

DOCKET NO. HHB-CV-21-6064435

SUPERIOR COURT

CITY OF BRIDGEPORT, ET AL.

JUDICIAL DISTRICT
NEW BRITAIN

VS.

ADMINISTRATIVE APPEALS

FREEDOM OF INFORMATION
COMMISSION

JANUARY 21, 2022

MEMORANDUM OF DECISION

OFFICE OF THE CLERK
SUPERIOR COURT
2022 JAN 21 PM 3 53
JUDICIAL DISTRICT OF
NEW BRITAIN

INTRODUCTION:

The City of Bridgeport, the Chief of Police of the Bridgeport Police Department, and the Bridgeport Police Department (collectively, plaintiffs) have appealed a final decision of the Freedom of Information Commission (FOIC) in the matter of *Marlando Daley v. City of Bridgeport et al.*, Docket No. FIC 2019-0516.

FACTS AND PROCEDURAL HISTORY:

The relevant undisputed facts are as follows. In a letter dated August 6, 2019,¹ Marlando Daley (complainant) requested records pertaining to his criminal case in *State of Connecticut v. Marlando Daley*, CR 11-0257070-T. The complainant is, and at all relevant times was, a prisoner

¹ The plaintiffs assert that they received the complainant's letter on August 19, 2019. In view of the fact that the complainant sent the letter from his prison within the Department of Corrections, it is not surprising that the letter took until August 19, 2019 to be received.

Electronic notice sent to all counsel of Record
and to official reporter. A. Jordanopoulos, Ct. Officer
1-21-22

in the State of Connecticut having been convicted in the foregoing criminal case of murder. On August 19, 2019, the complainant sent a complaint to the FOIC stating that the plaintiffs had not complied with his August 6, 2019 Freedom of Information Act (FOIA) request despite the complainant's diligent efforts. The complainant attached his August 6, 2019 FOIA request as evidence of "all the attempts I have made in order to receive this request."² It is noteworthy that the complainant's complaint to the FOIC does not give any details whatsoever concerning the alleged "non-compliance of a Freedom of Information Request."³ It is even more noteworthy that the complainant's August 6, 2019 FOIA request explicitly stated: "Please respond to my request within (14) work days and or ask for additional time to respond." The plaintiffs acknowledged receipt of the complainant's FOIA request on the same day that the plaintiffs received it⁴ by letter to the complainant dated August 19, 2019, which stated that the plaintiffs would search for responsive records.

The complainant's complaint was assigned docket no. FIC 2019-0516 by the FOIC and forwarded to the plaintiffs on September 19, 2019. On September 26, 2019, the plaintiffs filed an

² See the record at pages 1-7. No efforts other than the August 6, 2019 FOIA request itself were asserted or are apparent from the record.

³ However, in the FOIC's final decision, in finding of fact section number 4, the FOIC understood the complaint to be asserting "failing to provide the records responsive to the request."

⁴ In view of the complainant's incarceration, it is not surprising that the plaintiffs did not receive the August 6, 2019 FOIA request until August 19, 2019. Mail from prisons is generally known to be delayed because of prison procedures. The foregoing fact is, or should have been, known by the FOIC.

answer to the complaint with the FOIC. The plaintiffs answer stated “pursuant to C.G.S. Sec. 1-206(b)(1), the Freedom of Information Commission does not have jurisdiction to hear the Complainant’s Complaint, as the City of Bridgeport has not denied the Complainant the right for a copy of the requested records. The Respondent respectfully requests dismissal of Complainant’s Complaint.”⁵ On November 13, 2019, the plaintiffs provided the complainant with documents responsive to his FOIA request. Hearings were held on the complainant’s complaint on December 6, 2019 and January 21, 2020. A draft decision from the hearing officer was considered by the FOIC at its regular meeting on September 9, 2020. The FOIC remanded the matter back to the hearing officer for consideration of the plaintiffs’ jurisdictional argument that the hearing officer had ignored. The hearing officer produced an amended draft decision, which dismissed the plaintiffs’ jurisdictional argument. This draft decision was considered and adopted by the FOIC at its November 18, 2020 meeting.⁶

⁵ The plaintiffs’ September 26, 2019 answer also explicitly stated that a search had been conducted, responsive documents located, and the responsive documents would soon be produced to the complainant after completion of an ongoing legal review process. Accordingly, the FOIA process was working as it should have, and as the complainant had expressly requested.

