

DOCKET NO.: HHB-CV-23-6079418-S

SUPERIOR COURT

CHIEF OF POLICE, CITY OF
BRIDGEPORT, POLICE DEPARTMENT,
CITY OF BRIDGEPORT, CITY OF
BRIDGEPORT

JUDICIAL DISTRICT OF
NEW BRITAIN

TAX AND ADMINISTRATIVE
APPEALS SESSION

v.

FREEDOM OF INFORMATION
COMMISSION, ET. AL

JUDICIAL DISTRICT OF
NEW BRITAIN
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SUPERIOR COURT

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v.

FREEDOM OF INFORMATION
COMMISSION, ET AL.

MAY 24, 2024

MEMORANDUM OF DECISION

In these two consolidated administrative appeals,¹ the plaintiffs, the Chief of Police, City of Bridgeport, the Bridgeport Police Department, and the City of Bridgeport (together,

¹ The above captioned appeals stem from two substantively identical complaints that were consolidated and argued together before the commission. See Docket #FIC 2022-0182, *Johanna Fay v. Chief, Police Department, City of Bridgeport; Police Department, City of Bridgeport; and City of Bridgeport*; Docket #FIC 2022-0183, *Johanna Fay v. Chief, Police Department, City of Bridgeport; Police Department, City of Bridgeport; and City of Bridgeport*; see also Return of Record (ROR), at 37-42 (all references to the record in this memorandum of decision are to the record filed in HHB-CV-23-6079418-S). The above captioned appeals were consolidated for argument and decision in this court as well. See Docket Entry No. 102.10 in HHB-CV-23-6079418-S; Docket Entry No. 102.10 in HHB-CV-23-6079420-S.

Electronic notice sent to all counsel of record:
1) Dina Scale, 2) Johanna Fay and Phil Small and
3) Kevin Munn. A. Jordanopoulos, Ct Officer
5/24/24
-18: #126
-20: 126

Bridgeport), appeal from an April 12, 2023 final decision (the decision) of the defendant, the Freedom of Information Commission (the commission), ordering the disclosure of documents related to the 1992 murder conviction of Anthony Hopkins. The intervenor/defendants, Attorney Johanna Fay and the New England Innocence Project (together, NEIP), represent Mr. Hopkins and are seeking all documents between 1975 and 1988 that are held by Bridgeport and that relate to Mr. Hopkins (the subject records). Bridgeport withheld and redacted some otherwise responsive records claiming that public disclosure of the records would subject witnesses identified in the records to threats or intimidation, as well as that some subject records were preliminary drafts. After a hearing below, the commission ordered disclosure of the subject records. Bridgeport has appealed.

In its defense, Bridgeport asserts that (1) the commission lacked jurisdiction to hear NEIP's appeal in the first instance because Bridgeport never denied NEIP's request; (2) NEIP's appeal to the commission was untimely; (3) the commission improperly expanded the scope of NEIP's appeal; (4) there was no substantial evidence in the record supporting the commission's conclusion that Bridgeport failed to demonstrate that disclosure of the subject records would endanger witnesses; and (5) there was no substantial evidence in the record supporting the commission's conclusion that Bridgeport failed to demonstrate that the subject

records were preliminary drafts.² As set forth below, the court rejects each of Bridgeport's arguments and, therefore, dismisses these appeals.

FACTS

The administrative record before the court demonstrates the following facts as relevant to this memorandum of decision which, except where noted, are not in dispute.

On March 23, 2022, Attorney Fay submitted a Freedom of Information Act (FOIA) request to Bridgeport for "any and all records related to Anthony Hopkins" between 1975 and 1988. The subject records relate to a 1988 murder investigation leading to Mr. Hopkins' conviction. See generally *State v. Hopkins*, 222 Conn. 117, 609 A.2d 236 (1992). Attorney Fay and NEIP represent Mr. Hopkins in connection with a post-conviction investigation of Mr. Hopkins' case.

On March 23, 2022, Bridgeport acknowledged NEIP's request stating that "[w]e are reviewing your request and will contact you in writing when the requested information is available." On April 25, 2022, NEIP filed two substantively identical complaints with the commission alleging that Bridgeport violated FOIA because Bridgeport had not responded to NEIP's FOIA request within four business days and, therefore, the request ought to be deemed denied pursuant to General Statutes § 1-206(a).

