour period around the time of the crime. Sudock provided the following summary of the meeting: “[A]t that time, we were stale; we hadn’t gotten any new leads, we had looked at all the evidence, technology hadn’t changed. We haven’t seen anything nation[wide] or worldwide that would assist us in possibly identifying the perpetrator.” Accordingly, Sudock expressed a willingness to cooperate with the documentary project, pending Drumm’s approval.

Drumm did not give his approval, citing the ongoing investigation as the reason. Consequently, the police department declined to provide further information or assistance. As a result, in October, 2019, Niemeyer filed an FOIA request with the department. Niemeyer’s request sought copies of five categories of documents: all investigatory records, witness statements, interrogation records,

years after the crime and for which no viable and significant unexplored leads remain to investigate; see National Institute of Justice, Office of Justice Programs, U.S. Dept. of Justice, *National Best Practices for Implementing and Sustaining a Cold Case Investigation Unit* (July, 2019) pp. 1–2, available at <https://www.ojp.gov/pdffiles1/nij/252016.pdf> (last visited February 16, 2024); in Connecticut, the Division of Criminal Justice defines a cold case simply as one that is “unsolved for a prolonged period of time.” Connecticut Division of Criminal Justice, *supra*.

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and crime scene recordings related to the homicide, as well as a transcript or recording of the 911 call. The request encompasses hundreds, if not thousands, of individual documents, including photographs.

The police department denied the request and initially declined to produce any documents. The department contended that the requested documents were not subject to public disclosure pursuant to § 1-210 (b) (3).³ In response, Niemeyer filed a complaint with the commission.

The commission heard the matter as a contested case in February, 2020. By that time, nearly one decade had passed since the homicide. The only evidence the respondents offered at the hearing was Sudock's testimony.

With respect to the first prong of § 1-210 (b) (3) (D), whether the information requested was "to be used in a prospective law enforcement action," Sudock testified that, when he joined the police department in 2012, approximately two years after the victim's death, the department was still focusing on the crime, and it was a high priority for Drumm at that time. By approximately 2016, however, the case had gone cold.

Sudock further acknowledged that several "cold case looks" at the file since 2016 had failed to turn up any potential investigative steps or additional individuals to interview. He conceded having told Hamburg that "[n]obody has made a phone call . . . or written an anonymous letter, [or] anything; we've got nothing. We've done hundreds and hundreds and hundreds of

³ At the hearing, Sudock acknowledged that all of the documents at issue were responsive to Niemeyer's request, but he took the position that none of them should be turned over. His stated understanding was that the police department has a policy of not releasing any records in open investigations. Ultimately, however, the department did release certain documents related to the investigation, at various times, both to Niemeyer and to other individuals.

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interviews. . . . [The state forensic science laboratory] . . . [has] identified suspects, but [the] DNA is not enough to go forward with the arrest warrants, or anything like that.” He also conceded that, at the June, 2019 meeting, he might have told Hamburg that “the case is not moving forward and that it’s held up” Sudock also confirmed having previously told Hamburg something to the effect of, “I need something to investigate, and . . . right now, I’m stuck”

Sudock also testified, however, that the investigation remained open and active. He acknowledged that the case was “stale” and that long periods of time—as much as eight weeks—pass without any work being done on it. But he stated that he does work on the case periodically throughout the year when “something pops up, and we’re back to [having] something to investigate again.” He was unable to put a firm number on how frequently he works on the case or how much time he dedicates to it but ultimately suggested that he typically works on it at least once per month.

As recently as the week prior to the hearing, Sudock testified, there had been new activity in the case. He specifically stated that, “[l]ast week, we had information on this investigation,” but he declined to answer any questions about that development.

Looking to the future, Sudock testified that his ongoing work on the homicide investigation includes analyzing evidence, monitoring changes in forensic technology, and pursuing possible leads. He suggested that unspecified new DNA technologies might help the police make an identification. He expressed no opinion, however, as to the likelihood of, or potential timetable for, that development in this particular case.

With respect to the second, prejudice prong of § 1-210 (b) (3) (D), Sudock stated that many of the requested documents, including photographs and video recordings,

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contained “information . . . that only the perpetrator of this crime would know” He opined that releasing such information to the public—especially for expected use in a documentary film—would make it more difficult for the police to assess the credibility of any informants who might come forward and might help suspects to create fake alibis. When asked to elaborate about the possible prejudice, Sudock explained: “There’s a myriad of things that could happen if all the information in this case was public and public knowledge, and it would certainly prevent a successful prosecution. It would make it more difficult. I shouldn’t say prevent; it would make it extremely more difficult to make an arrest and also to prosecute the case.” He further concurred with the statement that “[i]t is of paramount importance that any new information not be colored by information that is made publicly available. That is to say that the credibility of any new information will be amplified if it is information that would only be known by the killer, as opposed to information that could be gathered from watching a film.” (Internal quotation marks omitted.)

Finally, when asked to provide additional information as to the types of law enforcement actions that might be prejudiced by release of the victim’s homicide files, and the nature of the potential prejudice, Sudock responded: “I can’t say that there’s something in a report that’s viewed [as] insignificant now that may be important tomorrow, [one] year from now, five years from now. . . . I don’t know what it could be. . . . [T]here could be somebody out there [who] has information [who is] holding on to that information because of a fear . . . and now a documentary comes out, and now they get more fear I just don’t know. There’s so much information there. It could be a search warrant; it could be an arrest warrant. [It] could be another scene. I mean, there’s so many things that it

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could be. I can go on . . . speculating, but I don't know at this point in time. . . . The information . . . in my opinion should . . . remain with the police department and not be public because it's only going to hamper any further investigative tool or technique that we would have in the future.”

Following the hearing, the respondents reconsidered their position, in part, and released the 911 telephone call recording to Niemeyer. In its decision, the commission ruled in favor of Niemeyer with respect to most of the remaining documents, ordering that copies be provided.⁴ Although the commission found that the victim's death continues to be investigated as the police receive new information, it concluded that the respondents had failed to establish either that the records “would be used in a prospective law enforcement action” or that their release would be prejudicial. In reaching this conclusion and distinguishing the case from prior ones in which the commission had determined that the law enforcement exception was satisfied, the commission relied on, among other things, its observations that (1) the respondents had not called any additional witnesses to corroborate Sudock's testimony, (2) Sudock's testimony as to both prongs of § 1-210 (b) (3) (D) was purely speculative, (3) the police department has not identified any suspects in the crime, and (4) there was no evidence that an arrest was expected.

The respondents appealed from the commission's decision to the trial court pursuant to the Uniform Administrative Procedure Act (UAPA). See General Statutes § 4-183. Although the trial court acknowledged

⁴ The commission did not order the respondents to provide copies of the signed witness statements, which are protected under a different FOIA exception. See General Statutes § 1-210 (b) (3) (C). Accordingly, the only categories of documents that are at issue in this appeal are the investigatory records, interrogation transcripts and recordings, and crime scene recordings and related documents.

