NO. CV 105015001S	:	SUPERIOR COURT
LAMBERTO LUCARELLI	:	JUDICIAL DISTRICT OF
v.	:	NEW BRITAIN
FREEDOM OF INFORMATION COMMISSION, ET AL.	:	MARCH 10, 2011

MEMORANDUM OF DECISION

The plaintiff, Lamberto Lucarelli, has appealed[1] from an April 21, 2010 final decision of the defendant freedom of information commission (FOIC) as well from a May 26, 2010 denial by the FOIC of the plaintiff's motion for reconsideration. The plaintiff has also named as a defendant the Old Saybrook Police Department (the department), the respondent before the FOIC.

The relevant facts as reflected in the administrative record are as follows:

By letter dated June 29, 2009, the plaintiff requested from the department copies of the following police incident reports:

(a) #09-105-135913 (Officer DeMarco)
(b) #09-0417-160353 (Officer Perrotti)
(c) #09-0422-190647 (Detective Roche)
(d) #09-0427-110811 (Officer Perrotti)

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1 The plaintiff is aggrieved, as required by General Statutes § 4-183 (a), because, although the FOIC entered a favorable order, the plaintiff claims that the FOIC's order did not fully give him the relief that he had sought as a complainant to the FOIC.

In addition, the plaintiff requested "any and all other information regarding me or my affairs which may be in the possession of [the department] and which has not already been provided." (Return of Record, ROR, 111).

In his efforts to comply with the request, the chief of the department, Chief Spera, had a meeting with the plaintiff on July 9, 2009 during which he provided the plaintiff with copies of the four requested police incident reports. (ROR, 59, 123). Chief Spera also explained the department's records management system and showed the plaintiff how the department's computer system worked. The chief, further, printed out and provided the plaintiff with a list from the computer that showed each instance, since 1997, in which the plaintiff's name appeared in the department's records. (ROR, 60, 123). The parties reviewed all documents that had the plaintiff's name on them. At the conclusion of their July 9, 2009 meeting, the chief believed that the plaintiff was satisfied that his request had been or would be fully complied with. (ROR, 61, 123).

However, by letter dated July 14, 2009, the plaintiff made another records request to the department in which he specifically described the records he believed were retained by the department that were responsive to his original request but had not been provided to him. The letter was captioned "Reiterated Freedom of Information Act Request" and consisted of 10 pages of single spaced text in which there were forty-six (46) questions and requests for copies of records. (ROR, 113). In a telephone conversation with the

plaintiff, the chief explained to the plaintiff that the department did not maintain the records he was seeking.

By letter of complaint dated July 30, 2009, and filed on July 31, 2009, the plaintiff appealed to the FOIC, alleging that the department violated the Freedom of Information Act (FOIA) by failing to respond fully to his original June 29, 2009 request. (ROR, 10). After receipt of the FOIC's Notice of Hearing and Order to Show Cause, dated October 15, 2009, the plaintiff submitted a request to the FOIC that it issue Subpoenas Duces Tecum. (ROR, 19, 38). The plaintiff requested that the FOIC subpoena anyone that may have been involved in responding to his FOI request, but specifically included Chief Spera, Officers DeMarco and Perrotti, Detective Roche, a Ms. Klingerman and a Ms. Laverty. The plaintiff also requested that the FOIC subpoena "ALL information WHATSOEVER" regarding him." The plaintiff further stated that he was seeking the subpoenas to ensure that "all possible audio recordings" were produced at the pending hearing. (ROR, 39). The FOIC took no action with respect to his request for subpoenas.

A contested case hearing was held on November 10, 2009, at which time all parties appeared before an FOIC hearing officer and presented testimony, exhibits and argument on the complaint. The plaintiff represented himself and the chief, who personally appeared, and the department, were represented by counsel. During the administrative hearing, both parties testified to the efforts made by Chief Spera to

respond and ensure complete compliance with the plaintiff's request. However, the plaintiff testified at the administrative hearing that he was seeking not just the incident reports, but also all records related to the incident reports that might be kept in the case files associated with such incident reports. Notwithstanding the hearing officer's finding that there was genuine misunderstanding on the part of the chief as to the scope of the request, she ordered the chief to conduct an additional search for records in light of the plaintiff's testimony. She further ordered that, if additional records responsive to either the plaintiff's June 29 or July 14, 2009 requests were found, the department provide a copy of such records to him and to the FOIC, along with an affidavit detailing the nature of the search, on or before December 4, 2009. (ROR, 93-94, 99).

