CV-18-6047447-S	:	SUPERIOR COURT
MARISSA LOWTHERT	:	JUDICIAL DISTRICT
V.	:	OF NEW BRITAIN
FREEDOM OF INFORMATION COMMISSION	:	SEPTEMBER 1, 2021

MEMORANDUM OF DECISION
RE: APPLICATION TO SCHEDULE HEARING
PURSUANT TO GENERAL STATUTES § 1-206[1]

I

PROCEDURAL HISTORY

The plaintiff, Marissa Lowthert, applies for an order pursuant to General Statutes § 1-206 (b) (2) requiring the defendant, the Freedom of Information Commission (commission), to hold a hearing on a complaint she filed with the commission in 2017. For the reasons discussed below, the court denies the plaintiff's request for a court-ordered hearing before the commission.

[1] This matter is an application for a court order requiring that the commission schedule a hearing in the following contested case: *Lowthert* v. *Freedom of Information Commission*, Docket No. FIC 2017-0518 (August 23, 2018).

Judicial District of New Britain
SUPERIOR COURT
FILED
SEP 01 2021
ASSISTANT CLERK

Electronic notice sent to all counsel and official reporter. Mailed to Marissa Lowthert.
A. Jordanopoulos, 9-1-21

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The administrative record submitted by the commission reflects the following relevant facts.[2] On September 5, 2017, the plaintiff filed a five-page complaint with and against the commission alleging that the commission and/or staff of the commission held unnoticed/secret meeting(s), failed to post notices, failed to post minutes, and failed to record votes. In her complaint, the plaintiff requested the following remedies: the nullification of any vote taken at any secret or unnoticed meetings conducted by the commission during the pendency of the plaintiff's "Notice in Fact Appeals" to the Superior Court; a finding by the commission that it violated the Freedom of Information Act (FOIA); a public disclosure of an agenda and minutes of any secret meeting the commission conducted; the commission's consideration of action to repeal Senate Bill 983 (Public Acts 1987, No. 87-215); and an in-camera review of any records for which an exemption to disclosure is claimed concerning a FOI records request issued by the plaintiff to the commission on September 4, 2017.

On July 24, 2018, the commission's executive director issued a "Notice of Request to Summarily Deny Leave to Schedule a Hearing" (notice) on the ground that scheduling a hearing on the plaintiff's complaint would "constitute an abuse of the commission's administrative process" under § 1-206 (b) (2) (C). The notice provided:

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[2] Although the present case is not an appeal under the Uniform Administrative Procedure Act and there is no formal record under General Statutes § 4-183 (g), the commission compiled a record of the underlying administrative proceedings and submitted it to the court (# 107). The parties have not objected to the contents of the record. The court therefore relies on the record submitted by the commission in this decision.

The Executive Director is not seeking to schedule a hearing in the matter, but rather is asking the Commission to affirm her decision not to schedule a hearing. The Executive Director's decision not to schedule was based on the following factors, pursuant to § 1-206 (b) (2) (c) of the Connecticut General Statutes:

A. The Commission's resources are diminished due to budget cuts and consolidation with other state agencies, while its caseload has increased dramatically. It is impossible for the Commission to schedule a hearing for every case that is filed.

B. The complainant has filed more than forty-four complaints against various public agencies over the last few years. The Superior Court has concluded that the filing of a multitude of complaints with the Commission in a limited time period constitutes an abuse of the Commission's administrative process. Memorandum of Decision, [*Smith* v. *Freedom of Information Commission*, Superior Court, judicial district of New Britain, Docket No. CV-16-5017349-S (July 19, 2016, *Schuman, J.*)] (filing multiple complaints constitutes abuse of the Commission's administrative process).

C. The Commission has already expended an inordinate amount of time and resources adjudicating and mediating a multitude of previous cases filed by the complainant. Moreover, the complainant's practice of filing copious motions, postponement requests, and other pleadings, often insinuating that the Commission has acted unfairly or unprofessionally with regard to her, is tantamount to harassment and clearly an abuse of the Commission's administrative process. . . .

D. The Commission's caseload has been running at a record pace, and hundreds of complainants, other than Ms. Lowthert, who have not yet been before the Commission, await hearings.

E. The Commission has already ruled that four of the complainant's previous complaints, if scheduled, would constitute an abuse of the Commission's administrative process. Thus, the complainant has a history of filing abusive complaints with the Commission.

F. The complainant alleges that the FOI Commission held a secret or unnoticed meeting sometime before March 3, 2017, which is when the Executive Director submitted public testimony to the General Assembly concerning Public Act 17-86. The complainant alleges that the Executive Director's testimony revealed the existence of a secret meeting.

