

DOCKET NO. HHB-CV-18-6047741	:	SUPERIOR COURT
	:	
COMMISSIONER OF DEPARTMENT OF EMERGENCY SERVICES AND PUBLIC PROTECTION	:	JUDICIAL DISTRICT OF NEW BRITAIN
	:	ADMINISTRATIVE APPEALS SESSION
VS.	:	
	:	
FREEDOM OF INFORMATION COMMISSION, ET AL	:	JULY 2, 2020

MEMORANDUM OF DECISION

INTRODUCTION:

This is an administrative appeal from a final decision of the Freedom of Information Commission (FOIC) finding that the Commissioner of the Department of Emergency Services and Public Protection (Commissioner) violated the Freedom of Information Act (FOIA), ordering the Commissioner to comply with his department's FOIA obligations and assessing a \$100 penalty against the Commissioner.

FACTS AND PROCEDURAL HISTORY:

On September 26, 2017, defendants Mark Dumas and the Connecticut State Police Union made a request of the Commissioner under FOIA to receive copies of certain records concerning investigations of officer Andrew Matthews and/or the Connecticut State Police Union (FOIA

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Request). Having received no response to their FOIA Request, on October 26, 2017, Mark Dumas and Connecticut State Police Union filed a complaint with FOIC alleging that the Commissioner violated FOIA by not promptly addressing their FOIA Request. FOIC held a contested case hearing on March 6, 2018. Prior to the March 6, 2018 hearing, the Commissioner had not provided any responsive records pursuant to the FOIA Request. On the day of the hearing, the Commissioner produced 20 records responsive to the FOIA Request, having at that point only reviewed 700 of 5,000 potentially responsive e-mails.

At the hearing, defendant Dumas testified that the records were needed in order to understand whether the Commissioner, through the internal affairs division, had investigated officer Andrew Matthews without providing a notice required by the current union contract. A staff attorney in the Commissioner's legal affairs unit testified that the FOIA Request had been assigned to him and that he had only limited time to work on it, spending an hour here and there on it. The staff attorney further testified that weeks had gone by without him turning his attention to the FOIA Request. The Commissioner also presented evidence of the work load being experienced by relevant portions of his department.

Upon hearing the evidence, the hearing officer determined that the Commissioner had violated FOIA in not promptly responding to the FOIA Request, that the violation was without reasonable grounds and therefore ordered compliance, set a schedule for the production of responsive records, and imposed a \$100 penalty. On August 8, 2018, FOIC adopted the decision of the hearing officer as its final decision.

The Commissioner is classically aggrieved because he has exhausted all administrative remedies and appeals from a final adverse decision of FOIC finding non-compliance with FOIA, ordering compliance therewith and imposing a \$100 penalty.

STANDARD OF REVIEW:

This appeal is brought pursuant to the Uniform Administrative Procedure Act (UAPA), General Statutes § 4-183.¹ Judicial review of an administrative decision in an appeal under the UAPA is limited. *Murphy v. Commissioner of Motor Vehicles*, 254 Conn. 333, 343, 757 A.2d 561 (2000). “[R]eview 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. . . . Neither [the Supreme Court] nor the trial court may retry the case or substitute its own judgment for that of the administrative agency on the weight of the evidence or questions of fact. . . . Our

¹ Section 4-183 (j) provides in relevant part: “The court shall not substitute its judgment for that of the agency as to the weight of the evidence on questions of fact. The court shall affirm the decision of the agency unless the court finds that substantial rights of the person appealing have been prejudiced because the administrative findings, inferences, conclusions, or decisions are: (1) in violation of constitutional or statutory provisions; (2) in excess of the statutory authority of the agency; (3) made upon unlawful procedure; (4) affected by other error of law; (5) clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record; or (6) arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion. If the court finds such prejudice, it shall sustain the appeal and, if appropriate, may render a judgment under subsection (k) of this section or remand the case for further proceedings.”

ultimate duty is to determine, in view of all of the evidence, whether the agency, in issuing its order, acted unreasonably, arbitrarily, illegally or in abuse of its discretion.” Id.