² In its briefs to this court, Bridgeport alludes in passing to other arguments, but the court concludes that these arguments are not adequately briefed and, therefore, they are not considered by this court. *State v. Buhl*, 321 Conn. 688, 727, 138 A.3d 868 (2016).

On October 7, 2022 and October 11, 2022, Bridgeport produced some responsive records to NEIP. Nevertheless, on October 7, 2022, Bridgeport also informed NEIP that Bridgeport had redacted some responsive records and withheld other responsive records pursuant to claimed statutory exemptions within FOIA. On October 12, 2022, the commission held an initial hearing on NEIP's complaints. The Commission continued the October 12th hearing so that Bridgeport could gather and present evidence in support of its claimed exemptions. On October 28, 2022, Bridgeport produced to the commission the responsive records that Bridgeport had withheld so that those records could be reviewed *in camera*³ by the commission. On February 19, 2023, Bridgeport produced additional responsive records to NEIP.

On March 2, 2023 (approximately one year after NEIP's initial FOIA request), the commission reconvened the continued hearing from October 12, 2022. In support of its exemption claims, Bridgeport offered testimony from Dina A. Scalo, an attorney in the Office of the City Attorney. Attorney Scalo testified that she was not working for Bridgeport at the time of Mr. Hopkins' case and that she had "a very limited understanding of the criminal procedure process." ROR, at 110. General Statutes § 1-210(b)(1) exempts from public disclosure "[p]reliminary drafts or notes provided 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)(3)(A) exempts from public disclosure "[r]ecords of

³ The court has also reviewed the subject records *in camera*.

law enforcement agencies not otherwise available to the public which records 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 (A) the identity of informants not otherwise known or the identity of witnesses not otherwise known whose safety would be endangered or who would be subject to threat or intimidation if their identity was made known.”

At the March 2, 2023 hearing, Attorney Scalo testified that because of the age of Mr. Hopkins’ case, Bridgeport had “very little institutional knowledge, if any” regarding the case. ROR, at 101. Attorney Scalo also testified that Bridgeport “does not have routine access to trial materials or criminal record materials,” and, therefore, Bridgeport was “basing the claim of exemptions upon the information that’s been presented to us” by NEIP. ROR, at 99. Attorney Scalo testified that in order to determine whether any responsive records contained information that might not be publicly known, Attorney Scalo searched various internet sources, e.g., Westlaw, and spoke directly to Attorney Fay. ROR, at 99-101; 109-111. If Attorney Scalo found no record of the information in the responsive record on the internet and Attorney Fay did not indicate to Attorney Scalo that Attorney Fay was already aware of the information, Attorney Scalo considered that “proof positive” that the information was not otherwise known to the public, and therefore, Bridgeport withheld the responsive information. *Id.* To determine whether a witness might be endangered by the release of responsive records, Attorney Scalo assumed “there is always an inherent risk of harm or intimidation of witnesses if the perpetrator or members of the public learn of their identity. . . . If individuals are not

made [known] during the trial . . . that danger of harm or harassment could still exist.” ROR, at 102-103; 116. Nevertheless, Attorney Scalo also testified that, “[w]hether they have actual threats against them, I wouldn’t necessarily know that information.” ROR, at 116. Attorney Scalo testified that she did not know if any of the witnesses in question were still alive and that Attorney Scalo did not think such facts were relevant to her exemption inquiry. ROR, at 114.

With respect to preliminary drafts and notes, Attorney Scalo described her review process as follows. “Some of [the withheld responsive records] can fairly be described as appearing to be written on a post-it note. A lot of handwritten materials, some of it appears to be sort of preliminary fact finding. . . . [B]ased on my analysis of the files, reading the contents of the records, and just sort of my basic understanding of the types of records that are included in a homicide case file, I conducted the balancing test, and I can testify to the fact that I believe those sort of pre-decisional drafts and materials, that may or may not have wound up in a formal report, may or may not have been vetted. I think that the benefit of withholding that sort of pre-decisional fact-finding material outweighs the benefit to the public in obtaining those notes and drafts.” ROR, at 105-106.