G. The complainant's letter of appeal barely alleges a prima facie case of a secret meeting or unnoticed meeting, and is more akin to conjecture. Much of the complainant's letter of appeal expressed her belief that the Executive Director's testimony was inaccurate.

H. As remedy, the complainant seeks, among other requests, that the FOI Commission consider action to seek repeal of Public Act 17-86.

I. The Commission did not conduct a secret meeting, as suggested in the complaint. Legislative matters are discussed in the Commission's public sessions. If a vote is required, one is taken and duly recorded in the Commission's minutes. A vote was neither required nor taken regarding the Commission's public discussion of the legislation which was enacted as Public Act 17-86.

J. It would be extremely problematic for the Commission to conduct a hearing in this matter which would presumably require the Commissioners be called as witnesses, and then be required to make a ruling on the basis of such hearing. Ethical and conflict of interest issues would inevitably arise, resulting in an administrative quagmire.

Based on the factors set forth in paragraphs A through [J], above, the Executive Director of the Commission has reason to believe that scheduling a hearing in the above-captioned appeal would "constitute an abuse of the Commission's administrative process," pursuant to § 1-206 (b) (2) (c) of the Connecticut General Statutes. Proceeding to a hearing would be a waste of the scarce resources of the Commission and would needlessly delay hearings of hundreds of other complainants.

At its regular meeting on August 22, 2018, the FOIC commissioners unanimously voted to affirm the executive director's decision not to schedule a hearing on the plaintiff's complaint.

On September 5, 2018, the plaintiff commenced the proceeding presently before this court, requesting an order pursuant to General Statutes § 1-206 (b) (2) requiring the defendant to hold a hearing on the underlying complaint. On September 28, 2020, the plaintiff filed an appeal brief in support of her request. The defendant filed a brief in opposition to the plaintiff's request

on January 29, 2021, and the plaintiff filed a reply on March 30, 2021. The matter was heard at a remote hearing on June 8, 2021.

II

DISCUSSION

A. Relevant Case History and Senate Bill 983 (Public Act 17-86)

In order to understand the plaintiff's underlying complaint in the present case, and the commission's decision not to schedule a hearing on the complaint, it is necessary to discuss two previous matters involving the plaintiff that were decided by the commission and appealed to the Superior Court, as well as relevant legislative history regarding Senate Bill 983 (Public Act 17-86).

The first matter, *Lowthert* v. *Miller Driscoll Building Committee*, Docket No. FIC 2014-444 (June 10, 2015), was appealed to the Superior Court and a decision was rendered on January 17, 2017. See *Lowthert* v. *Freedom of Information Commission*, Superior Court, judicial district of New Britain, Docket No. CV-15-6030425-S (January 17, 2017, *Huddleston, J.*) (63 Conn. L. Rptr. 820) (collectively, *Lowthert 1*).

The second matter, *Lowthert* v. *Wilton Public Schools*, Docket No. FIC 2015-147 (January 13, 2016) (final decision upon reconsideration), was appealed to the Superior Court and docketed as *Lowthert* v. *Freedom of Information Commission*, Superior Court, judicial district of New Britain, Docket No. CV-16-6032522-S (settled and withdrawn on the condition that the commission hold another hearing). The commission held another hearing and issued a

decision in *Lowthert* v. *Wilton Public Schools*, Docket No. FIC 2015-147 (August 23, 2017) (final decision upon reconsideration). The plaintiff appealed the commission's final decision to the Superior Court, and court remanded the appeal to the commission to make additional findings of fact. See *Lowthert* v. *Freedom of Information Commission*, Superior Court, judicial district of New Britain, Docket No. CV-17-6041629-S (March 5, 2021, *Cohn, J.T.R.*). The plaintiff subsequently appealed the court's decision to remand, and it remains pending before the Appellate Court (collectively, *Lowthert 2*).

Prior to *Lowthert 1*, General Statutes (Rev. to 2011) § 1-206 (b) (1) provided in relevant part: "Any person . . . wrongfully denied the right to attend any meeting of a public agency . . . may appeal therefrom to the Freedom of Information Commission, by filing a notice of appeal with said commission. A notice of appeal shall be filed not later than thirty days after such denial, except in the case of an unnoticed or secret meeting, in which case the appeal shall be filed not later than thirty days after person filing the appeal receives *notice in fact* that such meeting was held." (Emphasis added.).

