DOCKET NO. CV 17 6038625

ROBERT T. MORRIN : SUPERIOR COURT

v. : JUDICIAL DISTRICT OF NEW BRITAIN

FREEDOM OF INFORMATION
COMMISSION ET AL. : AUGUST 12, 2019

MEMORANDUM OF DECISION

Are social media posts by a state employee concerning state business, made during his personal time and on his personal electronic devices, "public records," as that term is defined by the freedom of information act (FOIA)?[1] In the proceedings leading to this administrative appeal the freedom of information commission (commission) declined to consider that question, deciding that, even if the posts in question in this case were public records, the state banking department (department) was not required to produce them in response to a request by the plaintiff, Robert T. Morrin.

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[1] "'Public records or files' means any recorded data or information relating to the conduct of the public's business prepared, owned, used, received or retained by a public agency, or to which a public agency is entitled to receive a copy by law or contract under section 1-218, whether such data or information be handwritten, typed, tape-recorded, printed, photostated, photographed or recorded by any other method." General Statutes § 1-200(5).

Electronic notice sent to all counsel of record.
Sent to official Reporter of Judicial Decisions
A. Jordan on 8-12-19

I

Bruce Adams was general counsel of the department from October 2014 through March 2016; for a six-week period in early 2015 he also served as the acting commissioner of the department. During his tenure as general counsel the department was involved in litigation over the extension of "payday loans"[2] to Connecticut residents by an Indian tribe based in Oklahoma.[3]

While that litigation was in progress, Mr. Adams posted on social media sites – Twitter, Facebook and LinkedIn – many publicly available comments on the litigation, along with his personal commentary on payday loans in general and the pending litigation in particular. He posted these comments during his personal time and on his personal electronic devices.

On September 15, 2015 Hilary B. Miller sent a written request to the department that it provide him with, *inter alia*, "all social media communications (including postings on Facebook,

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[2] Generally speaking, a "payday loan" is a small, unsecured loan of short duration, often carrying a very high interest rate.

[3] See *Great Plains Lending, LLC et al.* v. *Conn. Dept. of Banking*, Superior Court, judicial district of New Britain, Docket No. CV 15 6028096; *Great Plains Lending, LLC et al.* v. *Conn. Dept. of Banking et al.*, Superior Court, judicial district of New Britain, Docket No. CV 17 6038913.

LinkedIn, Twitter and other similar outlets) by employees of the Department regarding" the pending litigation, payday lending and certain individuals and tribal entities involved in such lending. R. 8. Mr. Miller, at the department's request, agreed in October 2015 to limit his request to (1) records created by present employees of the department, which then included Mr. Adams, and (2) records created on or after January 1, 2015. R. 626. In February 2016 the department produced social media posts by Mr. Adams, "as a courtesy," taking "no position" as to whether those postings constituted "public records" under FOIA. R. 2, 782. Mr. Miller did not challenge the adequacy of the department's production by an appeal to the commission.

Unbeknownst to the department employee charged with complying with Mr. Miller's request, Mr. Adams had "taken down", i.e., removed from his social media accounts several of his prior posts after Mr. Miller's request had been filed.[4] Mr. Adams provided the department employee with several pages of his posts, not including those he had taken down, and he did not advise her or anyone else

[4] He did so at the request of the general counsel to then Governor Dannel P. Malloy. That request had been prompted, it appears from the record, by complaints about these posts by a representative of the Indian tribes involved in litigation with the department. R. 349.

at the department of his actions in taking down those other posts. The upshot was that, when the department disclosed to Mr. Miller on February 26, 2016 the social media posts Mr. Adams had provided, that production did not include any of the posts that Mr. Adams had deleted from his accounts after Mr. Miller's request had been made.

On May 13, 2016 the plaintiff herein, Mr. Morrin, filed a written request with the department, through his attorney, that specifically referenced Mr. Miller's earlier request, stated that "the social media posts that the Department produced . . . were not complete . . ." and, "given the apparent incomplete search by the Department," renewed the request made by Mr. Miller for all social media posts. R. 556. By this time Mr. Adams had left the department's employ. In response the department reiterated its position that the social media postings that it had earlier produced "were not provided by the Department as public records that it 'maintained or kept on file' but as a courtesy." It further responded that "(t)he Department is under no obligation to do any more than it already has." R. 562.