⁶ There are two documents signed and labeled as a “FINAL DECISION” of the FOIC both dated November 18, 2020. One final decision deals with the jurisdictional issue and the other does not. See Record at pages 258-270 and 271-281 for the two final decisions. Both “FINAL DECISION”’s purport to have been adopted by the FOIC at its November 18, 2020 meeting. The second FINAL DECISION is labeled “After Remand”. See docket entry 104.00 for a further explanation. See also the record at pages 269-270 which explains that the “After Remand” decision was a correction to the record after a remand by this court at the agency’s request.

The plaintiffs appeal from a final decision of the FOIC finding that they violated FOIA, directing them to remove specified redactions from the documents produced to the complainant, and ordering the plaintiffs to search for additional responsive documents. The plaintiffs are classically aggrieved.

STANDARD OF REVIEW:

This appeal is brought pursuant to the Uniform Administrative Procedure Act (UAPA), General Statutes § 4-183.⁷ 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

⁷ 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.” (Internal quotation marks omitted.) 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.” (Internal quotation marks omitted.) *Dept. of Public Safety v. Freedom of Information Commission*, 298 Conn. 703, 716, 6 A.3d 763 (2010).

ANALYSIS:

To begin, the plaintiffs are public agencies within the meaning of General Statutes § 1-200 (1) and the documents requested are generally public records within the meaning of § 1-200 (5). Accordingly, the plaintiffs, the complainant’s August 6, 2019 FOIA request, and the requested documents are generally subject to FOIA. However, in order for a court, or an administrative tribunal in a contested case, to obtain subject matter jurisdiction over a complaint, there must exist an actual case and controversy between the parties. This concept is embedded in the FOIC’s authorizing statute, in this case General Statutes § 1-206 (b) (1):

“Any person **denied** the right to inspect or copy records 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

Information Act may appeal **therefrom** to the Freedom of Information Commission, by filing a notice of appeal with said commission.”⁸ [emphasis added]

Accordingly, an appeal to the FOIC is authorized from a denial. A denial ensures that there is an actual dispute or case and controversy.⁹

Subject matter jurisdiction, and in this case whether or not there was a denial and therefore statutory jurisdiction and a case and controversy, is assessed as of the date that the complaint is filed. Here the complaint was dated August 19, 2019 and filed with the FOIC on August 20, 2019. Accordingly, the question to be answered is was there a denial of the complainant’s August 6, 2019 FOIA request, and therefore statutory jurisdiction and a case and

⁸ The word “therefrom” in § 1-206 (b) (1) refers back to “denied.” An appeal is possible from a denial. General Statutes § 1-205 (d) furthers this thought by turning upon an “alleged violation.”

⁹ The following facts were explicitly before the hearing officer and the FOIC. The complainant’s own FOIA request explicitly gave fourteen business days for a response and invited the plaintiffs to ask for more time if necessary. The plaintiffs’ answer explicitly stated that they had received the request on August 19, 2019, had not denied the request, and had positively responded that very day, which was clearly within the fourteen business days asserted in the complainant’s request. The answer also explicitly challenged FOIC’s jurisdiction pursuant to § 1-206(b)(1) and the fact that there was no denial, and explicitly requested that FOIC dismiss the complaint. The FOIC also had the plaintiffs’ response, which is dated August 19, 2019, promising to promptly produce responsive documents within two weeks, which was certainly reasonable given the request and the complainant’s express invitation to request more than fourteen business days if necessary. Lastly, the FOIC knew that the plaintiffs had actually acted in accordance with their promise and produced responsive documents. The foregoing facts were also obviously before the Executive Director, and as a result, the FOIC’s assertion that the Executive Director had no reason to believe that the complaint was beyond the FOIC’s jurisdiction is deeply misplaced. With any administrative tribunal or court, jurisdiction cannot exist absent a genuine case and controversy, and also cannot exist outside of the statutory authorization which explicitly requires a denial. Further, § 1-206 (b) (2) provides that if the executive director has reason to believe that an appeal presents a claim beyond the commission’s jurisdiction, “the executive director shall not schedule the appeal for a hearing without first seeking and obtaining leave of the commission”. In this case leave was neither sought nor received despite facts that clearly called the commission’s jurisdiction into question.

controversy, on or before August 20, 2019. The answer is contained within the complainant's FOIA request itself, and the answer is no.