In *Lowthert 1*, which involved allegations of a secret or unnoticed meeting, the commission dismissed the plaintiff's complaint for not having been timely filed after determining that more than thirty days had elapsed from the date upon which the plaintiff *should have known* that an unnoticed meeting had occurred. *Lowthert* v. *Freedom of Information Commission*, supra, 63 Conn. L. Rptr. 820. The plaintiff appealed the commission's decision to the Superior Court, and the court found that "notice in fact," as used in § 1-206 (b)

(1), "means actual notice to the person filing the appeal." Id. The court concluded that the commission did not apply this interpretation in considering the plaintiff's complaint, and remanded the case back to the commission for further proceedings consistent with the court's decision. Id. Upon reconsideration, the commission issued a second decision finding that the plaintiff's complaint was timely, and concluding that that the Miller Driscoll Building Committee had violated the FOI Act by conducting an unnoticed meeting. See *Lowthert* v. *Town of Wilton*, Docket No. FIC-2014-44 (September 26, 2018).

On January 26, 2017, roughly one week after the *Lowthert 1* decision was issued, a staff attorney from the commission asked for a meeting with the chairs of the General Administrative and Elections (GAE) Committee to discuss the court's ruling, which she characterized as "unfavorable."[3] A few days later, on January 30, 2017, the executive director and staff attorney met with elected officials to draft an amendment to change the notice requirement in § 1-206 (b) (1), which eventually became Senate Bill 983.[4] The Connecticut General Assembly subsequently passed Senate Bill 983, *An Act Concerning Appeals of Information Act Involving Notice of Meetings*, effective October 1, 2017, which eliminated the phrase "notice in fact" and substituted the phrase "actual or constructive notice" in the context of "secret or unnoticed" meetings within the meaning of § 1-206 (b) (1). See Public Acts 2017, No. 17-86.

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[3] Record, p. 504
[4] Record, p. 508

As of October 2017 and in the current version of the statute, § 1-206 (b) (1) provides in relevant part: "Any person . . . wrongfully denied the right to attend any meeting of a public agency . . . may appeal therefrom to the Freedom of Information Commission, by filing a notice of appeal with said commission. A notice of appeal shall be filed not later than thirty days after such denial, except in the case of an unnoticed or secret meeting, in which case the appeal shall be filed not later than thirty days after person filing the appeal receives *actual or constructive notice* that such meeting was held." (Emphasis added.).

In *Lowthert 2*, in which the plaintiff alleged that the Wilton Board of Education had conducted a secret meeting and during which time § 1-206 (b) (1) contained the "notice in fact" language, the commission dismissed the complaint as untimely filed. See *Lowthert* v. *Wilton Public Schools*, supra, Docket No. FIC 2015-147 (January 13, 2016). While *Lowthert 2* was pending with the Superior Court, the parties agreed to settle the case on the condition that the commission conduct an evidentiary hearing encompassing the alleged secret meeting violations. See *Lowthert* v. *Wilton Public Schools*, supra, Docket No. FIC 2015-147 (August 23, 2017). Upon reconsideration of *Lowthert 2*, the commission, citing to the "notice in fact" version of § 1-206 (b) (1) as well as the court's decision in *Lowthert 1*, determined that the plaintiff had filed her complaint within thirty days of receiving "notice in fact" and concluded it could exercise jurisdiction over the complaint. Id. The commission included a footnote in that decision to the "actual or constructive notice" language of § 1-206 (b) (1), recognizing the then upcoming legislative change to the statute brought about by Public Act 17-86. Id.

In the present case, the plaintiff's underlying complaint to the commission states that her belief of secret meeting stems from the above-referenced footnote in the draft report of the commission's August 23, 2017 *Lowthert 2* decision. The plaintiff contends that this footnote is where she first learned of the legislature's intent to take up the "notice in fact" language of § 1-206 (b) (1), and replace such language with the "actual or constructive notice" language in Senate Bill 983. The plaintiff further contends that the executive director's March 3, 2017 public testimony on Senate Bill 983, in which she claimed that the commission "supports Raised Bill 983,"[5] indicates that secret meeting(s) took place at some point between the court's *Lowthert 1* decision and the executive director's testimony, as no public record exists demonstrating that FOI commissioners met in public at a properly noticed or recorded meeting to discuss an amendment to the FOIA regarding the appeal period for secret meetings, the commission's support of Senate Bill 983, or the commission's concern regarding the *Lowthert 1* decision.