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that the commission's decision was not a model of clarity, the court found no reversible error. Looking to federal law for guidance, the trial court concluded that the law enforcement exception to the FOIA is governed by a reasonable possibility standard, and the court articulated a list of seven nonexclusive factors that the commission should use to determine whether a prospective law enforcement action is a reasonable possibility. Having clarified the standard that governs the prospective law enforcement action exception (law enforcement exception) and determined that the respondents were unable to satisfy that standard, the court affirmed the commission's decision and dismissed the appeal. The respondents appealed from the trial court's judgment to the Appellate Court, and we transferred the appeal to this court pursuant to General Statutes § 51-199 (c) and Practice Book § 65-1. Additional facts will be set forth as necessary.

II

On appeal, the respondents' primary claim is that the commission arbitrarily and capriciously failed to articulate and apply the correct legal standard that governs claims of exemption under § 1-210 (b) (3) (D). They further contend that the trial court adopted and retroactively applied a new version of the standard without affording them a fair chance to satisfy that standard. We address the legal standard in this part of the opinion, and, in part III, we consider whether the trial court's application of the new standard was correct as a matter of law rather than a remand of the case to the commission.

A

The following well established principles guide our interpretation of the law enforcement exception to the FOIA. "Under the UAPA, it is [not] the function . . . of this court to retry the case or to substitute its judg-

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ment for that of the administrative agency. . . . 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 of 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.” (Internal quotation marks omitted.) *Commissioner of Emergency Services & Public Protection v. Freedom of Information Commission*, 330 Conn. 372, 379, 194 A.3d 759 (2018).

“Cases that present pure questions of law, however, invoke a broader standard of review [T]he traditional deference accorded to an agency’s interpretation of a statutory term is unwarranted when the construction of a statute . . . has not previously been subjected to judicial scrutiny [or to] a governmental agency’s time-tested interpretation Even if time-tested . . . an agency’s interpretation of a statute [is subject to deference] only if it is reasonable . . . [as] determined by [application of] our established rules of statutory construction.” (Citation omitted; internal quotation marks omitted.) *Id.*, 379–80.

It is well established that § 1-210 (b) (3) (D) has two prongs—that the records are “to be used in a prospective law enforcement action” and that disclosure would be prejudicial. See, e.g., *Commissioner of Public Safety v. Freedom of Information Commission*, 312 Conn. 513, 545 n.31, 93 A.3d 1142 (2014). Although the first prong has been interpreted in a few instances by the lower courts, those interpretations have not been outcome determinative. Nor has the commission articu-

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lated a clear, time-tested interpretation of the legal standard required to establish the first prong of the law enforcement exception, particularly with respect to cold case murder investigation records. Our review of that pure question of law is, therefore, de novo.

It also is settled law that the custodians of the records—in this case, the respondents—bear the burden of establishing that an FOIA exception applies. “[T]he overarching legislative policy of [the FOIA] is one that favors the open conduct of government and free public access to government records. . . . [I]t is well established that the general rule under the [FOIA] is disclosure, and any exception to that rule will be narrowly construed in light of the general policy of openness expressed in the [FOIA]. . . . [Thus] [t]he burden of proving the applicability of an exception [to disclosure under the FOIA] rests [on] the party claiming it.” (Citation omitted; internal quotation marks omitted.) *Lieberman v. Aronow*, 319 Conn. 748, 754–55, 127 A.3d 970 (2015).

B

We begin our analysis of the law enforcement exception with the plain language of the statute. See General Statutes § 1-2z. Subsection (a) of § 1-210 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” Subsection (b) of § 1-210 carves out various exceptions to that rule of disclosure, and the exception at issue in the present case is codified at § 1-210 (b) (3) (D). Section 1-210 (b) provides in relevant part that “[n]othing in the Freedom of Information Act shall be construed to require disclosure of . . . (3) [r]ecords of law enforcement agencies not otherwise available to the public which records

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were compiled in connection with the detection or investigation of crime, if the disclosure of such records would not be in the public interest because it would result in the disclosure of . . . (D) information *to be used in a prospective law enforcement action if prejudicial to such action . . .*⁵ (Emphasis added.) Although the focus of the present appeal is on the first prong of the test—what it means for a document “to be used in a prospective law enforcement action”—we briefly address the prejudice prong in part IV of this opinion.

1

The meaning of the first prong of § 1-210 (b) (3) (D) centers around the word “prospective.” Because the FOIA does not define that term, we look to its ordinary meaning. See, e.g., *Meriden v. Freedom of Information Commission*, 338 Conn. 310, 322, 258 A.3d 1 (2021). Dictionaries in print in the 1970s, when the statute was amended to include the relevant language; see Public Acts 1975, No. 75-342, § 2 (P.A. 75-342); defined “prospective” in one or more of three ways. First, prospective can have a probabilistic meaning, such as “potential,” “anticipated,” “expected,” “likely,” or “possible.” See, e.g., *The Random House Dictionary of the English Language* (Unabridged Ed. 1966) p. 1155 (defining prospective as “potential”); *Webster’s New Universal Unabridged Dictionary* (Deluxe 2d Ed. 1979) p. 1445 (defining prospective as “anticipated”); *Webster’s New World College Dictionary* (2d Ed. 1972) p. 1141 (defining prospective as “expected” or “likely”); *Webster’s Third New International Dictionary* (1966) p. 1821 (defining “prospect” as “possibility”); see also, e.g., *Ortiz v. State*, 93 S.W.3d 79, 86 (Tex. Crim. App. 2002) (prospective

⁵ The parties do not dispute that the first set of statutory requirements is satisfied; all of the documents at issue are records of a law enforcement agency that are not otherwise available to the public and that were compiled in connection with the investigation of a crime.

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also can mean possible), cert. denied, 538 U.S. 998, 123 S. Ct. 1901, 155 L. Ed. 2d 824 (2003).

Second, prospective can mean “in prospect” or “pertaining to a prospect,” as in “prospective buyers.” See, e.g., Webster’s New Universal Unabridged Dictionary, supra, p. 1445 (“pertaining to a prospect” or “perspective”). The term is used in that manner both with respect to identified or pending prospects, as when we say that “the prospective buyers have been preapproved for a mortgage,” as well as with possible or potential prospects, as when we say that “prospective buyers will find the bonus room a nice feature.”

Third, prospective can mean looking forward in time or effective in the future. See, e.g., Ballentine’s Law Dictionary (3d Ed. 1969) p. 1014 (“[l]ooking to the future”). This definition is commonly used in distinguishing statutes that apply retroactively from those that have solely prospective effect; see, e.g., id.; *Thompson v. Hagan*, 96 Idaho 19, 25, 523 P.2d 1365 (1974); and we fail to see how the legislature plausibly could have intended this definition to govern the law enforcement exception, insofar as arrests and prosecutions cannot be retrospective or past oriented in the way that laws can be. Cf. *Brayman Construction Corp. v. Commonwealth, Dept. of Transportation*, 608 Pa. 584, 598 n.10, 13 A.3d 925 (2011) (concluding that “‘effective in the future’” definition of “prospective” could not be applicable in context of case).