The complainant's August 6, 2019 FOIA request explicitly states "Please respond to my request within (14) work days or ask for additional time to respond." Fourteen work (business) days from August 6, 2019 is August 26, 2019.¹⁰ Further, the plaintiffs received the FOIA request on August 19, 2019 and responded that very day, not with a denial, but with a promise to search for the requested records. In view of the foregoing, no denial could exist before the complainant's own effective requested response date of August 26, 2019 at the earliest, unless there was an explicit denial before that date, which there was not. Accordingly, as of the date of the filing of the complaint with the FOIC, August 20, 2019, there was no denial to appeal, no case and controversy, and therefore no subject matter jurisdiction in the FOIC. Thus, given the complainant's request and the fact that there was no express denial, no denial could exist, and therefore no statutory jurisdiction could exist, before August 26, 2019 at the earliest.¹¹

The FOIC found jurisdiction in the operation of § 1-206 (a), which provides that "[a]ny denial of the right to inspect or copy . . . shall be made . . . within four business days of such

¹⁰ Further, it would be reasonable to count the fourteen business days from the plaintiffs' receipt of the FOIA request on August 19, 2019, which would be September 6, 2019.

¹¹ A lack of subject matter jurisdiction on the date that the complaint was filed cannot be cured by events occurring after the filing of the complaint.

request Failure to comply with a request to so inspect or copy such public record within the applicable number of business days shall be deemed a denial.” Ignoring the complainant’s own requested response date, the FOIC found a deemed denial on August 12, 2019, which was four business days after the date written on the complainant’s FOIA request.¹² Not only does this argument ignore the complainant’s own explicit requested response date, but it also ignores the fact that the plaintiffs did not receive the FOIA request until August 19, 2019. With such a tight time frame of four business days, the meaning of the statutory words “within four business days of such request” in § 1-206 (a) means four business days from the date that the request is received or filed, for if § 1-206 (a) does not mean the foregoing, then we will continually have “deemed denials” before the request is actually received and considered by the agency.¹³ No case and controversy can exist, and no denial deemed, until the agency has at least four business days to actually consider the request. Further, there can be no “deemed denial” that occurs earlier than

¹² See Final Decision (version that deals with the jurisdictional issues at record pages 271-281) numbered sections 8-10. The court notes that the FOIC determined the deemed denial date by counting four business days from the August 6, 2019 date written on the complainant’s request without any consideration of when the request was actually mailed or received.

¹³ If deemed denials were possible before the agency even has an opportunity to consider the request, then clearly this would undermine the right of the agency to consider a request before being hauled before a tribunal and would also undermine the complainant’s obligation to exhaust administrative remedies at the lowest possible level before appealing. Given the normal speed of regular mail, four business days will easily expire before an agency actually receives a request, even assuming the request is actually mailed on the date that is written on the request.

the complainant's own explicit requested response date. An explicit requested response date which is longer than the statutory four business days must override the statutory default.

In view of the foregoing, the FOIC should have dismissed the complainant's complaint for lack of subject matter jurisdiction.¹⁴ Instead, the FOIC decided a controversy that did not exist at the time of the complainant's complaint, on a complaint which did not and could not have defined the issues, and without jurisdiction because of the lack of an actual case and controversy and because there was no effective denial from which to acquire jurisdiction pursuant to § 1-206 (b) (1). The court will therefore sustain the plaintiff's appeal, vacate the FOIC's final decision, both of them, and instruct the FOIC to dismiss the complainant's complaint.

The importance of acting only upon an actual case and controversy is further exhibited in what happened in this matter. As noted, the complaint here was filed before there was a denial or production of any of the requested documents. The complaint blandly cites "non-compliance of a freedom of information request" without providing any details whatsoever as to the alleged non-