On April 3, 2023, the commission issued a proposed final decision ordering Bridgeport to produce the responsive records that had been withheld or redacted. The proposed final decision found that due to the passage of time and lack of institutional knowledge, Bridgeport failed to present any evidence that any specific individual would be subject to threat or intimidation if their identities became known. ROR, at 313-14. The

proposed final decision also found that, after reviewing the subject records *in camera*, the “records consist of handwritten notes of unknown origin in that the authors of such notes are not known. It also found that many such notes are fragmentary and consist of a series of initials, or letters, or digits, which have no obvious meaning when reviewed thirty-five years later. Moreover, the testimony regarding the handwritten notes consisted of general assertions and was not specific to the particular records. Given the age of the records, it is found that there is a lack of institutional knowledge in the respondent police department regarding the underlying murder case. . . . [T]here is no evidence showing that the handwritten notes . . . were used as a memory aid or kept separate by investigators at the time.” ROR, at 312. On April 12, 2023, the commission unanimously voted to adopt the proposed final decision without amendment. ROR, 400-402.

LEGAL STANDARD

“Our resolution of [administrative appeals] is guided by the limited scope of judicial review afforded by the Uniform Administrative Procedure Act; General Statutes § 4-166 et seq.; to the determinations made by an administrative agency. We must decide, in view of all of the evidence, whether the agency, in issuing its order, acted unreasonably, arbitrarily or illegally, or abused its discretion. . . . Even as to questions of law, the 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. . . . Conclusions 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. . . . Although the interpretation of statutes is ultimately a question of law . . . it is the well established practice of this court to accord great deference to the construction given a statute by the agency charged with its enforcement.” (Citations omitted; emphasis in original; internal quotation marks omitted). *Rocque v. Freedom of Information Commission*, 255 Conn. 651, 658, 774 A.2d 957 (2001).

“Our review of an agency’s factual determination is constrained by . . . § 4-183(j), which mandates that a 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 . . . (5) clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record. . . . This limited standard of review dictates that, with regard to questions of fact, it is neither the function of the trial court nor of this court to retry the case or to substitute its judgment for that of the administrative agency. . . . An agency’s factual determination must be sustained if it is reasonably supported by substantial evidence in the record taken as a whole.” (Citations omitted; internal quotation marks omitted). *Id.*, 658-59.

“It must be noted initially that there is an overarching policy underlying [the Freedom of Information Act] . . . favoring the disclosure of public records. . . . It is well established that the general rule under the act is disclosure, and any exception to that rule will be narrowly construed in light of the general policy of openness expressed in the . . . legislation [comprising the act]. . . . The burden of establishing the applicability of an exemption clearly

rests upon the party claiming the exemption. . . . This burden requires the claimant of the exemption to provide more than conclusory language, generalized allegations or mere arguments of counsel. Rather, a sufficiently detailed record must reflect the reasons why an exemption applies to the materials requested.” (Citations omitted; internal quotation marks omitted). *Id.*, 660-61.

LEGAL ANALYSIS

a. Commission jurisdiction

Bridgeport first argues that the commission lacked jurisdiction to hear NEIP’s complaints below because Bridgeport never “denied” NEIP’s request. Bridgeport argues that it in fact timely “responded” to NEIP’s request the same day it was filed and subsequently engaged in discussions with NEIP over the scope and parameters of Bridgeport’s response. Thus, Bridgeport argues, it never “denied” NEIP’s FOIA request at all. See Docket Entry No. 116.00, at 10-11.⁴ This argument has previously been rejected by our Appellate Court.

In *City of Bridgeport v. Freedom of Information Commission*, 222 Conn. App. 17, 304 A.3d 481, cert. denied, 348 Conn. 936, 306 A.3d 1072 (2024) (hereinafter *City of Bridgeport*), our Appellate Court expressly rejected the same claim made by Bridgeport against the commission in this case. In *City of Bridgeport*, the Appellate Court held that “there is no

⁴ Because the court holds that Bridgeport’s failure to comply with NEIP’s request within four business days of March 23, 2022 triggers NEIP’s right to file a complaint with the commission pursuant to General Statutes § 1-206(a), the court holds that NEIP’s April 25, 2022 complaint was timely filed within 30 days of the denial as required by General Statutes § 1-206(b). See Doc. No. 116.00, at 14-15.

