

NO. CV 095014643S : SUPERIOR COURT
 :
 LAMBERTO LUCARELLI :
 : JUDICIAL DISTRICT OF
 :
 v. : NEW BRITAIN
 :
 FREEDOM OF INFORMATION COMMISSION : AUGUST 26, 2010
 :

MEMORANDUM OF DECISION

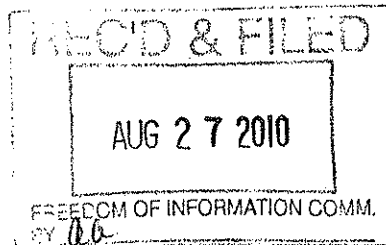
The plaintiff, Lamberto Lucarelli, appeals from a July 22, 2009 final decision of the freedom of information commission (FOIC) on the ground that the order issued against the respondent before the FOIC, the town of Old Saybrook (the town), was inappropriate and illegal.

The final decision states in relevant part as follows:

1. [The town is a public agency].
2. [The plaintiff in a series of letters] requested a substantial quantity of records [from the town].
3. [The town attorney replied that] the [plaintiff must] send \$150 before the [town] initiated copying the records.
4. By letter . . . filed with the [FOIC] on November 4, 2008, the [plaintiff] appealed to the Commission, alleging that the [town] failed to provide the requested records without a copying charge, which, because the [plaintiff] was indigent, was in violation of the Freedom of Information Act ("FOIA").

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8. It is found that the [town has] not adopted any standard for determining indigence for purposes of § 1-212 (d) (1), G.S. The Commission takes administrative notice that claims of indigence in the Town of Old Saybrook are relatively uncommon as compared with the volume of such claims in the large cities of Connecticut.

11. Also at the hearing, the [plaintiff] argued that he was indigent, presenting an affidavit essentially showing that he had no income or assets. The [town] cited the definition of indigence set forth in Black's Law Dictionary and argued that the [plaintiff] was poor, but not indigent, in the commonly approved usage of the term
12. In its post-hearing brief, the [town] argued that: "[t]here is no reason why any public agency should not be able to determine 'indigency' on a case by case basis when a fee waiver was made by an individual."

14. It is concluded that the standard for establishing indigence, and therefore waiver of copying fees, is wholly within the discretion of the custodial public agency, as long as the standard is objective, fair and reasonable, and applied in a nondiscriminatory manner. [The FOIC relied on both a Superior Court opinion and prior FOIC decisions for this proposition].
15. It is concluded that the principle of an objective standard applied in a nondiscriminatory manner precludes case by case determinations of indigence, performed without any objective standard of indigence. Therefore, it is concluded that the [town] violated the requirements of § 1-212 (d) (1),

G.S., as interpreted by relevant case law, when [the town] failed to adopt a standard in order to determine who is indigent for purposes of the FOIA.

16. It is also concluded, based upon the specific facts and circumstances of this case, that, because [the town does] not have any standard for determining indigence for the purposes of § 1-212 (d) (1), G.S., no legal conclusions concerning the [plaintiff's] indigence can be reached.

The FOIC entered the following order: "The [town] shall forthwith, adopt an objective, fair and reasonable standard for establishing indigence for purposes of § 1-212 (d) (1), G.S., and henceforth, shall apply such criteria in a nondiscriminatory manner. The FOIC decisions stating various standards of indigence in the Endnote hereto can serve as an aid to the [town] in [its] selection of standards." (Return of Record, ROR, pp. 292-95.)

The plaintiff agrees with the FOIC final decision in its rejection of the town's argument that it was not required to adopt a standard for indigence, but might resolve every request on an individual, "case by case" basis. He claims, however, that the FOIC erred by not reviewing the record developed at the FOIC hearing on his complaint and itself determining that he was indigent. He makes two specific arguments: (1) that, as § 1-212 (d) (1) applies to "public agencies," the FOIC is itself a public agency and (2) the FOIC has incorrectly interpreted § 1-212 (d) (1) by allowing towns to develop their own objective standards; there should be one standard set by the FOIC for every town.

The court 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.” *Lewin v. Freedom of Information Commission*, 91 Conn. App. 521, 881 A.2d 519, cert. denied, 276 Conn. 921, 888 A.2d 88 (2005). In addition, in this case, the issues raised involve statutory construction.

“When construing a statute, [o]ur fundamental objective is to ascertain and give effect to the apparent intent of the legislature In other words, we seek to determine, in a reasoned manner, the meaning of the statutory language as applied to the facts of [the] case, including the question of whether the language actually does apply 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. . . . The test to determine ambiguity is whether the statute, when read in context, is susceptible to more than one reasonable interpretation.”