By letter dated December 4, 2009, the plaintiff and the FOIC were provided with (1) an affidavit of the chief stating that an additional search for records had been conducted, and that all responsive records had been provided to the complainant; (2) a written response to each of the forty-six (46) questions in the plaintiff's July 14, 2009 request; and (3) a copy of the additional records found as a result of the search, consisting of the contents of the case files corresponding to the four incident reports. The written response indicated that the department maintained no tape recordings of any conversations of voice mails related to the incident reports at issue and further, that they were not required to do so pursuant to § 1-213(b)(3).

The plaintiff objected to the department's letter, contending that the department's compliance with the hearing officer's order was flawed. In support of his contention, he pointed to the fact that the search for records was conducted by the chief, and not the individual officers who created the incident reports at issue, and that such officers did not "attest" to the information contained in such reports. In addition, the plaintiff contended that the department acted in "bad faith" because they failed to acknowledge the specific statement, written by Officer Perrotti in an incident report dated April 22, 2009, that Officer Perrotti "taped [the plaintiff's] voice mail message he had left for me on April 20, 2009 . . ." and further failed to disclose such tape recording.

The hearing officer issued a report of hearing officer on March 8, 2010 which report was considered by the FOIC at its April 14, 2010 regular meeting. At that meeting, the plaintiff clarified to the FOIC that he had requested that the Police Department record all of his voice mail messages in the manner that Officer Perrotti had and that therefore his request included those tape recordings as well.

In light of the plaintiff's objection and his clarification at its meeting, the FOIC adopted a final decision in which it concluded:

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18. Taking into consideration all of the facts and circumstances in this case, it is found that the respondents' additional search for records responsive to the request

described in paragraphs 2 and 5, above, was diligent, and made in good faith, in an effort to fully comply with such request. It is found that the respondents provided the complainant with all of the requested records, with the exception of a copy of the tape recording of the complainant's voice mail message created by Officer Perrotti, described in paragraph 17, above. It is found that, although the respondents' failure to disclose such record to the complainant, to the extent such record still exists, violates the disclosure provisions of the FOI Act, the Commission further finds that the respondents' failure to disclose such record was not intentional. It is also found that the respondents did not violate the FOI Act in refusing to transcribe, tape or record voice mail messages that may exist on the respondents' voice mail system.

The FOIC entered the following order:

Based upon the foregoing, it is concluded that the respondents violated the provisions of §§ 1-210(a) and 1-212(a), G.S. by failing to comply with the request for a copy of the tape created by Officer Perrotti, described in paragraph 17, above.

1. The respondents shall forthwith provide the complainant with a copy of the tape recording created by Officer Perrotti, described in paragraph 17 of the findings, above, free of charge, if such tape still exists.

2. In the alternative, if the respondents no longer maintain the tape recording described in paragraph 17 of the findings, above, they shall so inform the complainant by letter forthwith.

3. The respondents shall make a diligent search for tape recordings of any additional voice mail messages and shall provide an affidavit to the complainant indicating the results of such search and shall also provide the complainant with a copy of any additional tape recordings it finds.[2]

The plaintiff moved for reconsideration and on the FOIC's denial, appealed to this court. He raises the following issues on appeal: (1) The FOIC erred in stating that the department did not have to preserve voice mail communications; further, the statutory exemption to the FOIA only applied to the *production* of voice mail; (2) The FOIC erred by not granting the plaintiff's request for subpoenas; and (3) The FOIC erred in not assessing a penalty against the department as part of its remedial order.

The court must resolve these issues under the following standard:

"It is well established that [j]udicial review of [an administrative agency's] action is governed by the Uniform Administrative Procedure Act (UAPA). . . . and that the scope of that review is very restricted." *Dept. of Public Safety* v. *Freedom of Information Commission*, 298 Conn. 703, 716, 6 A.3d 763 (2010). Regarding questions of fact, it is not the function of the trial court to "retry the case or to substitute its judgment for that of the administrative agency." Id. "Cases that present pure questions of law, however,

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[2] At oral argument of the plaintiff's appeal on February 28, 2011, the plaintiff stated that the department had not complied with this order. The department stated that its records showed compliance. The court ordered that, to the extent that there had not been compliance, that this be resolved by March 15, 2011.

traditionally invoke a broader standard of review than ordinarily is involved in deciding whether, in light of the evidence, the agency has acted unreasonably, arbitrarily, illegally or in abuse of discretion." *Board of Selectmen* v. *Freedom of Information Commission*, 294 Conn. 438, 446, 984 A.2d 748 (2010). When construing a statute, the fundamental objective "is to ascertain and give effect to the apparent intent of the legislature. . . . In seeking to determine that meaning, General Statutes § 1-2z directs us first to consider the text of the statute itself and its relationship to other statutes. If, after examining such text and considering such relationship, the meaning of such text is plain and unambiguous and does not yield absurd or unworkable results, extratextual evidence of the meaning of a statute shall not be considered. " *Fairchild Heights, Inc.* v. *Amaro*, 293 Conn. 1, 8-9, 976 A.2d 668 (2009).