question that a complaint alleging a violation of the act is within the commission's jurisdiction. . . . Section 1-206 (a) provides that 'failure to *comply* with a request to so inspect or copy such public record within the applicable number of business days shall be deemed to be a denial. . . .' Because, for purposes of filing a complaint with the commission, the act requires *compliance* with a request for public records—not simply 'assurances' that the agency will comply at some point in the future"⁵ (Emphasis in original) Id., 63; see also *Gemmell v. Hodge*, Freedom of Information Commission, Docket No. FIC 2006-433 (August 22, 2007) ("[Section] 1-206 (a) . . . does not establish a time limit by which a public agency must respond to a records request but rather that section provides a definite time period beyond which a requester may invoke the right to appeal to [the] commission pursuant to § 1-206 (b) (1)").

b. The commission improperly expanded the scope of NEIP's appeal

Bridgeport next argues that the commission lacked jurisdiction to address the scope of Bridgeport's claimed exemptions because NEIP did not specify which exemptions it was disputing. See Docket Entry No. 116.00, at 16. The Appellate Court has previously rejected this argument as well. See *City of Bridgeport*, supra, 222 Conn. App. 66-67 ("The act 'makes disclosure of public records the statutory norm. . . . It is well established that the general rule under the act is disclosure, and any exception to that rule will be narrowly construed in light of the general policy of openness expressed in the act. . . . Thus the burden of proving the

⁵ NEIP's initial complaint expressly alleged that Bridgeport violated FOIA. ROR, at 3.

applicability of an exception to disclosure under the act rests upon the party claiming it.’ . . . In the present case, in which [the requester] alleged that [Bridgeport] failed to comply with [the] request, the fact that [Bridgeport] believed that they complied by providing redacted copies of the responsive records did not resolve [the requester’s] complaint that [Bridgeport] had not complied with his request. Indeed, [Bridgeport] bore the burden of proving the propriety of the exemptions they claimed to establish that they had complied with [the] request. Thus, [the requester] had no obligation to amend his complaint to allege that [Bridgeport] violated the act by redacting portions of the responsive records, as such a claim is encompassed within the allegation that [Bridgeport] failed to comply with his request for *all*⁶ responsive records.” (Emphasis in the original) (Internal quotation marks omitted.)

c. General Statutes § 1-210(b)(3)(A); safety of witnesses not publicly known

Bridgeport next argues that the commission’s conclusion that Bridgeport failed to sustain its burden to demonstrate that disclosure of certain of the subject records would endanger the safety of witnesses whose identities were not publicly known was against the weight of evidence. See Docket Entry No. 116.00. The court is not convinced.

To determine whether the commission applied the facts of this case to the well settled meaning of the exemptions laid out in § 1-210 (b), “[t]he appropriate standard of judicial review . . . is whether the commission’s factual determinations are reasonably supported by substantial evidence in the record taken as a whole.” *City of Bridgeport*, supra, 222 Conn.

⁶ NEIP’s complaint requested all responsive records. ROR, at 4.

App. 67. In this case, Attorney Scalo testified that she depended on internet searches and Attorney Fay to tell her whether the identity of witnesses were publicly known. Neither Attorney Scalo nor anyone at Bridgeport had any first hand or institutional knowledge as to whether any witnesses were publicly known at the time of Mr. Hopkins' prosecution, or whether they had become publicly known in the interceding 30 years since the investigation. Neither Attorney Scalo nor anyone at Bridgeport attempted to locate or contact any witnesses, or even knew if they were still alive. With respect to any possible danger a witness might face, Attorney Scalo simply presumed that "there is always an inherent risk of harm or intimidation of witnesses if the perpetrator or members of the public learn of their identity." ROR, at 102-103. Attorney Scalo did not testify that she considered the very practical fact that more than 30 years had passed since the original investigation of Mr. Hopkins and how that fact might affect any possible threats a witness might face. It is undisputed that there is no direct evidence in the record that any witness is actually subject to any threats or intimidation, or even that such was the case at the time of the original investigation.