A plausible argument can be made, though, that either of the first two definitions is what the legislature intended, and, even within those definitions, there is a range of possible meanings. Accordingly, we conclude that the statute is facially ambiguous.

The trial court adopted the first, probabilistic definition, concluding that the statute, by its express terms, requires a prediction as to the probability of a future law enforcement event. Recognizing that this definition

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of “prospective” includes within it a broad range of probabilities, lying along a spectrum, the trial court rejected a legal standard that lies at either extreme. The court reasoned that requiring the police to demonstrate that a law enforcement action is likely or probable would impose an unreasonable burden but that requiring only a speculative possibility would allow the exception to swallow the rule. Accordingly, the court concluded that a prospective law enforcement action is one that is at least a reasonable possibility, which, it explained, is more than theoretically possible, but not necessarily likely or probable, to occur.⁶

⁶ The trial court twice indicated that it had given particular weight to the decisions of federal courts that, when construing the corresponding—albeit differently worded—provisions of the federal Freedom of Information Act; see 5 U.S.C. § 552 (b) (7) (A) (2018); applied a “pending or reasonably anticipated” standard. (Emphasis omitted; internal quotation marks omitted.) In other places, the trial court indicated that it was adopting the “reasonable possibility” standard, which both the commission and Niemeyer had advocated for, and we understand that to be the standard the court ultimately adopted. The trial court never defined that standard, however, other than to say that it sits somewhere on the spectrum between “a mere theoretical possibility” and “likely or probable.”

With respect to the federal cases, it is worth noting that, although the United States Court of Appeals for the District of Columbia Circuit has interpreted the analogous federal FOIA exemption to require a “pending or reasonably anticipated” law enforcement action, federal courts hearing FOIA claims have used inconsistent language in their efforts to describe and apply that standard. At times, those courts have applied what is arguably a *less* stringent standard than we articulate here. See, e.g., *Citizens for Responsibility & Ethics in Washington v. United States Dept. of Justice*, 746 F.3d 1082, 1098 (D.C. Cir. 2014) (stating that “an ongoing criminal investigation typically triggers [the exemption]”); *Juarez v. Dept. of Justice*, 518 F.3d 54, 59 (D.C. Cir. 2008) (concluding that, “so long as the investigation continues to gather evidence for a possible future criminal case, and that case would be jeopardized by the premature release of that evidence, [the exemption] applies”). Moreover, whereas Connecticut courts decide FOIA exemption claims based on the facts of each case, federal courts may apply a categorical approach that omits consideration of individual circumstances. Compare *Director, Retirement & Benefits Services Division, Office of the Comptroller v. Freedom of Information Commission*, 256 Conn. 764, 779, 775 A.2d 981 (2001), with *United States Dept. of Justice v. Reporters Committee for Freedom of the Press*, 489 U.S. 749, 776, 109 S. Ct. 1468, 103 L. Ed. 2d 774 (1989). For these reasons, federal cases interpreting this FOIA exemption may not be as instructive as they initially appear.

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We agree with the trial court that this is the most reasonable reading of the statute. Because § 1-210 (b) seeks to strike a balance between competing public goods, fostering openness and transparency while protecting important governmental functions that demand a degree of confidentiality, it makes sense that the legislature would have carved out an exception only for law enforcement actions that are, at the very least, reasonable possibilities. In at least one instance, the commission has articulated that this is the standard that it applies. See *Graeber v. Chief, New Haven Police Dept.*, Freedom of Information Commission, Docket No. FIC 2016-0865 (September 27, 2017).⁷

The law enforcement exception plausibly could be read to impose an even more exacting standard, such that records would be exempt only if an arrest or prosecution is pending or likely. That would be consistent with the overarching principle that FOIA exceptions should be narrowly construed in favor of disclosure. See, e.g., *Lieberman v. Aronow*, supra, 319 Conn. 754–55. Like the trial court, however, we would require a clear statement of legislative intent before concluding that the legislature wanted to require law enforcement agencies to disclose sensitive and potentially prejudicial investigatory information in the early stages of a homicide investigation or when there are promising leads that, although not enough to render prosecution likely, make it eminently possible.

⁷ As we discuss hereinafter, although the respondents rely heavily on *Graeber*, in which the reasonable possibility standard was deemed satisfied, the commission reasonably could find that that case is distinguishable from the present case because (1) the respondents in *Graeber* submitted all responsive records for the commission's in camera review in order to provide specific, nonspeculative support for their assertions, and (2) the investigation in *Graeber* remained in a different, more active phase, insofar as the assistant state's attorney leading the investigation spent at least one day per week on the case, she was actively supervising a team of detectives in that regard, and they continued to interview witnesses to the crime. See *Graeber v. Chief, New Haven Police Dept.*, supra, Docket No. FIC 2016-0865.

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At the same time, we agree with the trial court that requiring that the police demonstrate only a remote, speculative, or theoretical possibility of some future law enforcement action would permit the exception to swallow the rule and would fly in the face of the well established principle that FOIA exceptions are to be narrowly construed. We have recognized that “[t]he overarching legislative policy of the [FOIA] is one that favors the open conduct of government and free public access to government records. . . . The sponsors of the [FOIA] understood the legislation to express the people’s sovereignty over the agencies [that] 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 [FOIA] 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). With the thumb on the scale in favor of disclosure, it would be inconsistent with the purpose of the FOIA to conclude that the law enforcement exception applies upon a showing that a law enforcement action is only remotely or theoretically possible.

Further support for the reasonable possibility standard can be found in a related statute within the FOIA. General Statutes § 1-215 establishes a default rule that records of arrest are public records subject to disclosure pursuant to the FOIA. See General Statutes § 1-215 (b). Included among information that must be redacted from such records prior to disclosure, however, is “specific information about the commission of a crime, the disclosure of which the law enforcement agency reasonably believes may prejudice a *pending* prosecution or a *prospective* law enforcement action” (Emphasis added.) General Statutes § 1-215 (b) (3). On the one

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hand, the presentation of the alternatives of a “pending prosecution” or a “prospective law enforcement action” in this related statute supports the conclusion that the legislature viewed the term “prospective” in § 1-210 (b) (3) (D) as signifying a degree of probability that is less than “pending.” Otherwise, the term “prospective” would be superfluous. See, e.g., *American Promotional Events, Inc. v. Blumenthal*, 285 Conn. 192, 203, 937 A.2d 1184 (2008) (“[i]nterpreting a statute to render some of its language superfluous violates cardinal principles of statutory interpretation”); see also, e.g., *id.* (“[i]n construing statutes, we presume that there is a purpose behind every sentence, clause, or phrase used in an act and that no part of a statute is superfluous” (internal quotation marks omitted)). On the other hand, the interpretive principle of *noscitur a sociis*—a word is known by the company it keeps—suggests that “prospective” is not entirely unlike “pending” for purposes of the statutory scheme. Indeed, if a “prospective law enforcement action,” for purposes of § 1-215, meant any remotely possible action, then the word “pending” would become unnecessary.