Although the courts ordinarily afford deference to the construction of a statute applied by the administrative agency empowered by law to carry out the statute’s purposes, “[c]ases that present pure questions of law . . . invoke a broader standard of review than is . . . involved in deciding whether, in light of the evidence, the agency has acted unreasonably, arbitrarily, illegally or in abuse of its discretion.” *Dept. of Public Safety v. Freedom of Information Commission*, 298 Conn. 703, 716, 6 A.3d 763 (2010).

ANALYSIS:

General Statutes § 1-210 (a) provides in pertinent part:

“Except as otherwise provided by any federal law or state statute, all records maintained or kept on file by any public agency . . . shall be public records and every person shall have the right to (1) inspect such records *promptly* during regular office or business hours, (2) copy such records in accordance with subsection (g) of section 1-212, or (3) receive a copy of such records in accordance with section 1-212.” (Emphasis added.)

General Statutes § 1-212 (a) provides in pertinent part:

“Any person applying in writing shall receive, *promptly* upon request, a plain, facsimile, electronic or certified copy of any public record.” (Emphasis added.)

Thus FOIA has a promptness standard requiring that FOIA requests be promptly handled.

FOIC, the agency responsible for administering and enforcing FOIA, has issued Advisory Opinion #51 interpreting the statutory promptness standard. FOIC defines “promptly” as used in the foregoing statutes to mean “quickly and without undue delay, taking into account all of the factors presented by a particular request.” Freedom of Information Commission of the State of Connecticut, Advisory Opinion # 51 (January 11, 1982), available at https://www.state.ct.us/foi/Advisory_Opinions_&_Dec/AO_51.htm (copy contained in the file of this case in the Superior Court clerk’s office). The Advisory Opinion provides that some of the factors to be considered are (i) the volume of records requested, (ii) the amount of personnel time necessary to address the request, (iii) the timeframe under which the requestor needs the information, (iv) the importance of the records to the requestor, (v) time constraints placed on the agency by other work, and (vi) the importance of other pressing work at the agency. FOIC notes in the opinion that providing access to records is a “primary duty” of all public agencies and should be considered part of their mission. See *Id.*

FOIC’s interpretation of the promptness standard required by the foregoing statutes is reasonable. FOIC’s interpretation has been in place since 1982. Several Superior Court decisions have found FOIC’s interpretation of the promptness standard reasonable. See *Torlai v. Freedom of Information Commission*, Superior Court, judicial district of New Britain, Docket No. CV-16-5017450-S (November 27, 2017, *Huddleston, J.*); *Smith v. Freedom of Information Commission*, Superior Court, judicial district of New Britain, Docket No. CV-12-5015684-S (June 7, 2013, *Cohn, J.*); and *Torlai v. Freedom of Information Commission*, Superior Court, judicial district of

New Britain, Docket No. CV-15-5016760-S (June 27, 2016, *Schuman, J.*). Similarly, this court concludes that FOIA's statutory promptness standard means quickly and without undue delay, taking into account all of the factors presented by a particular request. Further, the factors for consideration noted in FOIC's advisory opinion also appear reasonable. In addition to this court's own view that FOIC's interpretation of the statutory promptness standard is reasonable, the court should typically defer to an agency's interpretation of a statute that the agency is empowered to administer, particularly when the agency interpretation is reasonable as is here. See *Chairperson, Connecticut Medical Examining Board v. Freedom of Information Commission*, 310 Conn. 276, 77 A.3d 121 (2013).

The plaintiff takes FOIC to task for describing the plaintiff's FOIA duties as "primary duties" of that agency. The court interprets "primary duty" in this sense as an important duty of the agency on par with the agency's other significant duties, or said another way, that the agency's FOIA duty is not a second class duty². This appears to the court to be an apt description. An agency's FOIA duty is a statutory duty or command. As such, it is not second class to any other statutory duty or command. That being said, agencies such as the plaintiff, have multiple statutory duties and finite resources, and some statutory duties may be more urgent

² In the Advisory Opinion, FOIC describes a primary duty as a duty that is made as much a part of the agency mission as its other functions. The Advisory Opinion also recognizes that agencies have limited resources and need to prioritize those resources appropriately among the agency's duties and objectives.

than others. Obviously, maintaining public safety and order are generally more urgent duties than the plaintiff's FOIA duty and resources may be prioritized accordingly. However, FOIC's interpretation of the FOIA statutory promptness requirement is consistent with the foregoing realization. In particular, FOIC in assessing the promptness requirement considers time constraints placed on the agency by other work and the importance of other pressing work at the agency.