Mr. Morrin filed a timely appeal with the commission from the department's response to his request. A hearing officer of the

commission, after a three-day evidentiary hearing, recommended that the commission find that the department had not violated the FOIA in its response to Mr. Morrin's request and dismiss his appeal, and the commission did so. R. 784.

In its final decision, dated May 24, 2017, the commission declined to decide whether Mr. Adams' social media posts were public records. Rather, it ruled that "irrespective of whether the removed posts are public records," the department was not required to provide them to Mr. Morrin because:

(1) the department did not know at the time of Mr. Morrin's request that Mr. Adams had deleted some of his posts from his social media accounts and, therefore, it was "reasonable for the (department) to reject (Mr. Morrin's) allegation, as the basis for his second request, that their (sic) search for and disclosure of records responsive to his first request was 'incomplete'";

(2) by the time of Mr. Morrin's May 2016 request for disclosure of social media posts Mr. Adams was no longer employed by the department, and "neither the (department) nor any employee of the (department) maintained or had access to such posts";

(3) "in its discretion," the commission declined to address whether the department had an obligation to attempt to retrieve

such posts from Mr. Adams, "in light of the fact that the complainant[5] has possessed such records since before he made his first request from the respondents in September 2015." R. 783-84.

Mr. Morrin filed this appeal pursuant to General Statutes § 4-183.[6]

II

"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 . . . . An administrative finding is supported by substantial evidence if the record affords a substantial basis of fact from which the facts in issue can be reasonably inferred. " *Hogan* v. *Dept. of Children & Families*, 290 Conn. 545, 561 (2009). "The substantial evidence rule imposes an important limitation on the power of the courts to overturn a decision of an administrative agency. . . and . . . provide[s] a more restrictive standard

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[5] The "complainant" in this appeal is Mr. Morrin. It was Mr. Miller who was in possession of Mr. Adams' posts in 2015; see pp. 9-11, below; and his FOIA request was taken over by Mr. Morrin.

[6] "A person who has exhausted all administrative remedies available within the agency and who is aggrieved by a final decision may appeal to the Superior Court as provided in this section."

of review than standards embodying review of weight of the evidence or clearly erroneous action. . . . It is something less than the weight of the evidence, and the possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency's finding from being supported by substantial evidence." *Blinkoff* v. *Comm. on Human Rights & Opportunities*, 129 Conn. App. 714, 720-21 (2011).

"Neither this court nor the trial court may retry the case or substitute its own judgment for that of the administrative agency on the weight of evidence on questions of fact. . . ." *Dickman* v. *Office of State Ethics et al.*, 140 Conn. App. 754, 766-67 (2013).

"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." *Spitz* v. *Board of Examiners of Psychologists*, 127 Conn. App. 108, 116 (2011).

"It is fundamental that a plaintiff has the burden of proving that the commissioner, on the facts before him, acted contrary to the law and in abuse of his discretion. . . . The law is also well established that if the decision of the commissioner is reasonably supported by the evidence, it must be sustained." (Internal quotation marks omitted.) *Murphy* v. *Commissioner of Motor Vehicles*, 254 Conn. 333, 343-44 (2000).

III

Mr. Morrin challenges only one of the factual findings made by the commission in its final decision of May 24, 2017; namely, that made in paragraph 11 of the decision: "It is found that on September 14, 2015, the computer forensics expert [retained by Mr. Miller's counsel] collected and provided *all* publicly available data from Adams's social media accounts to the complainant's[7] attorney." (Emphasis added.) R. 781. The commission leaned heavily on this finding in support of its decision to exercise "its discretion" in declining to address the issue whether Mr. Adams' social media posts are public records "in light of the fact that the complainant[8] has possessed such records since before he made

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[7] See footnote 5, above.

[8] See footnote 5, above.

his first request from the respondents in September 2015." R. 784. Thus, the court must determine whether there is "substantial evidence in the administrative record" in support of the commission's finding.

The evidence on this point consists of the affidavits of two expert witnesses and one of his attorneys, and the testimony of one of those experts, offered by Mr. Morrin as to the results of their searches of Mr. Adams' social media postings in 2015 and 2016. Also relevant is the testimony of Mr. Adams concerning the timing of and circumstances under which he took down some of his postings relating to the department's efforts to regulate payday lending in Connecticut.