Insofar as the statutory language is ambiguous, we also may consider the legislative history of § 1-210 (b) (3) (D). See General Statutes § 1-2z. “Like the federal Freedom of Information Act . . . our state FOIA was enacted in the aftermath of the Vietnam War and [the] Watergate [scandal] . . . [when] people were fed up with furtive government and had los[t] faith in government and politicians.” (Citation omitted; internal quotation marks omitted.) *Commissioner of Mental Health & Addiction Services v. Freedom of Information Commission*, 347 Conn. 675, 706 n.16, 299 A.3d 197 (2023). Prior to the 1975 amendments to the predecessor statute, the law enforcement exception was broadly worded and exempted any “investigatory files compiled for law enforcement purposes, except to the extent available by

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law to a private citizen” General Statutes (Rev. to 1975) § 1-19. Among other changes, P.A. 75-342, § 2, enacted in the wake of, and in response to, the Watergate scandal, dramatically scaled back the scope of the law enforcement exception, adding the current language limiting the exception to information to be used in, and prejudicial to, a prospective law enforcement action.

The legislative history of P.A. 75-342, § 2, is replete with statements indicating that the intent of the sponsors was to increase transparency, give the FOIA sharper teeth, and craft a bill that could stand side by side with the strongest freedom of information laws in the country. For example, Representative Raymond J. Dzialo, the sponsor of the bill in the House of Representatives, explained that “[t]he [s]tate’s existing right to know law has been ineffective. It has been unable to protect the public unable to mandate that records are available This [b]ill before you embodies the significant, no I must say, sweeping changes [to] the present law.” (Internal quotation marks omitted.) 18 H.R. Proc., Pt. 8, 1975 Sess., p. 3895.⁸

Indeed, the authors of P.A. 75-342, § 2, took the extraordinary measure of drafting an informal preamble that, although not included in the FOIA itself, was highlighted during the legislative debates to emphasize the purpose of the act: “[T]he [l]egislature finds and declares that secrecy in government is inherently inconsistent with [a] true democracy. That the people have a right to be fully informed of the actions taken by public agencies in order that they may retain control over the instruments they have created. . . . That the people in

⁸ See also 18 S. Proc., Pt. 5, 1975 Sess., pp. 2323, 2325, remarks of Senator Robert L. Julianelle; *id.*, p. 2327, remarks of Senator Lawrence J. DeNardis; 18 H.R. Proc., *supra*, p. 3910, remarks of Representative Martin B. Burke; Conn. Joint Standing Committee Hearings, Government Administration and Policy, 1975 Sess., pp. 304–305, remarks of Representative Walter J. Henderson.

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delegating authority do not give their public servants the right to decide what is good for them to know and that it is the intent of this [l]aw that . . . the records of all public agencies be open to the public except in those instances [in which a] superior public interest requires confidentiality.” (Internal quotation marks omitted.) *Id.*, p. 3911, remarks of Representative Martin B. Burke. As the Senate sponsor, Senator Robert L. Julianelle summarized the intent of the amendments: “[W]e do not have any right to withhold, except with the agreement of the people, any information, any proceedings, anything at all, that we do for the benefit of the people.” 18 S. Proc., Pt. 5, 1975 Sess., p. 2325. He further remarked that “it is the intent of the law that actions taken by public agencies be taken openly and their deliberations be conducted openly and that the record of all public agencies be open to the public except in those instances [in which] a superior public interest requires confidentiality. . . . We exclude the right to public records in only some very serious areas . . . [that are] sacred and should [not be] subject to the law.” *Id.*, pp. 2323–24.

When this court previously reviewed this legislative history, it observed that, although the FOIA evidences “a strong legislative policy in favor of the open conduct of government and free public access to government records,” it “does not confer [on] the public an absolute right to all government information.” *Wilson v. Freedom of Information Commission*, 181 Conn. 324, 328, 435 A.2d 353 (1980). Rather, this court concluded, this legislative history “reflects a legislative intention to balance the public’s right to know what its agencies are doing, with the governmental and private needs for confidentiality.” *Id.*

With respect to the exceptions to the disclosure requirement, the legislative history reinforces this idea that the legislature sought to strike a balance: open

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access to public records must be balanced against certain compelling public interests in confidentiality. See, e.g., 18 S. Proc., *supra*, p. 2324, remarks of Senator Julianelle; see also, e.g., 18 H.R. Proc., *supra*, p. 3910, remarks of Representative Burke (“There should be no mistake about the legislative intent of this bill. . . . [A]ll records of all governmental agencies shall be in the public domain with few and very precise exceptions.”).

Both the text of the statute and its legislative history thus rule out the most extreme readings of the term “prospective”—requiring that the law enforcement agency establish that there is a pending law enforcement action or that it demonstrate that there is a mere theoretical possibility of one. With respect to the remaining possible meanings of “prospective”; i.e., probable, likely, or possible; we rely on the principle that the FOIA effects a balance between the competing interests and conclude that the legislature intended the law enforcement exception to apply only when a law enforcement agency is able to make the threshold showing that an arrest or prosecution is at least reasonably possible. It need not be probable or likely, but it must be more than only remotely or theoretically possible. This standard effectuates the legislative intent of providing open access to public records without unduly hamstringing ongoing investigations.

2

The law enforcement exception is limited to records “to be used” in a prospective law enforcement action. General Statutes § 1-210 (b) (3) (D). Although the trial court did not discuss this element of the statutory language, and the parties have not addressed it directly, we briefly touch on it here because the Appellate Court has construed it in a manner that has led the commission to misapply the “prospective law enforcement action” requirement of § 1-210 (b) (3) (D).

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In *Dept. of Public Safety v. Freedom of Information Commission*, 51 Conn. App. 100, 720 A.2d 268 (1998), the Appellate Court concluded that “the statute is not satisfied and, consequently, information is not exempted from disclosure by the mere good faith assertion that the matter to which the information pertains is potentially criminal. [Rather], there must be an evidentiary showing that the actual information sought *is going to be used* in a law enforcement action” (Emphasis added.) *Id.*, 105. Judges of the Superior Court have embraced and relied on this language. See, e.g., *Nastro v. Freedom of Information Commission*, Docket No. HHB-CV-08-4016200-S, 2008 WL 3852748, *3 (Conn. Super. July 23, 2008); see also, e.g., *Tuccitto v. Dept. of Public Safety, Division of State Police*, Freedom of Information Commission, Docket No. FIC 2004-029 (October 27, 2004) (relying on Appellate Court’s decision in *Dept. of Public Safety* for proposition that law enforcement exception “requires an evidentiary showing that the records are in fact to be used in a prospective law enforcement action”). Under this standard, respondents would have to establish that it is at least probable, if not certain, that the subject records would be used for an arrest or prosecution.

We agree with the trial court that the Appellate Court’s analysis of the law enforcement exception in *Dept. of Public Safety* was dictum. That case involved an accidental drowning, and, by the time the document request had been made, it was clear that there had been no criminal conduct. See *Dept. of Public Safety v. Freedom of Information Commission*, *supra*, 51 Conn. App. 103. A law enforcement action was neither pending nor even reasonably possible. The statement of the legal standard in *Tuccitto* was likewise dictum, although for the opposite reason. In that case, a prosecution was pending, and the only question was whether, under the prejudice prong of § 1-210 (b) (3) (D), release of the

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investigation records was likely to bias potential jurors. See *Tuccitto v. Dept. of Public Safety, Division of State Police*, supra, Docket No. FIC 2004-029. In both cases, then, the result would have been the same under any plausible standard.