B. Application for Order Requiring the Commission to Schedule Hearing

The commission's decision to deny leave to schedule a hearing in this case is governed by § 1-206. Section 1-206 (b) (1)[6] allows any person wrongfully denied the right to attend any

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[5] Record, p. 515

[6] The current version of § 1-206 (b) (1) provides in relevant part: "Any person denied the right to inspect or copy records provided for under section 1-210 or wrongfully denied the right to attend any meeting of a public agency or denied any other right conferred by the Freedom of

meeting of a public agency or denied any other right conferred by the Freedom of Information Act to file a notice of appeal to the commission. Section 1-206 (b) (2) sets out the relief that the commission may provide if it finds a violation of the act and the actions it may take to deter noncompliance with the act. It also authorizes the commission to decline to hold hearings in certain cases. General Statutes § 1-206 (b) (2).[7] More specifically, § 1-206 (b) (2) provides in relevant part: "If the executive director of the commission has reason to believe an appeal under subdivision (1) of this subsection or subsection (c) of this section (A) presents a claim beyond the commission's jurisdiction; (B) would perpetrate an injustice; or (C) *would constitute an abuse of the commission's administrative process*, the executive director shall not schedule the appeal for hearing without first seeking and obtaining leave of the commission. The commission shall provide due notice to the parties and review affidavits and written argument that the parties may submit and grant or deny such leave summarily at its next regular meeting. The

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Information Act may appeal therefrom to the Freedom of Information Commission, by filing a notice of appeal with said commission. A notice of appeal shall be filed not later than thirty days after such denial, except in the case of an unnoticed or secret meeting, in which case the appeal shall be filed not later than thirty days after the person filing the appeal receives actual or constructive notice that such meeting was held." (Footnote omitted.).

[7] Our Appellate Court has held that the claim that "hearings must be held in any administrative proceeding before decisions affecting an individual's rights are made" is "without merit." *Albright-Lazzari* v. *Freedom of Information Commission*, 136 Conn. App. 76, 81, 44 A.3d 859, cert. denied, 305 Conn. 927, 47 A.3d 886 (2012). See also *Godbout* v. *Freedom of Information Commission*, Superior Court, judicial district of New Britain, Docket No. CV-14-5016057-S (June 18, 2015, *Schuman, J.*) ("The plaintiff holds the mistaken belief that a hearing is required in every administrative case.").

commission shall grant such leave unless it finds that the appeal: (i) Does not present a claim within the commission's jurisdiction; (ii) would perpetrate an injustice; or (iii) *would constitute an abuse of the commission's administrative process*. Any party aggrieved by the commission's denial of such leave may apply to the [S]uperior [C]ourt for the judicial district of Hartford, within fifteen days of the commission meeting at which such leave was denied, for an order requiring the commission to hear such appeal." (Emphasis added.).

"The three bases for not scheduling a hearing set forth above are listed in the disjunctive. Therefore, a hearing is not required even if the facts support only one of the criteria." *Lowthert* v. *Freedom of Information Commission*, Superior Court, judicial district of New Britain, Docket No. CV-17-6041081-S (June 11, 2019, *Aurigemma, J.*), aff'd, 205 Conn. App. 904, 251 A.3d 99 (2021).

"Section 1-206 (b) (3) sets out a non-exhaustive list of factors the commission may consider when determining whether to grant or deny leave to schedule a hearing." *Godbout* v. *Freedom of Information Commission*, Superior Court, judicial district of New Britain, Docket No. CV-19-5025125-S (September 23, 2019, *Huddleston, J.*), aff'd, 202 Conn. App. 908, 245 A.3d 496, cert. denied, 336 Conn. 936, 249 A.3d 38 (2021). Section 1-206 (b) (3) provides: "In making the findings and determination under subdivision (2) of this subsection the commission shall consider the nature of any injustice or abuse of administrative process, including but not limited to: (A) The nature, content, language or subject matter of the request or the appeal, including, among other factors, whether the request or appeal is repetitious or cumulative; (B)

the nature, content, language or subject matter of *prior* or contemporaneous requests or appeals *by the person making the request or taking the appeal*; (C) the nature, content, language or subject matter of other verbal and written communications to any agency or any official of any agency from the person making the request or taking the appeal; (D) any history of nonappearance at commission proceedings or disruption of the commission's administrative process, including, but not limited to, delaying commission proceedings; and (E) the refusal to participate in settlement conferences conducted by a commission ombudsman in accordance with the commission's regulations. (Emphasis added.).

Therefore, in the present case, the language of 1-206 (b) (3) (B) gives the commission discretion to consider the nature, content, language, and subject matter of prior complaints the plaintiff has filed with the commission in determining whether scheduling a hearing on the present complaint would constitute an abuse of the commission's administrative process.