In this matter, there is substantial evidence that the record request was important and urgent to the requestor. The requestor asked for the records by a date certain within a little over two weeks from the request and there was testimony that the request arose out of union concerns that the department was internally investigating a union member without notice in violation of the applicable collective bargaining agreement obligations. Considering that the union was making the request and the substance of the request, it is reasonable to infer that the plaintiff understood that the request was important. The record also contains substantial evidence that the request produced voluminous records that would require substantial time to review. Further, the record contains substantial evidence that the plaintiff's personnel were busy and that the plaintiff appropriately prioritized public safety and order. The record also contains substantial evidence that the portion of the legal affairs department to which this task was assigned was not directly concerned with public safety and order. Lastly, and most importantly, the record contains substantial evidence that the person to whom this FOIA Request was assigned did not consider the request important and prioritized the task at the bottom of his obligations. In this regard, the

staff attorney to whom the FOIA Request had been assigned testified that he had only limited time to work on it and spent only an hour here and there on it. The staff attorney further testified that weeks had gone by without him turning his attention to the FOIA Request. Further, the FOIA Request was made in September 2017 and the hearing was held in March 2018. In the six months between the FOIA Request and the hearing only 700 of the 5,000 responsive emails had been reviewed and only 20 responsive documents had been produced. Most telling is that the fact that the plaintiff only produced the foregoing 20 responsive documents on the very day of the hearing at the hearing itself. Given the foregoing, it was reasonable for FOIC to infer that the plaintiff had not taken the FOIA Request seriously. It was also reasonable for FOIC to find that the plaintiff violated the FOIA promptness requirement.

General Statutes § 1-206 (b) (2) provides in pertinent part as follows:

“... upon the finding that a denial of any right created by [FOIA] was *without reasonable grounds* and after the custodian or other official directly responsible for the denial has been given an opportunity to be heard at a hearing . . . the commission may, *in its discretion*, impose against the custodian or other official a civil penalty of not less than twenty dollars nor more than one thousand dollars.” (Emphasis added.)

FOIC found that the delay here was unreasonable and amounted to a denial. It also found that the denial was without reasonable grounds. In view of the record, FOIC’s determination that the plaintiff’s denial was without reasonable grounds has substantial evidentiary support in the record and was not an abuse of discretion on the part of FOIC. In this regard, FOIC also considered that during the fourteen

months preceding the hearing, FOIC had issued four final decisions in other matters that concluded that this plaintiff had violated the promptness standard of FOIA.

Although the foregoing consideration was not directly tied to the facts of this matter, FOIC cannot be expected to forget its general view of the recent compliance record of the plaintiff. Thus this appears to be a reasonable consideration. However, even without the foregoing consideration, the record in this matter has substantial evidentiary support for FOIC's decision.

CONCLUSION:

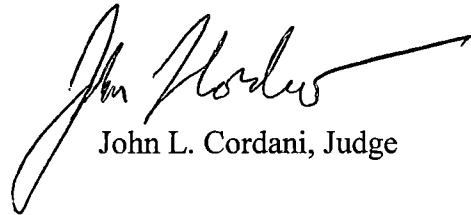
In view of the record, FOIC's finding that the plaintiff violated the promptness requirement of FOIA is supported by substantial evidence and is reasonable. Further, FOIC's finding that the plaintiff's violation was without reasonable grounds is supported by substantial evidence in the record, is reasonable and was not an abuse of FOIC's discretionary authority as provided in the statute.

The civil penalty applied was modest and appears to be calibrated to make an appropriate point to the plaintiff. The plaintiff has failed to establish on appeal that FOIC's decision was (1) in violation of constitutional or statutory provisions; (2) in excess of the statutory authority of the agency; (3) made upon unlawful procedure; (4) affected by other error of law; (5) clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record; or (6) arbitrary or

capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion. As such, the court respectfully dismisses the appeal.

ORDER:

The appeal is dismissed.



John L. Cordani, Judge