The plaintiff's first issue concerns his request to the department for voice mail recordings or records. The parties agree that if such items are "maintained or kept on file" by the public agency, then under § 1-200 (5), they are public records and the plaintiff is entitled to a copy pursuant to § 1-210 (a). But the plaintiff contends further that the department was *required* to record or transcribe voice mail messages. This contention is incorrect as a specific exemption to the FOIA states: "Nothing in the [FOIA] shall be deemed in any manner to . . . [r]equire any public agency to transcribe the content of any voice mail message and retain such record for any period of time. As used in this

subdivision, 'voice mail' means all information transmitted by voice for the sole purpose of its electronic receipt, storage and playback by a public agency." In contradistinction to the statute before the Supreme Court in *Board of Selectmen*, supra, 294 Conn. 449, § 1-213 (b) (3) is "plain and unambiguous," subject to only one reasonable interpretation.

Thus, the FOIC in Finding 18, was correct that the department did not err in having a policy of "refusing to transcribe, tape or record voice mail messages that may exist on the [department's] voice mail system." The plaintiff argues that the federal FOIA requires retention of voice mail. He also points to a directive from the public records administrative regarding the retention of voice mail.

On the other hand, the FOIC is a body of limited jurisdiction. "Administrative agencies . . . are tribunals of limited jurisdiction and their jurisdiction is dependent entirely upon the validity of the statutes vesting them with power . . . . The commission is entirely a creature of statute. . . . It operates within the confines of the Freedom of Information Act." (Citation omitted.) *Dept. of Public Safety* v. *Freedom of Information Commission*, 103 Conn. App. 571, 577, 930 A.2d 739, cert. denied, 284 Conn. 930, 934 A.2d 245 (2007). See also *Marroquin* v. *Manarca Masonry*, 121 Conn. App. 400, 406-7, 994 A.2d 727 (2010). The FOIC was thus limited to its own act in resolving the complaint that the plaintiff brought before it.

The plaintiff secondly challenges the apparent refusal of the FOIC to issue subpoenas in advance of the hearing to individual members of the department. As seen above in the references to the administrative record, the plaintiff stated that his specific purpose in seeking the subpoenas was to probe each individual on his or her retention of audio recordings.

There is no question that the hearing officer may, pursuant to FOIC regulations, subpoena witnesses if the hearing officer finds it "necessary." Regulation § 1-21j-8 (3). The court is unable to conclude on this record whether the plaintiff's request was in fact denied or was merely overlooked. (ROR, 245-46, 255). But even if the FOIC denied the plaintiff's request, this does not end the matter. The plaintiff must show that the FOIC abused its discretion in denying the request. In addition, any fault in denying the subpoenas must amount to prejudice to the plaintiff. See § 4-183 (j); *Goldstar Medical Services, Inc.* v. *Dept. of Social Services*, 288 Conn. 790, 828, 955 A.2d 15 (2008) ("not all procedural irregularities require a reviewing court to set aside an administrative decision; material prejudice to the complaining party must be shown.")

The FOIC concluded that the police chief of the department had replied that, in keeping with department policy, no voice mail messages had been retained, except for Officer Perrotti's. The department had acted in good faith and fully complied in all other respects to the plaintiff's requests. Under § 1-213 (b) (3), the department had no duty to

retain these messages in any event. On this record, the court cannot find that the failure to honor the plaintiff's request for the issuance of subpoenas was prejudicial.

The plaintiff's final argument is that the FOIC failed to enforce the penalty provision of § 1-240 (a) in its order. Section 1-240 (a) provides: "Any person who wilfully, knowingly and with intent to do so, destroys, mutilates or otherwise disposes of any public record without the approval required under section 1-18 or unless pursuant to chapter 47 or 871, or who alters any public record, shall be guilty of a class A misdemeanor and each such occurrence shall constitute a separate offense." Here Finding 18 of the final decision specifically concluded that the department and its officers did not wilfully dispose of any public record. Therefore the statutory provision is inapplicable.

For the foregoing reasons, the appeal is dismissed.

Henry S. Cohn, Judge