In any event, we disagree with the standard annunciated in *Dept. of Public Safety*. It would make little sense for the legislature, having required only that a prospective law enforcement action be reasonably possible, to then impose a far more exacting requirement under which respondents must demonstrate that it is probable or certain that they will use the requested information in such an action. When possible, we must construe statutes to create a coherent and cohesive scheme. See, e.g., *State v. Victor O.*, 320 Conn. 239, 249, 128 A.3d 940 (2016). In the absence of any further guidance, we will presume that the same standard governs both elements of the first prong of the statutory exception, and that the respondents must establish for any requested document only that it is at least reasonably possible that the information contained therein will be used in support of an arrest or prosecution. To the extent that *Dept. of Public Safety* imposed a different standard, it is overruled.

C

We next consider certain policy arguments advanced by the respondents and/or the Division of Criminal Justice as amicus curiae. The division contends that the reasonable possibility standard should be deemed satisfied whenever a law enforcement “investigation is open, a suspect has been identified, and no insurmountable obstacles exist to a future prosecution.” In support of this three factor standard, the division describes a handful of cold cases in which the police ultimately were able to make arrests, many years after the crime, when new witnesses or suspects emerged who made state-

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ments that included details that only the killer or killers could have known. If those case files had been made public, the division argues, prosecutions would have been “grievously, if not fatally, prejudiced”

We recognize that some added leeway must be afforded for investigations of crimes such as homicide. The division, however, fails to identify any support for its proposed rule in the language or legislative history of the statute. Moreover, as discussed, in construing FOIA exceptions, we long have eschewed a categorical approach that fails to account for the specific facts and context of each individual case. See, e.g., *Director, Retirement & Benefits Services Division, Office of the Comptroller v. Freedom of Information Commission*, 256 Conn. 764, 779, 775 A.2d 981 (2001). The division’s proposed rule would follow that impermissible path, treating the identification of a suspect as dispositive, for example, without considering key factors such as the strength of the evidence pointing to that suspect and whether, with the passage of significant time, the early identification of a suspect may become less meaningful.

The same can be said for the fact that an investigation remains open and free of insurmountable obstacles to a future prosecution. As a result, we are not prepared to say that those three factors, without more, will always satisfy the reasonable possibility standard. Depending on the context, they may establish no more than a theoretical possibility. As we explained, a theoretical possibility standard would not be consistent with the overarching principles underlying the FOIA, would upset the careful balance the legislature sought to strike, and would be incompatible with what we believe to be the fairest reading of the statutory requirement that the information being sought is to be used in a *prospective*—that is, at least reasonably possible—law enforcement action.

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Moreover, to the extent that policy considerations such as those raised by the division are relevant,⁹ we are concerned that this interpretation of the statute places too much weight on the law enforcement side of the scale. Adopting the rule advanced by the respondents and the division would preclude the public from exercising any effective oversight, not only in murder cases, but in all cases in which any applicable statute of limitations has not run. This position also ignores the fact that the legislature through this exception sought to balance law enforcement's interests in solving crimes and bringing wrongdoers to justice against more than just the public's interests in transparency and oversight. With the passage of time, it becomes increasingly likely that openness, rather than secrecy, is what will unearth that elusive lead that will help the police solve the case. As the trial court explained, after having reviewed the relevant research, "a fresh pair of eyes"—potentially millions of eyes in the age of Internet crowdsourcing—"is far more likely to improve the odds of an arrest and successful prosecution than it is to prejudice that outcome." (Internal quotation marks omitted.)

Although the division tells a compelling tale of cases in which the police were able to solve long cold murders because investigatory records were not "[p]remature[ly]" disclosed, we are confident that, for every such case, there is an equally powerful, countervailing *pragmatic* case for transparency. Some of the most paradigmatic instances in which law enforcement files were inappropriately shielded from public view, and heinous crimes were solved only when sunlight finally broke through, can be found in the civil rights era of the 1950s and 1960s. The history of that era is replete with incidents

⁹ We note that such arguments are better addressed to the legislature, and we continue to encourage the legislature to provide as much clarity and specificity as possible as to how it would strike the balance between the competing interests at play in cases such as this.

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in which law enforcement agencies failed to diligently investigate the murders of Black victims and then resisted disclosing investigation records that would have both shed light on their own indolence, if not complicity, and allowed victims' families and outside organizations, sometimes with the assistance of documentary filmmakers, to help bring the killers to justice. See generally J. McDonald, "Heroes or Spoilers? The Role of the Media in the Prosecutions of Unsolved Civil Rights Era Murders," 34 Ohio N.U. L. Rev. 797 (2008). These examples demonstrate that a theoretically possible standard poses too great a risk of unfettered and unchecked police discretion. Indeed, as we mentioned in part II B 1 of this opinion, the underlying purpose of the FOIA was the recognized need to increase government accountability in the wake of Watergate. The legislative history of the FOIA makes clear that the legislature has recognized a particular need for robust oversight of local law enforcement agencies.¹⁰

The respondents and the division also contend that, as a matter of public policy, we should defer to the expertise of law enforcement agencies and officials in

¹⁰ Our legislature expressed this sentiment even more clearly when amending the sister law enforcement exception, § 1-215, in 2015. See, e.g., 58 H.R. Proc., Pt. 18, 2015 Sess., pp. 5974–75, remarks of Representative Richard A. Smith (commenting that some police departments are less than forthcoming and that "the police cannot hide behind closed doors"); Conn. Joint Standing Committee Hearings, Government Administration and Elections, Pt. 1, 2015 Sess., pp. 212–13, remarks of Representative Smith (opining that police, left unsupervised, can "become abusive," that police departments have "all made mistakes," and that stronger transparency laws "have the advantage of making sure that the police now know that they're being watched and they need to do a better job at what they're doing"); Conn. Joint Standing Committee Hearings, *supra*, pp. 214–15, remarks of Representative David Alexander (referencing "a couple [of] bad actors" who were complicit in police brutality and raising concerns about hidden arrests and overly oppressive government). Those amendments are directly relevant to our understanding of § 1-210 because the primary purpose of the amendments was to make clear that, during the pendency of an arrest, law enforcement officials must comply with the broad disclosure requirements of § 1-210 and not only with § 1-215. See Public Acts 2015, No. 15-164, § 1.

