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FREEDOM OF INFORMATION COMM.
BY *[Signature]*

SUPERIOR COURT

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*File # 2013-011
FIC # 2012-486
Atty: VRP*

DOCKET NO. HHB CV13-5015882 S : SUPERIOR COURT
NANCY BURTON : JUDICIAL DISTRICT
v. : OF NEW BRITAIN
FREEDOM OF INFORMATION COMMISSION : APRIL 7, 2014

MEMORANDUM OF DECISION ON MOTION TO DISMISS

PROCEDURAL HISTORY:

The petitioner, Nancy Burton, appeals from a decision of the respondent, Freedom of Information Commission. The petitioner asserts that, on June 26, 2013, the respondent issued a decision, FIC #2012-486, finding that Daniel Esty, Commissioner of the Connecticut Department of Energy and Environmental Protection [Esty], violated the Freedom of Information Act, General Statutes § 1-206, in his initial failure to respond to the petitioner's e-mail request, but that he subsequently did respond. The respondent declined to impose a civil penalty upon Esty. The petitioner alleges she is aggrieved thereby.¹ Esty² has filed a motion to dismiss the appeal (107.00) asserting that the court has no subject matter jurisdiction because the petitioner is not aggrieved by the respondent's

¹ The petitioner does not specify in her appeal the relief she is requesting. In her objection to the motion to dismiss, the petitioner appears to seek relief of the court to remand the matter to the respondent with a direction to "reopen the proceedings to enable [Esty's] compelled testimony and to enable the [respondent] to properly consider the [petitioner's] request for imposition of a civil penalty."

² The court refers to Nancy Burton as "petitioner," Freedom of Information Commission as "respondent" and Daniel Esty, Commissioner of the Connecticut Department of Energy and Environmental Protection as "Esty." Only Esty has filed a motion to dismiss the appeal.

decision not to impose a civil penalty and she has received her requested records. The motion to dismiss was initially granted without opposition. Subsequently, the court granted the petitioner's motion for reargument, which was filed together with her objection to the motion to dismiss (113.00). The motion and objection were scheduled for a hearing on various dates, including March 13, 2014. On that date, all parties declined oral argument and the matter was taken on the papers for the court's decision.

LEGAL STANDARD OF REVIEW:

“A motion to dismiss . . . properly attacks the jurisdiction of the court, essentially asserting that the plaintiff cannot as a matter of law and fact state a cause of action that should be heard by the court. . . . A motion to dismiss tests, inter alia, whether, on the face of the record, the court is without jurisdiction.” (Internal quotation marks omitted.) *Conboy v. State*, 292 Conn. 642, 650, 974 A.2d 669 (2009).

“Pursuant to the rules of practice, a motion to dismiss is the appropriate motion for raising a lack of subject matter jurisdiction.” *St. George v. Gordon*, 264 Conn. 538, 545, 825 A.2d 90 (2003), overruled on other grounds by *Flanagan v. Blumenthal*, 100 Conn. App. 255, 917 A.2d 1047 (2007). “Subject matter jurisdiction involves the authority of the court to adjudicate the type of controversy presented by the action before it.” (Internal quotation marks

omitted.) *Bloomfield v. United Electrical, Radio & Machine Workers of America, Connecticut Independent Police Union, Local 14*, 285 Conn. 278, 286, 939 A.2d 561 (2008).

“When a trial court decides a jurisdictional question raised by a pretrial motion to dismiss on the basis of the complaint alone, it must consider the allegations of the complaint in their most favorable light. . . . In this regard, a court must take the facts to be those alleged in the complaint, including those facts necessarily implied from the allegations, construing them in a manner most favorable to the pleader.” (Internal quotation marks omitted.) *Conboy v. State*, supra, 292 Conn. 651.

ANALYSIS:

The issue presented to the court by the respondent is whether the petitioner is aggrieved by the decision of the respondent. Lack of aggrievement would deprive the petitioner with standing to prosecute this appeal. The petitioner asserts two bases for standing.

The first basis is that the respondent abused its discretion in declining to assess a civil penalty against Esty. Both the petitioner and Esty agree that any civil penalty awarded against Esty would be payable to the State of Connecticut, not to the petitioner. Esty asserts that, as the petitioner would not receive any award, she has no standing.

The second basis asserted by the petitioner is “there remains a question whether the [petitioner] received all the records she requested.” Esty asserts that the respondent made a finding that Esty complied with the petitioner’s request for the records.

For the reasons set forth below, the court finds that the petitioner is not aggrieved by the decision of the respondent not to assess a civil penalty against Esty, and, therefore, the petitioner has no standing to prosecute this appeal as to her first claim in the appeal. The court finds that the second claim in the appeal as to records production is not ripe for adjudication.