This evidence provides substantial support for the commission's conclusion that Mr. Miller in 2015, before he made his initial request of the department, and Mr. Morrin in 2016 had *all* of Mr. Adams' relevant social media postings. In his affidavit of August 10, 2016 Jeremy Agcaoili, a "forensic consultant" retained by Mr. Miller's counsel, swore that on September 14, 2015 he "preserved, collected and provided" to counsel "all publicly available data" from Mr. Adams' Facebook, Twitter and LinkedIn accounts. R. 458. An attorney from the law firm representing Mr.

Miller, Andrea Donovan Napp, swore in her affidavit of August 17, 2016 that on September 16, 2015 she "downloaded all publicly available Tweets made by Mr. Adams *since the account's inception in November 2012.*" (Emphasis added.) R. 464. An attorney retained by Mr. Morrin, Frank Rudewicz, provided an affidavit on August 19, 2016; R. 525-34; in which he compared the Facebook captures described in the Agcaoili affidavit with Mr. Adams' Facebook account on August 17, 2016, identifying one post in which a comment of Mr. Adams' was deleted from the post in the interim. In addition he identified and described in detail fourteen relevant tweets either deleted from Mr. Adams' Twitter account since Mr. Agcaioli's review of the account in 2015 or present in his account in August 2016 but not provided by the department in response to Mr. Miller's earlier request. As to Mr. Adams' LinkedIn account the Rudewicz affidavit concluded that, after receiving Mr. Miller's request, the account was edited to remove one post entirely and to remove Mr. Adams' commentary on another post. Again, the content of the missing material was described in detail. Mr. Rudewicz testified at length at the commission's hearing in this matter, substantially to the same effect. R. 151-78.

This evidence demonstrates that as early as September 14 and 16, 2015 Mr. Agcaoili and Attorney Napp, respectively, had captured all of Mr. Adams' relevant postings. These captures laid the foundation for Mr. Rudewicz's comparison of those posts with those present on Mr. Adams' accounts in August 2016 and those provided by the department in February 2016 in response to Mr. Miller's request. The fact that he was able to describe, with detailed quotations, the posts having to do with payday lending and the department's litigation with the Indian tribes taken down by Mr. Adams after Mr. Miller's 2015 request further shows that Mr. Morrin had in 2016 all that Mr. Miller had requested in 2015.

But, Mr. Morrin argues, the comparison of the "snapshot" captures on September 14 and 16, 2015 with the department's production in February 2016 could not have identified relevant posts made and then taken down by Mr. Adams *before* Mr. Miller made his original request and *before* those captures were effected. This is logically correct and entirely speculative. There is nothing in the administrative record from which the commission could have

concluded that Mr. Adams had taken down any of his relevant posts prior to Mr. Miller's 2015 request.[9]

Indeed, in the complaint with which Mr. Morrin initiated this appeal he alleged that "*after receiving a valid FOIA request for public records*, including social media communications, the then-General Counsel and Acting Commissioner of the Department, Bruce Adams, intentionally deleted or removed from public view certain social media postings . . . ." (Emphasis added.) Docket entry #100.30. This could be considered a judicial admission that Mr. Adams' deletions occurred only after and not before Mr. Miller's 2015 request. See generally C.Tait & E. Prescott, Conn. Evidence (4th Ed. 2008) § 8.16.3, p. 482.

Mr. Adams testified at the hearings on November 15, 2016 and January 11, 2017. It is clear from his testimony on the latter of those dates that the only reason he took down any of his social media posts related to payday lending and litigation with the Indian tribe was that he was asked to do so by the Governor's legal counsel in September 2015. See, e.g., R 353-54. Had he not been asked by the Governor's legal counsel to take down his posts,

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[9] This argument also ignores the fact that Attorney Napp's Twitter capture was longitudinal, i.e., she captured all tweets made by Mr. Adams since he opened his Twitter account in 2012.

he testified, they would still have been on his social media accounts when Mr. Miller's original freedom of information request was made. R. 349. It is a reasonable and logical inference from this testimony that Mr. Adams had taken down none of his relevant social media posts before Mr. Miller's agents captured the posts that were on his accounts on September 14 & 16, 2015. In examining Mr. Adams on January 11, 2017, after the preceding testimony had been elicited, counsel for Mr. Morrin had an opportunity to explore whether Mr. Adams had taken down from his accounts any relevant posts before the Governor's legal counsel asked him to do so and before Mr. Agcaoili made his initial capture of his social media posts; counsel failed to inquire into that subject. Thus, the record is bare of any evidence that would indicate that relevant posts had been made and taken down prior to Mr. Miller's request.