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such matters. Once again, however, nothing in the statutory scheme or the legislative history gives any indication that the legislature intended that the commission should defer to the expertise of law enforcement agencies or officials when construing or applying the law enforcement exception. Quite the contrary, in the context of exceptions to disclosure of records, the legislature has been clear when it intends to give the agency possessing the subject records increased deference. Several FOIA exceptions expressly provide that the commission must defer to the determination of the respondent agency or official as to whether the exception is satisfied. See, e.g., General Statutes § 1-210 (b) (1) (exception for preliminary drafts or notes when “the public agency has determined that the public interest in withholding such documents clearly outweighs the public interest in disclosure”); General Statutes § 1-210 (b) (18) (exception for correction records that Commissioner of Correction has reasonable grounds to believe may result in safety risk if disclosed); General Statutes § 1-210 (b) (19) (exception for other records reasonably likely to result in safety risk if disclosed, as determined by identified public agencies); General Statutes § 1-210 (b) (24) (exception for responses to bids or proposals, so long as public agency certifies that public interest in disclosure is outweighed by public interest in confidentiality). The legislature could have drafted § 1-210 (b) (3) in the same manner as those exceptions, granting the law enforcement agency or official broad discretion to determine whether the public interest in disclosure is outweighed by the public interest in confidentiality. It did not.

D

We next consider how the reasonable possibility standard that we articulated applies to law enforcement records compiled in connection with the investigation of a murder, especially in cases, such as the present

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case, in which years have passed and the leads are few and far between. Although such cases implicate the same balancing of interests present in any FOIA request for law enforcement records, they also involve distinct considerations. In particular, the fact that there is no statute of limitations means that unsolved murder investigations may remain open, at least nominally, forever. Most crimes, by contrast, feature a statute of limitations of five years or less, which means that, by the time an investigation has gone cold, a law enforcement action will no longer be possible. See General Statutes § 54-193 (c) and (d); see also footnote 2 of this opinion.

We emphasize that the commission has publicly announced its strong inclination to trust the representations of law enforcement officials in these matters.¹¹ At the same time, however, the commission has taken seriously this court's repeated admonition that "the claimant of [an FOIA] exemption [must] provide more than conclusory language, generalized allegations or mere arguments of counsel." (Internal quotation marks omitted.) *Director, Retirement & Benefits Services Division, Office of the Comptroller v. Freedom of Information Commission*, supra, 256 Conn. 773; see, e.g., *Hartford v. Freedom of Information Commission*, 201 Conn. 421, 434–35, 518 A.2d 49 (1986) ("[t]he commission is not obliged to accept an agency's generalized and unsupported allegations relating to documents claimed to be exempt from disclosure" (internal quotation marks omitted)).

For murder and, presumably, other crimes that involve lengthy or no statutes of limitations,¹² the trial

¹¹ See, e.g., Conn. Joint Standing Committee Hearings, Government Administration and Elections, Pt. 1, 2015 Sess., p. 208, remarks of Colleen M. Murphy, executive director and general counsel of the Freedom of Information Commission ("[B]elieve me . . . if a member of the law enforcement community comes in and makes that representation to us, we don't really [second-guess] it . . . as long as there is . . . any kind of basis for it. . . . [B]ut that law enforcement [agency] must at least come in and say what those reasons are and strike that balance between disclosure and confidentiality.").

¹² Other crimes without statutes of limitations include all class A felonies, various sexual crimes committed against minors, and certain instances of

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court adopted and applied a nonexclusive, multifactor test to determine whether a future law enforcement action is reasonably possible. Although we agree that the factors identified by the trial court are relevant to the analysis, we caution that individual factors may vary in importance from case to case, and the court's test is not intended to serve as a complete or mechanistic checklist. Indeed, another relevant consideration that the trial court implicitly or explicitly considered, but did not expressly list, is the empirical likelihood that crimes of this sort will be solved after years of fruitless investigation.

Pursuant to this multifactor test, the commission must consider, among other things, “(1) the length of time that has elapsed since the commission of the crime; (2) the length of time that has elapsed since the law enforcement agency last obtained significant new evidence or leads, i.e., whether the agency has effectively exhausted all investigatory leads; (3) whether the agency has classified the investigation, even if technically open, as a cold case or the functional equivalent thereof; (4) the number of investigators currently assigned to the investigation; (5) the amount of time investigators currently commit to the investigation; (6) whether the agency has a suspect and, if so, whether the agency's suspicion is supported by more than speculation; [and] (7) whether advances in [science] or technology, such as advances in DNA analysis, may lead to new evidence or permit the fruitful reexamination of existing evidence.”

Other courts have considered similar factors in comparable cases. See, e.g., *Chastant v. Prudential Ins. Co. of America*, Docket No. 11-CV-626, 2011 WL 4007863,

escape, hindering prosecution, perjury, and motor vehicle violations resulting in the death of another person. See General Statutes § 54-193 (a); see also General Statutes § 54-193 (b) (various crimes featuring statutes of limitations of ten to thirty years).

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*4–5 (W.D. La. September 8, 2011) (applying Louisiana law); see also, e.g., *Dept. of Kentucky State Police v. Teague*, Docket No. 2018-CA-000186-MR, 2019 WL 856756, *2 (Ky. App. February 22, 2019). In our view, such factors should be helpful to the commission in carrying out the legislative intention that the commission strike a balance between the public’s right to access government information and the legitimate interests of law enforcement agencies and the state in investigating and prosecuting crimes.

In applying these factors, both independently and in relation to each other, sight should not be lost of the two fundamental questions that underlie them. First, does the law enforcement agency continue to actively and earnestly investigate the crime, or has the investigation, although technically still open, essentially gone cold? In the initial months and years following a homicide, when significant resources are being dedicated to a case and new leads are regularly pursued, it generally is not difficult for a law enforcement agency to establish that arrest and prosecution are at least reasonably possible. The commission has deferred heavily to the representations of law enforcement officials under such circumstances. See, e.g., *Hoda v. Chief, New Haven Police Dept.*, Freedom of Information Commission, Docket No. FIC 2007-143 (January 23, 2008) (finding that law enforcement exception was satisfied when FOIA request was made approximately five months after murder and police were actively pursuing leads and suspect); *Rouen v. Chief, Groton Police Dept.*, Freedom of Information Commission, Docket No. FIC 2006-064 (January 24, 2007) (finding that law enforcement exception was satisfied when FOIA request was made approximately thirteen months after murder and police were still actively investigating); *Postras v. Chief, Portland Police Dept.*, Freedom of Information Commission, Docket No. FIC 1998-085 (August 12, 1998) (deferring

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to state's attorney and finding that law enforcement exception was satisfied when FOIA request was "made very early in the [murder] investigation").

At some point, however, when years have passed, solid leads have dried up, and the case has been classified (whether formally or de facto) as cold, it may no longer be reasonable for the commission to defer to representations of law enforcement agencies, without more. The commission has long recognized this as well. See, e.g., *Estate of Mazzotta v. Chief, Middletown Police Dept.*, Freedom of Information Commission, Docket No. FIC 2012-033 (November 14, 2012) (requiring disclosure of records in homicide investigation that had gone dormant after nine years); *Gura v. Chief, New Haven Police Dept.*, Freedom of Information Commission, Docket No. FIC 2001-147 (February 13, 2002) (requiring disclosure three years after homicide when respondent merely represented that investigation was ongoing); see also, e.g., *Donovan v. Greenwich Police Dept.*, Freedom of Information Commission, Docket No. FIC 87-173 (February 26, 1992) (following in camera review, requiring disclosure eight years after homicide, even though investigation remained active). It is largely in the gray areas between these two sets of cases that specific factors, such as those identified by the trial court, will be most illuminating.