“The concept of standing as presented . . . by the question of aggrievement is a practical and functional one designed to assure that only those with a genuine and legitimate interest can appeal an order.” (Internal quotation marks omitted.) *Beckish v. Manafort*, 175 Conn. 415, 419, 399 A.2d 1274 (1978). “It is well settled that pleading and proof of aggrievement [within the meaning of the statute] are prerequisites to a trial court’s jurisdiction over the subject matter of an administrative appeal.” (Internal quotation marks omitted.) *Bongiorno Supermarket, Inc. v. Zoning Board of Appeals*, 266 Conn. 531, 537-38, 833 A.2d 883 (2003). “Aggrievement is established if there is some possibility, as distinguished from a certainty, that some legally protected interest . . . has been adversely affected.” (Emphasis omitted; internal quotation marks omitted.) *State Library v. Freedom of Information Commission*, 240 Conn. 824, 834, 694 A.2d

1235 (1997). “In appeals pursuant to the Freedom of Information Act, aggrievement is determined in accordance with a twofold test. . . . This test requires a showing of: (1) a specific personal and legal interest in the subject matter of the [commission’s] decision; and (2) a special and injurious effect on this specific interest.” (Citation omitted; internal quotation marks omitted.) *Id.*, 833.

As to the respondent’s decision not to impose a civil penalty upon Esty, not payable to the petitioner, the petitioner is not aggrieved. She has not alleged a specific personal and legal interest in the declination of award. The petitioner has not pleaded any interest separate and distinct from the interest of the community as a whole. *Lewin v. United States Surgical Corp.*, 21 Conn. App. 629, 632, 575 A.2d 262, cert. denied, 216 Conn. 801, 577 A.2d 716 (1990) (“The concerns the plaintiffs express here cannot be distinguished from those held by the community as a whole”). As the petitioner has not alleged a specific interest, she cannot establish a special and injurious effect on such interest.

Esty has not substantively addressed in his motion or memorandum the petitioner’s second claim, that she has not received all the records she requested. Esty merely asserts that “there is no question [Esty] did eventually provide the requested documents.” But there is indeed such a question and the petitioner directly raises it in her appeal. In paragraph 14, the petitioner states: “However, the response was incomplete. . . . A hearing on FIC #2013-172 was conducted on

August 13, 2013, at which time Commissioner Esty's representatives acknowledged that . . . the March 14, 2013 response had been incomplete."³

In viewing the petitioner's appeal in the most favorable light, however, the petitioner also states in the same paragraph 14, "[t]hat [the] matter is pending before the [respondent] after hearing."⁴ "Because courts are established to resolve actual controversies, before a claimed controversy is entitled to a resolution on the merits it must be justiciable. Justiciability requires . . . that there be an actual controversy between or among the parties to the dispute . . ." (Internal quotation marks omitted.) *State v. Preston*, 286 Conn. 367, 374, 944 A.2d 276 (2008).

"[J]usticiability comprises several related doctrines, namely, standing, ripeness, mootness and the political question doctrine, that implicate a court's subject matter jurisdiction and its competency to adjudicate a particular matter. . . . [A]n issue regarding justiciability raises a question of law [T]he rationale behind the ripeness requirement is to prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements

Accordingly, in determining whether a case is ripe, a trial court must be satisfied

³ The petitioner does not identify or articulate the nature or extent of the alleged missing records.

⁴ Paragraph 14 of the appeal states, "At hearing in FIC #2012-486, the [petitioner] offered into evidence as a full exhibit her October 9, 2012 [Freedom of Information Act] request. On March 14, 2013, Commissioner Esty's representative provided the [petitioner] with certain documents responsive to the request. However the response was incomplete. On March 21, 2013 the [petitioner] appealed from the withholding of records responsive to the October 9, 2012 request (FIC #2013-172). A hearing on FIC #2013-172 was conducted on August 13, 2013, at which time Commissioner Esty's representatives acknowledged that [the] Commissioner did not timely respond to the October 9, 2012 FOIA request and that the March 14, 2013 response had been incomplete. That matter is pending before the [respondent] after hearing.

that the case before [it] does not present a hypothetical injury or a claim contingent [on] some event that has not and indeed may never transpire. . . . [R]ipeness is a sine qua non of justiciability” (Citations omitted; internal quotation marks omitted.) *Janulawicz v. Commissioner of Correction*, 310 Conn. 265, 270-71, 77 A.3d 113 (2013). As the petitioner has asserted that this issue is pending before the respondent following a hearing in another appeal,⁵ the issue regarding completeness of production of records is not ripe for adjudication, depriving this court of jurisdiction.

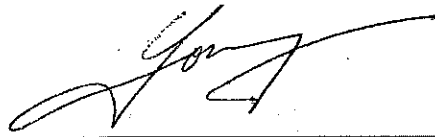
Additionally, under the exhaustion of administrative remedies doctrine, “the Superior Court has jurisdiction only over appeals from a final decision of an administrative agency.” (Internal quotation marks omitted.) *Derwin v. State Employees Retirement Commission*, 234 Conn. 411, 418, 661 A.2d 1025 (1995). Taking as true the petitioner’s assertion that the respondent’s decision as to whether all the subject records have been provided is a pending administrative adjudication, albeit in a different appeal, the court lacks subject matter jurisdiction until the respondent has issued its decision.

⁵ FIC #2013-172.

ORDER:

For the foregoing reasons, Esty's motion to dismiss (107.00) is granted.

The objection to the motion (113.00) is overruled.

A handwritten signature in black ink, appearing to read "Young", written over a horizontal line.

Robert E. Young, J.