The court concludes that the commission's factual finding that "on September 14, 2015, the computer forensics expert [Mr. Agcaoili] collected and provided all publicly available data from Adams's social media accounts to the complainant's attorney" is supported by substantial evidence in the record. "Neither this court nor the trial court may retry the case or substitute its own

judgment for that of the administrative agency on the weight of evidence on questions of fact. . . ." *Dickman* v. *Office of State Ethics et al.*, supra.

IV

Having upheld the commission's finding on the only fact in dispute, the court must 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." *Spitz* v. *Board of Examiners of Psychologists*, supra.

The commission dismissed Mr. Morrin's complaint without deciding whether Mr. Adams' social media posts were public records for three reasons: (1) the department did not know at the time of Mr. Morrin's request that Mr. Adams had deleted some of his posts from his social media accounts and, therefore, it was "reasonable for the (department) to reject (Mr. Morrin's) allegation, as the basis for his second request, that their (sic) search for and disclosure of records responsive to his first request was 'incomplete'"; (2) by the time of Mr. Morrin's May 2016 request

for disclosure of social media posts Mr. Adams was no longer employed by the department, and "neither the (department) nor any employee of the (department) maintained or had access to such posts"; and (3) "in its discretion," the commission declined to address whether the department had an obligation to attempt to retrieve such posts from Mr. Adams, "in light of the fact that (Mr. Morrin) has possessed such records since before he made his first request from the respondents in September 2015." R. 783-84.

The court rejects the first two of these grounds for dismissal. First, neither the commission nor the department cites any authority for dismissal of a complaint under the FOIA solely because the public agency from which records have been requested acted "reasonably" in responding to the request, and the court is not aware of any such authority.

Second, Mr. Adams was an employee of the department at the time Mr. Miller made his records request in 2015. A finding by the commission that Mr. Adams' postings on social media while he was the department's employee were public records would impose on the department an obligation to produce those posts in response to Mr. Miller's request. Since, as found by the commission, Mr. Morrin's request, the subject of this appeal, was a "duplicate" of Mr.

Miller's request; R 781; the department would have a like obligation to produce those records to Mr. Morrin. Mr. Miller's failure to appeal to the commission from the department's production may not be found to limit the department's obligation to respond appropriately to Mr. Morrin's records request. "Because the Freedom of Information Act does not bar successive requests or successive denials, there is no requirement that an appeal to the FOIC, pursuant to § 1-21i(b), be taken from the denial of the first request or any particular request." *Town of West Hartford* v. *Freedom of Information Comm.*, 218 Conn. 256, 260 (1991).

In short, the court finds that the commission acted "unreasonably, arbitrarily, illegally, [and] in abuse of its discretion" when, in reliance on these grounds, it declined to determine whether Mr. Adams' posts were public records.

On October 31, 2017 the commission moved to dismiss this administrative appeal, claiming that the court lacked jurisdiction "because the case is moot." Docket entry #103. Mr. Morrin objected, and the court (Cohn,J.) summarily denied the motion. Docket entry #103.01. In addressing the third ground on which the commission relied in dismissing his complaint; namely, that the department could grant Mr. Morrin no practical relief because he

already was in possession of the records of Mr. Adams' posts before he requested them from the department, Mr. Morrin has argued that Judge Cohn's ruling is the law of the case to which this court should defer in rejecting this argument of the respondents. Plaintiff's Reply Brief on the Merits, Docket entry # 133, p. 8 (Feb. 19, 2019).

The issue in this administrative appeal, however, is not whether this court has jurisdiction over the appeal. Rather, it is whether the commission's conclusion of law that it could afford Mr. Morrin no practical relief because he already possessed the records he was requesting from the department "resulted from a correct application of the law to the facts found and could reasonably and logically follow from such facts."; *Spitz* v. *Board of Examiners of Psychologists*, supra; a question over which this court undoubtedly has jurisdiction.