Second, once a case has gone cold, does there remain a reasonable possibility that the investigation ultimately will culminate in some law enforcement action? This might be true, for example, if the police recently have unearthed significant new evidence or leads, if they can identify emerging technologies with the reasonable potential to move the case forward, or if other factors, such as the existence of evidence tending to incriminate a particular suspect, suggest a reasonable possibility of a law enforcement action. The commission is free to conclude, consistent with its prior practice, that the

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longer an investigation has been cold, in name or effect, the greater the burden on the respondents to affirmatively demonstrate that a prospective law enforcement action remains a reasonable possibility.

III

We now consider whether the existing administrative record is sufficient to permit this court to apply the newly adopted reasonable possibility standard as a matter of law. The trial court, in affirming the decision of the commission, concluded, as a matter of law, that only one outcome was possible. The court concluded that the case had gone cold and that the respondents had failed to provide any testimony or other evidence, beyond pure speculation, that would satisfy the new standard that it had articulated and to establish anything more than a remote or speculative possibility that the investigation will bear fruit. The court also concluded that, in light of the available statistics, there is no more than a theoretical possibility that the police will bring the perpetrator to justice when a case has been cold for this many years.

On the basis of the record, we do not agree. The respondents bore the burden before the commission of establishing not only that there was a reasonable possibility that the investigation will result in a law enforcement action, but also that, for each individual document or set of documents sought to be withheld, it is reasonably possible that the requested files contain information that will be used in such a law enforcement action and that disclosure of that information would be prejudicial.

In support of their assertion that the law enforcement exception applied, the respondents established the following through Sudock's testimony: The case remains open, and the police have identified a suspect. Sudock typically works on the case at least once a month and

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periodically receives new leads, which he then investigates. The police department monitors advances in forensic technology, including DNA technology, that could yield a break in the case.

Although the commission found this evidence to be insufficient to satisfy the respondents' burden, we find it significant that the commission's final decision was predicated, as we explain hereinafter, on the clearly erroneous factual finding that the police department had not identified a suspect and, potentially, on the application of a standard that required the respondents to demonstrate either an actual or pending law enforcement action. Because application of the reasonable possibility standard that we adopted in this opinion is fact intensive, we conclude that the case must be remanded to the commission for further proceedings. See, e.g., *Great Plains Lending, LLC v. Dept. of Banking*, 339 Conn. 112, 131–32, 143, 157, 259 A.3d 1128 (2021) (remand to Banking Commissioner for further proceedings was required to determine whether plaintiff was entitled to status as “arm of the tribe” for purposes of tribal sovereign immunity because minimal evidence in administrative record was insufficient to permit court to apply newly adopted standard as matter of law); *Ann Howard's Apricots Restaurant, Inc. v. Commission on Human Rights & Opportunities*, 237 Conn. 209, 233, 676 A.2d 844 (1996) (remanding for further proceedings in which complainant would have opportunity to present additional admissible evidence). We reach this conclusion for three reasons.

A

First, we agree with the respondents that the commission's decision rested in part on clearly erroneous factual findings for which there was no substantial evidence in the record. “Judicial 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.) *Amaral Bros., Inc. v. Dept. of Labor*, 325 Conn. 72, 84–85, 155 A.3d 1255 (2017). In the present case, the commission twice stated in its decision that "the . . . police [department has] not identified any suspects" This finding was without support in the record and, in fact, was contradicted by the undisputed testimony of both witnesses.¹³

Sudock testified that the police department had enough DNA to develop suspects. He further testified that the department had long been close to solving the crime and that it had a "number one" suspect. He confirmed specific details about that suspect, most notably that the suspect's cell phone had been uncharacteristically turned off during a twenty-four hour period around the time of the homicide.

Hamburg corroborated Sudock's testimony. He testified that he had been informed that the DNA evidence in the police department's possession "was enough to develop suspects" He recalled that, during the 2019 meeting with Sudock, he was informed that the department had had the same "number one" suspect since March 7, 2010, and he indicated that Sudock had asked repeatedly about one relative's potential involvement in the crime. He also confirmed that Sudock had shared information regarding the suspect's cell phone records.

In the absence of any conflicting testimony or determination that both witnesses lacked credibility, the commission's statement that the police department had not identified any suspects in the homicide was clearly

¹³ The respondents raised this issue in their trial brief. The trial court did not directly address the claim.

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erroneous. Although the department may not have publicly *named* any suspects, it had identified at least one.¹⁴

The lack of evidence to support the commission's findings, however, does not end our inquiry. "Substantial prejudice [arising from the commission's clearly erroneous findings] must be affirmatively shown." (Internal quotation marks omitted.) *Lawrence v. Kozlowski*, 171 Conn. 705, 714, 372 A.2d 110 (1976), cert. denied, 431 U.S. 969, 97 S. Ct. 2930, 53 L. Ed. 2d 1066 (1977); see also General Statutes § 4-183 (j). Although it is a close call, we agree with the respondents that this standard is satisfied.

The commission distinguished the present case from two previous cases in which it had found that release of requested records would be prejudicial to a prospective law enforcement action, largely on the basis that, in those cases, the police department had identified one or more suspects. See footnote 14 of this opinion. The erroneous statement that the department had not identified any suspects thus appears to have been important to the commission's determination that the department failed to provide nonspeculative evidence that the requested records would be used in, and their disclosure would be prejudicial to, a prospective law enforcement action. As we noted in part II D of this opinion, the identification of a suspect is one of the key factors that the commission may consider when determining whether a law enforcement action is a reasonable possi-

¹⁴ We are not persuaded that the commission merely intended to distinguish the present case, in which no suspect has been *publicly* named and identified, from prior cases, in which a specific suspect had been arrested and was thus known to the public. The commission's final decision stated that the respondents failed to identify a suspect in the context of distinguishing the present case from two previous decisions. In neither of those decisions, however, had the prime suspect been arrested or publicly identified. See *Strauss v. Chief, Westport Police Dept.*, Freedom of Information Commission, Docket No. FIC 2010-487 (May 25, 2011); *Rouen v. Chief, Groton Police Dept.*, *supra*, Docket No. FIC 2006-064.

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bility. Accordingly, the case must be remanded to give the commission an opportunity to consider what weight and importance, if any, to give to the testimony that the department identified a prime suspect early in the investigation.¹⁵

B

Second, although it is not entirely clear, it does not appear that the commission applied the reasonable possibility standard in the present case. In its final decision, the commission repeatedly identified as its basis for declining to find that the respondents had established that there was a prospective law enforcement action their failure to present evidence of a “specific,” “expected,” “identified,” or “anticipated” law enforcement action.