In *City of Bridgeport*, the Appellate Court found that a city witness "express[ing] nothing more than a department policy of not disclosing names of witnesses due to general concerns for witness safety in *all cases* . . . does not support a finding that disclosure of the names of specific witnesses in [a specific] case would subject such witnesses to threat or harm. The burden of proving the applicability of an exemption under the act 'requires the claimant of the exemption to provide more than conclusory language, generalized allegations or mere arguments of counsel. Rather, a sufficiently detailed record must reflect the reasons

why an exemption applies to the materials requested.’ . . . For this reason, ‘generalized claims of a possible safety risk do not satisfy the plaintiffs’ burden of proving the applicability of an exemption from disclosure under the act.’” (Citations omitted.) *City of Bridgeport*, supra, 222 Conn. App. 69-70; see also *New Haven v. Freedom of Information Commission*, 205 Conn. 767, 776, 535 A.2d 1297 (1988) (“[T]he claimant of the exemption [must] provide more than conclusory language, generalized allegations or mere arguments of counsel. Rather, a sufficiently detailed record must reflect the reasons why an exemption applies to the materials requested.”).

This court reaches the same conclusion as the Appellate Court in *City of Bridgeport*. Where Bridgeport is “unable to provide anything more than a generalized claim of possible safety risks if the information was disclosed, the commission’s finding that [Bridgeport] failed to prove the applicability of § 1-210 (b)(3)(A) is reasonably supported by substantial evidence in the record.” *City of Bridgeport*, supra, 222 Conn. App. 70.

d. General Statutes § 1-210(b)(1); preliminary drafts

Bridgeport’s final claim is that certain of the subject records are preliminary drafts and notes under General Statutes § 1-210(b)(1). This court concludes that Bridgeport failed to present any evidence as to what the records withheld under § 1-210(b)(1), in fact, were, or how they may have been used by Bridgeport during its investigation of Mr. Hopkins. The court finds that the commission’s finding that Bridgeport failed to meet its burden to demonstrate the applicability of the exemption in § 1-210(b)(1) is reasonably supported by substantial evidence in the record.

“[T]he term preliminary drafts or notes relates to advisory opinions, recommendations and deliberations comprising part of the process by which government decisions and policies are formulated. . . . Such notes are predecisional. They do not in and of themselves affect agency policy, structure, or function. They do not require particular conduct or forbearance on the part of the public. Instead, preliminary drafts or notes reflect that aspect of the agency’s function that precedes formal and informed decision-making.” (Internal quotation marks omitted.) *Wilson v. Freedom of Information Commission*, 181 Conn. 324, 332-33, 435 A.2d 353 (1980). “Preliminary drafts or notes reflect that aspect of the agency’s function that precedes formal and informed decisionmaking. . . . It is records of this preliminary, deliberative and predecisional process that we conclude the exemption was meant to encompass.” (Internal quotation marks omitted.) *Shew v. Freedom of Info. Comm’n*, 245 Conn. 149, 165, 714 A.2d 664, 673 (1998).

In this matter, neither Attorney Scalo nor Bridgeport presented any facts as to what the subject records withheld under § 1-210(b)(1) might actually be, or how they were used at the time they were created. The evidence in the record demonstrates that Attorney Scalo was merely guessing as to the nature of the withheld records based on her own review of the withheld records thirty years after the fact. Attorney Scalo testified only that the withheld documents were “post-it notes” and “hand written materials” that “appear[] to be” preliminary fact finding material based on her own analysis. ROR, at 105-106. Given the age of the documents, their ambiguous nature, and the lack of any institutional knowledge within Bridgeport, Attorney Scalo had no basis to determine how these documents may have been

used at the time of the investigation of Mr. Hopkins some thirty years ago. For its part, the commission reviewed the withheld records *in camera*. Based on that review, the commission found that the withheld “records consist of handwritten notes of unknown origin in that the authors of such notes are not known. It also found that many such notes are fragmentary and consist of a series of initials, or letters, or digits, which have no obvious meaning when reviewed thirty-five years later.” ROR, at 412. Bridgeport presented no evidence whatsoever to the commission that the records Bridgeport withheld under § 1-210(b)(1) were used to support any decision making on the part of Bridgeport or its police department. The court concludes that there is substantial evidence in the record to support the commission’s conclusion that the records withheld by Bridgeport were not exempt from disclosure under § 1-210(b)(1).

CONCLUSION

For all the foregoing reasons, these appeals are dismissed.



Budzik, J.