In effect, the commission was finding, as a matter of law, that Mr. Morrin's appeal from the department's failure to provide all the records he requested was moot. In doing so it was applying a well-established judicial principle. "It is a well-settled general rule that the existence of an actual controversy is an essential prerequisite to appellate jurisdiction; it is not the

province of appellate courts to decide moot questions, disconnected from the granting of actual relief or from the determination of which no practical relief can follow . . . ." *State* v. *Peeler*, 271 Conn. 338, 404-05, cert. denied 126 S.Ct. 94 (2005). "Mootness applies to situations where events have occurred during the pendency of an appeal that make an appellate court incapable of granting practical relief through a disposition on the merits." *Sobocinski* v. *Freedom of Information Comm.*, 213 Conn. 126, 134 (1989).

The court can see no reason why this principle should not be applied by an administrative agency in an appropriate case. Proceeding from its factual finding that, through their attorneys, Mr. Miller in 2015 and Mr. Morrin in 2016 had all of the relevant, publicly available posts from Mr. Adams' social media accounts, which this court has found is supported by substantial evidence in the administrative record, the commission concluded that a ruling that those same posts were public records and must be provided by the department would grant no practical relief to the complainants.

It is true, as argued by Mr. Morrin, that in earlier cases the commission has ordered a public agency to produce records that

it determined were public records even though the complainant had obtained those records from another source. *Smith* v. *Santos*, final decision FIC 2014-831 (Aug. 12, 2015); *Black* v. *Warden*, final decision FIC 2011-413 (June 27, 2012); *Green* v. *Hartford Purchasing Dept.* final decision FIC 94-224 (Apr. 5, 1995); *Lindquist* v. *Chairman*, final decision FIC 89-94 (Mar. 14, 1990). The commission has not been entirely consistent in that approach, however. See *Shea* v. *Planning & Zoning Comm.*, final decision FIC 2006-679 (Oct. 24, 2007). And, in any event, these earlier decisions are not such binding precedent as to require the commission to decide a novel and difficult issue such as whether and under what circumstances, if any, the social media posts of a state employee, made on his own time and his own electronic devices, constitute public records when that decision will have no practical effect for the member of the public requesting those records.

Mr. Morrin argues that, even if he has all of Mr. Adams' relevant posts, a decision by the commission that such posts are public records could still provide him some "practical relief"; e.g., sanctions on the department and/or Mr. Adams for their failure to turn over all of the latter's posts, including those taken down by him. But, sanctions imposed on a state agency for

a violation of FOIA; e.g., a monetary fine or penalty, would not be paid to Mr. Morrin; so, they cannot afford Mr. Morrin any "practical relief" beyond what he already has; namely, copies of the arguably "public records" at issue.

"It is fundamental that a plaintiff has the burden of proving that the [commission], on the facts before [it], acted contrary to the law and in abuse of [its] discretion. . . ." (Internal quotation marks omitted.) *Murphy* v. *Commissioner of Motor Vehicles*, 254 Conn. 333, 343-44 (2000). The plaintiff in this case, Mr. Morrin, has not met that burden.

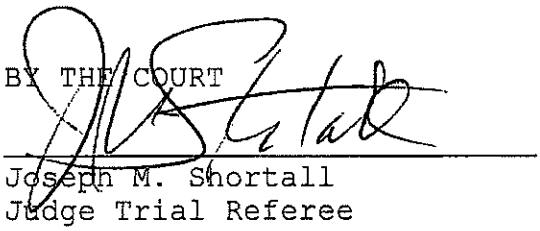
The court concludes that the commission's exercise of discretion in declining to address whether Mr. Adams' posts were public records which the department was obliged to produce in response to Mr. Miller's and Mr. Morrin's requests, in light of the fact that they were already in possession of the same posts, "resulted from a correct application of the law to the facts found and could reasonably and logically follow from such facts." *Spitz* v. *Board of Examiners of Psychologists*, supra.

V

The court affirms the decision of the commission.

No costs are taxed.

BY THE COURT



Joseph M. Shortall
Judge Trial Referee