¹⁵ To maintain the integrity of their investigation and techniques, law enforcement agencies often make the required showing by submitting for the commission’s in camera review any documents that allegedly fall under the law enforcement exception or otherwise support their claims. See Regs., Conn. State Agencies § 1-21j-37 (f) (1) (“[a]ny party or intervenor may request an in camera inspection of the records claimed to be exempt from disclosure in a contested case . . . and the presiding officer or the commission may order such an inspection on request, on such presiding officer’s or the commission’s own initiative, or on remand by a court”); see also *Hartford v. Freedom of Information Commission*, supra, 201 Conn. 434 n.16 (commission may review records, affidavits, or testimony in camera to allow respondents to make sufficiently detailed showing without compromising claimed confidentiality). Indeed, in most of the cases on which the respondents rely, the law enforcement agency submitted the documents at issue to the commission for in camera review. See, e.g., *Graeber v. Chief, New Haven Police Dept.*, supra, Docket No. FIC 2016-0865 (finding that prospective law enforcement action was reasonable possibility when respondents submitted copies of all responsive records for in camera review); *Hoda v. Chief, New Haven Police Dept.*, supra, Docket No. FIC 2007-143 (following in camera review of investigation records, finding that law enforcement exception was established); *Rouen v. Chief, Groton Police Dept.*, supra, Docket No. FIC 2006-064 (same); *Cotton v. Chief, Meriden Police Dept.*, Freedom of Information Commission, Docket No. FIC 2006-020 (August 9, 2006) (finding that first prong of law enforcement exception was satisfied on basis of in camera review). Although this avenue is not required, any party or intervenor may request an in camera review, and the hearing officer may order such an inspection on his or her own initiative. In the present case, the respondents did not submit any records for in camera review, and the commission did not order them to do so.

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The commission’s proposed final decision, which was prepared by the hearing officer, went even further, stating that Sudock “could not identify an *actual* prospective law enforcement action and could only provide speculation.” (Emphasis added.) Although the commission ultimately removed the word “actual” from its final decision, it is unclear whether this represented a substantive change. In short, the commission’s final decision could be understood to require a probability, even a certainty, that the requested records will be used for an arrest or prosecution.¹⁶ Such a stringent standard is not consistent with the plain language of the statute.

Moreover, although deference is due to the commission’s factual findings, in this instance, its findings, such as that the respondents’ claims were wholly speculative, are conclusory and may well be tied up with the legal standard that it applied. Application of the new standard to the existing record, therefore, would run the risk of this court’s “substitut[ing] its judgment for that of the agency as to the weight of the evidence on questions of fact,” contrary to the requirements of § 4-183 (j). On remand, the commission will have the opportunity to apply the new standard we adopted to assess whether some law enforcement action remains a reasonable possibility at this juncture.

C

Third, we note that, in concluding that a law enforcement action was not reasonably possible, the trial court relied on a body of empirical, statistical evidence suggesting that the probability of a prosecution in cold murder investigations such as this “approaches zero” and that, at some point, “a ‘fresh pair of eyes’ . . . is

¹⁶ Notably, the commission’s August 26, 2020 final decision relies on *Dept. of Public Safety v. Freedom of Information Commission*, supra, 51 Conn. App. 105, which we repudiated in part II B 2 of this opinion, for the applicable legal standard.

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far more likely to improve the odds of an arrest and successful prosecution than it is to prejudice that outcome.” The commission was the finder of fact in this matter, however, and it should have the opportunity to review any available statistical data in the first instance, with the input of the parties and any expert testimony they care to submit, before making relevant findings.¹⁷ Likewise, should the commission choose to follow the trial court in adopting a more statistical, probabilistic approach to such cases, it may consider, in the first instance, what sort of showing is necessary to establish a reasonable possibility. See, e.g., *Immigration & Naturalization Service v. Cardoza-Fonseca*, 480 U.S. 421, 431, 440, 107 S. Ct. 1207, 94 L. Ed. 2d 434 (1987) (10 percent chance was sufficient to establish reasonable possibility); *Lumataw v. Holder*, 582 F.3d 78, 92 (1st Cir. 2009) (same). For these reasons, we conclude that a remand for further proceedings in light of the legal standard that we articulated in this opinion is required.

IV

There remains the issue of prejudice. The commission determined not only that the respondents had failed to establish that any requested records were to be used in a prospective law enforcement action, but also that they had not established that disclosure of the records would be prejudicial to such action. The respondents challenged both determinations on appeal to the trial court. Having affirmed the commission’s decision on the basis of the former determination, the trial court declined to address the latter.

The respondents cannot prevail unless they satisfy both prongs of the statutory exception. See, e.g., *Com-*

¹⁷ It is unclear, for example, whether the statistical data support the same conclusions for murder investigations in which the police have identified a suspect. It will be for the commission, on remand, to determine what bearing, if any, broad statistical trends have on the likelihood of success in any particular case.

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missioner of Public Safety v. Freedom of Information Commission, supra, 312 Conn. 545 n.31. So long as the commission's determination as to a lack of prejudice stands, the respondents can obtain no practical relief with respect to the issue of a prospective law enforcement action, and any proceedings on remand would be moot. See, e.g., *In re Jordan R.*, 293 Conn. 539, 557, 979 A.2d 469 (2009).

Ordinarily, then, our conclusion that the commission failed to properly analyze the prospective law enforcement action prong of the statute would require that we remand the case to the trial court to give it the opportunity to consider the prejudice issue. Cf. *Equity One, Inc. v. Shivers*, 310 Conn. 119, 125 n.2, 74 A.3d 1225 (2013). Under the circumstances of the present case, however, we conclude that further review by the trial court is unnecessary.

First, the two prongs of the statutory exception, although distinct, are not wholly unrelated. Several of the factors that the trial court identified as relevant to the "prospective law enforcement action" prong of § 1-210 (b) (3) (D), such as the existence of a suspect and the availability of DNA evidence for future testing, also go to prejudice. The commission's reconsideration of these matters will necessarily bear on prejudice as well.

Second, it seems likely that the commission also applied the wrong legal standard as to the prejudice prong. In concluding that there was only speculative evidence that disclosure of the requested information would be prejudicial to a prospective law enforcement action, the commission appears to have (1) relied on its conclusion that the respondents failed to present evidence of a "specific," "expected," "identified," or "anticipated" law enforcement action, thus incorrectly conflating the two prongs of the test, and (2) taken too literally Sudock's offhand statement that he could "go

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on with speculating” as to how the requested information might be used.

Sudock testified that some of the requested records contain information that only the perpetrator could know, and that such information, if released, could prejudice any future prosecution. In past cases, the commission has treated such general representations as sufficient to satisfy the prejudice prong of the test, at least when borne out by the commission’s in camera review. See, e.g., *Graeber v. Chief, New Haven Police Dept.*, supra, Docket No. FIC 2016-0865; *Lopez v. Chief, Bridgeport Police Dept.*, Freedom of Information Commission, Docket No. FIC 2015-398 (February 24, 2016). If the respondents’ prejudice showing fell short, it was not because Sudock failed to testify as to exactly where and how the documents would be used—requiring that level of prognostication would be unreasonable. On remand, any documents that the respondents submit for in camera review as containing potentially prejudicial information should be reviewed under the commission’s established standards.

The judgment is reversed and the case is remanded with direction to remand the case to the commission for further proceedings according to law.

In this opinion the other justices concurred.