¹⁴ The FOIC's brief surprisingly asserts that the plaintiffs had not requested dismissal of the appeal. Such is clearly not the case. The plaintiffs' September 26, 2019 answer in paragraph 6 explicitly challenges the FOIC's jurisdiction, asserting that there was no denial, and explicitly asks that the complaint be dismissed for lack of jurisdiction pursuant to § 1-206(b)(1). The information provided in the plaintiffs' answer, the complainant's FOIA request, and the plaintiffs' response to the FOIA request, all of which were with the FOIC upon receipt of the answer, compelled a dismissal of the complaint. Despite the foregoing, the FOIC went on to decide a controversy that did not exist at the time of the complaint. The court further notes that the plaintiffs further demanded dismissal of the complaint at the hearing but to no avail. The first decision proposed by the hearing officer did not even address the subject matter jurisdiction issue.

compliance or the parameters of the asserted dispute. Subsequent to the filing of the complaint, but before the first hearing, the plaintiffs produced responsive documents. At the hearing, the hearing officer then unilaterally went through the documents produced in an in-camera review and decided what was exempt, what was not exempt, what could be redacted, and what could not be redacted¹⁵ based upon a complaint filed before a denial, with no specific allegations of non-compliance, and before the documents were produced.¹⁶ How could a complaint filed before a denial, contemporaneously with a promise to search for documents, and without the subsequently produced documents in the complainant's hand possibly reasonably put the plaintiffs on notice of a dispute concerning specific redactions that had not yet occurred or production of documents which the plaintiffs had not yet even considered. Of course it could not, precisely because any dispute had not yet crystalized. A complaint cannot effectively complain of matters that do not exist as of the time the complaint is filed. Without being reasonably put on notice, the plaintiffs here were forced to deal with the hearing officer as essentially an adverse party because the complainant had not yet effectively complained.¹⁷ The foregoing procedure has completely

¹⁵ The court notes that the redactions reviewed and decided upon by the hearing officer dealt with important issues of the safety of witnesses and the functionality of police investigations which are provided for in § 1-210(b)(3)(A).

¹⁶ The complainant, as is not too surprising in view of the facts of this matter, first verbally raised the issue of redactions and exemptions at the December 2019 FOIC hearing. The complainant, of course could not have described these issues in his August 19, 2019 complaint, because the documents were not produced to him until November 2019.

¹⁷ The hearing officer basically made up the complaint and established the parameters of the dispute as the hearing officer proceeded through the in-camera review. The plaintiffs' attorney specifically objected to this procedure at the

undermined our adversarial system, which requires a crystalized dispute and a complainant who has effectively put the opponent and the tribunal on notice of such a dispute and the parameters of the dispute before the tribunal acts. Due process and fundamental fairness require that a complaint be sufficiently specific to put the opposing party on notice and fairly apprise of the issues that are in dispute. ¹⁸ The complaint here failed to provide fair notice of the issues that were actually decided by the FOIC both because the complaint was entirely generic and because the complaint was filed before the issues existed and were capable of being described.

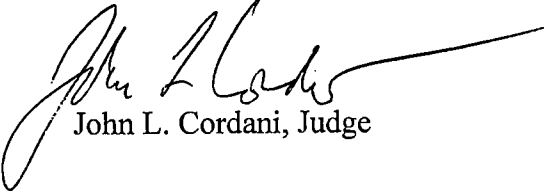
In view of all of the foregoing, this court finds that the plaintiffs have established on appeal that the FOIC's final decision was (1) in excess of the statutory authority of the agency; (2) made upon unlawful procedure; (3) affected by other error of law; (4) clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record; and (5) arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion. Accordingly, the court will sustain the appeal.

hearing, noting to the hearing officer that the complaint failed to put the plaintiffs on notice that the issues of redactions and exemptions from disclosure would be contested. The FOIC's own regulations at R.C.S.A. § 1-21j-29 specify that a hearing shall be for the purpose of conducting an investigation "of the complaint".

¹⁸ A trial or a hearing should not proceed to decide issues that the complaint has not fairly put the opposing party on notice will be contested. Here, the only operative sentence of the complaint was "I would like this letter to serve as a notice of appeal for non-compliance of a freedom of information request dated August 6, 2019 to the Bridgeport police department at 300 Congress Street, Bridgeport, CT. 06604". There is no reference to redactions, withheld records, incomplete search or any specific issue. In fact, the complaint does not even explicitly state whether or not the agency had responded to the request.

ORDER:

The appeal is sustained. The final decision of the Freedom of Information Commission is vacated. The matter is remanded to the Freedom of Information Commission with an instruction to dismiss the complaint.


John L. Cordani, Judge