(Citations omitted.) *Fairchild Heights, Inc. v. Amaro*, 293 Conn. 1, 8-9, 976 A.2d 668 (2009).

Finally, the court must adopt a construction that makes a statute effective and workable. *Nizzardo v. State Traffic Commission*, 259 Conn. 131, 157, 788 A.2d 1158

(2002). “The law favors a rational statutory construction and we presume that the legislature intended a sensible result.” *Wiele v. Board of Assessment Appeals*, 119 Conn. App. 544, 551-52, 988 A.2d 889 (2010).

The first issue raised by the plaintiff is that the FOIC is a public agency and, as such, was required to determine the plaintiff’s indigence itself. While the plaintiff is correct that the FOIC, by § 1-200 (1) (A), is a public agency, and itself subject to FOIA, in this instance the records were not initially sought from the FOIC, nor was a waiver under § 1-200 (d) (1) requested from the FOIC. Rather, access to the records was sought from the town by a letter dated October 10, 2008. (ROR, p. 7). The FOIC exercised its jurisdiction only on receipt of the plaintiff’s notice of appeal on November 4, 2008.

§ 1-206 (b) (1).

The second issue raised by the plaintiff is that, while the FOIC has correctly required a standard to be set by the towns to determine indigency, one uniform standard should be adopted by the FOIC, rather than leaving the development of indigency standards to the individual towns. On the other hand, as the FOIC has set forth in its brief at 8 “[s]ince 1992, the Commission has interpreted this provision as giving each custodial public agency the discretion to set its own standard of indigence, as long as the standard is objective, fair and reasonable, and applied in a nondiscriminatory manner.” The brief sets forth six examples of such holdings in FOIC cases between October 1992 and February 2010.

The FOIC's position was reviewed and approved in *May v. Freedom of Information Commission*, Superior Court, judicial district of New Haven, CV 06 4011456 (April 30, 2007, *Schuman, J.*) There the court concluded that the FOIC decision "flows logically from the fact that each agency may, within certain legislative limits, set its own costs for copying and make decisions in at least one other situation about when to waive those costs. . . . In other words, the evident scheme of the statute is to leave the matter of collecting and waiving the costs of copying to the agency in question. Determining who is indigent is simply part of the task of determining when to waive costs." The court noted that the legislature had not amended § 1-212 (d) (2) in the face of the FOIC's interpretation suggested that the legislature had implicitly accepted the FOIC's interpretation. See also *Food Service Division v. Freedom of Information Commission*, Superior Court, judicial district of New Britain, CV 07 4014939 (April 30, 2008, *Schuman, J.*).

The court agrees that the FOIC, with the benefit of the Superior Court opinion in *May*, has correctly and logically interpreted the procedure the legislature intended for resolving a claim of indigency. Moreover, under *Dept. of Public Safety v. State Board of Labor Relations*, 296 Conn. 594, 599, 996 A.2d 729 (2010), the court concludes that the FOIC is entitled to deference in its interpretation as time tested and reasonable. The Supreme Court at 601 cited two cases as examples of "time tested"—*Curry v. Allan S.*

Goodman, Inc., 286 Conn. 390 (2008) (“when commission on human rights and opportunities had consistently interpreted [a statute] in thirteen decisions over twelve years, several of which had been adopted by various trial courts, interpretation was entitled to deference”) and *Hartford v. Hartford Municipal Employees Assn.*, 259 Conn. 251, 788 A.2d 60 (2002) (“deferring to interpretation of board to resolve possible ambiguity when board had presented evidence of consistent interpretation of statute for more than twenty-five years.”)¹

The court has reviewed the arguments of the plaintiff and concludes that the FOIC has not acted unreasonably, arbitrarily, illegally or in abuse of its discretion. Therefore the appeal is dismissed.



Henry S. Cohn, Judge

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As stated at oral argument, the court does not find that the FOIC has violated either the first amendment or the equal protection clause of the fourteenth amendment by allowing the towns to decide, under a non-discriminatory standard, who is eligible for a waiver of costs based on indigency. To the extent that the plaintiff claims that his access to the courts has been denied, the court replies that the FOIC appellate process is not equivalent to the judicial system, but was established by the legislature in the public interest. The scope of its powers is subject to the terms of its act. See *State v. State Employees' Review Board*, 231 Conn. 391, 406, 650 A.2d 158 (1994). The standard of review of equal protection claims based on indigency is that of a rational basis, *United States v. Krass*, 409 U.S. 434, 93 S. Ct. 631, 34 L. Ed. 2d 626 (1973); here the record supports the FOIC's determination that it is rational to allow each town to develop an indigency policy.