The executive director's notice cites *Smith* v. *Freedom of Information Commission*, Superior Court, judicial district of New Britain, Docket No. CV-16-5017349-S (July 19, 2016, *Schuman, J.*), in support of the contention that filing a multitude of complaints with the commission in a limited time period constitutes an abuse of the commission's administrative process. The plaintiff contends that *Smith* is distinguishable from the present case, in that the court in *Smith* did not find that the plaintiff had abused the commission's administrative process solely because he filed a multitude of complaints within a short period of time, but also because the court determined that there was no merit to the plaintiff's complaints; that he improperly

requested a civil penalty against the commission's executive director; that he failed to appear at the court's hearing on his appeal and the commission's motion for summary judgment; and that he filed multiple complaints with the commission on a previously decided issue. Id. Although the plaintiff accurately describes the *Smith* court's findings, the court explicitly stated that "the fact that the plaintiff filed thirty-two complaints with the commission in the past two years *in and of itself* represents an abuse of the system." (Emphasis added.) Id.

The executive director's notice also cites the plaintiff's "history of filing abusive complaints with the commission." The notice references prior commission decisions finding that four complaints previously filed by the plaintiff with the commission, if scheduled for hearings, would have constituted an abuse of the commission's administrative process.[8] On June 8, 2021, our Appellate Court affirmed a Superior Court decision finding that the commission properly denied leave to schedule hearings on each of those four complaints, in part, because scheduling and hearing those complaints would have constituted an abuse of the commission's administrative process. *Lowthert* v. *Freedom of Information Commission*, Superior Court, judicial district of New Britain, Docket No. CV-17-6041081-S (June 11, 2019, *Aurigemma, J.*), aff'd, 205 Conn. App. 904, 251 A.3d 99 (2021). Therefore, this court finds that the plaintiff does, in fact, have a history of filing abusive complaints with the commission.

[8] See *Lowthert* v. *Wilton Parent Advisory Board*, Docket No. FIC 2016-0787 (November 4, 2016); *Lowthert* v. *Wilton Board of Education*, Docket No. FIC 2016-0803 (November 14, 2016); *Lowthert* v. *Wilton Board of Education*, Docket No. FIC 2016-0804 (November 14, 2016); *Lowthert* v. *Wilton Public Schools*, Docket No. FIC 2016-0812 (November 15, 2016).

Finally, the executive director's notice cites as factors the considerable amount of time and resources that have already been spent adjudicating and mediating the plaintiff's previously filed cases, the high volume of the commission's current caseload, and the particular administrative difficulty the commission would face in conducting a hearing on the present complaint. As previously stated, § 1-206 (b) (3) sets out a *non-exhaustive* list of factors the commission may consider when determining whether to grant or deny leave to schedule a hearing. See *Godbout* v. *Freedom of Information*, supra, Superior Court, Docket No. CV-19-5025125-S. Other courts have found that the commission properly considered similar factors under § 1-206 (b) (3) in denying leave to schedule a hearing on a complaint. See, e.g., *Lowthert* v. *Freedom of Information Commission*, supra, Superior Court, Docket No. CV-17-6041081-S (citing administrative difficulties of scheduling particular complaints, the "inordinate amount of time and resources adjudicating and mediating the plaintiff's previously filed cases," and commission's high caseload in upholding commission's decision not to schedule hearings on four complaints); *Smith* v. *Freedom of Information Commission*, supra, Superior Court, Docket No. CV-16-5017349-S (citing commission's legitimate interest in preventing its dockets from becoming overburdened in upholding commission's decision not to schedule hearing on complaint).

III

CONCLUSION

Based on (i) the plaintiff's history of filing more than forty-four complaints with the commission over the past few years, (ii) the plaintiff's history of filing abusive complaints with the commission, (iii) the considerable amount of time and resources that have already been spent adjudicating and mediating the plaintiff's previously filed cases, (iv) the high volume of the commission's current caseload, (v) and the particular administrative difficulty the commission would face in conducting a hearing on the present complaint, this court finds that the commission acted reasonably and within its discretion in denying a hearing to the plaintiff on the ground that scheduling a hearing on the plaintiff's complaint "would constitute an abuse of the commission's administrative process," pursuant to § 1-206 (b) (2) (C).

Accordingly, the plaintiff's application for an order requiring the commission to hold a hearing on her complaint is denied.

BY THE COURT

Wiese, J.

PETER EMMETT WIESE, JUDGE

September 1, 2021