NO. HHB CV 09-5014688	:	STATE OF CONNECTICUT
OFFICE OF CORPORATION COUNSEL, CITY OF HARTFORD	:	SUPERIOR COURT
v.	:	JUDICIAL DISTRICT OF NEW BRITAIN
FREEDOM OF INFORMATION COMMISSION ET AL.	:	OCTOBER 12 , 2010

Memorandum of Decision

Unfortunately, this administrative appeal, which includes a record 228 pages long and briefs totaling 116 pages, concerns a copying fee of only $27.50, which neither side contends that it is unable to afford. But both sides stand on principle and therefore the court must decide this matter.

The plaintiff, the office of corporation counsel for the city of Hartford (the city), appeals from the decision of the defendant state freedom of information commission (the commission) ordering the city to provide defendants Paul Wright, Alex Friedmann, and Prison Legal News (the defendants) copies of requested records concerning a Superior Court case free of charge without collecting a copying fee. The court sustains the appeal and reverses the decision of the commission requiring the city to provide the requested records free of charge.

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I

The commission found, and the record establishes, the following facts. On September 22, 2008, defendant Friedmann, as associate editor of the Prison Legal News, requested the City to provide a "copy of the complaint (or last amended complaint) and the court's judgment/verdict in *Estate of Thomas v. City of Hartford*, Hartford Superior Court, Case No. HHD-CV-05-500-12223" and a copy of any "attorney fee/costs award" issued in the case. (Return of Record (ROR), p. 80.) Apparently, the *Thomas* case concerned the suicide death of an inmate in a Connecticut holding facility and the defendants sought to publish an article about it. (ROR, p. 82.) The city replied that there were fifty-five pages of records and that the copying fee was $27.50. The defendants then requested a fee waiver, asserting that Prison Legal News was a non-profit media agency and that its reporting was for the benefit of the public. (ROR, pp. 79-80.)

On October 2, 2008, the city denied the requested fee waiver for the following reason: "[T]he information requested in this case is readily available to the public. The Hartford Courant (and perhaps other sources) reported on the outcome of the case and the complaint and the judge's decision are available to anyone at the Hartford Superior Court." (ROR, p. 78.)[1] Although the defendants took no immediate action, they renewed

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[1] The city also denied the request to provide the documents in electronic format, but that denial is not a subject of this appeal. (ROR, pp. 77, 219.)

their request for the records and a fee waiver on December 18, 2008, so that they could properly appeal if it were denied. The city again denied the fee waiver and the defendants promptly appealed to the commission. (ROR, pp. 81-82.)

At a hearing before a commissioner, a city attorney testified in essence that the reasons for the fee waiver denial included the fact that the documents were already public, that other newspapers had already reported on the decision, and that the city was in a financial crisis and received many freedom of information requests. (ROR, pp. 110-11.)[2] The commissioner's proposed decision focused on General Statutes § 1-212 (d) (3), which provides that a public agency shall waive any fee for records when "[i]n its judgment, compliance with the applicant's request benefits the general welfare." The commissioner found that the city had determined that the request would not benefit the general welfare and that the decision was "within the discretion of the [city]." (ROR, p. 141.)

The full commission, however, did not accept the proposed decision. The

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Although the city attorney did not specifically identify these factors as the basis for the city's decision to deny a waiver, the testimony concerning these factors immediately followed questions as to whether the city had made a decision about a fee waiver and what it had decided. Thus, it is a reasonable inference that the city considered these factors in denying the fee waiver. Some of them, in any event, duplicate the reasons given on October 2, 2008. With regard to the financial concerns of the city, such matters are invariably involved in fee waiver decisions and thus testimony on that point was not necessary.

commission found that the city did not take into consideration the purpose for which the information is sought or the benefit to the public from its disclosure and publication. It expressed the concern that the financial reasons asserted by the city would lead to denials of all fee waivers. The commission therefore concluded that the city had no "objective, fair, or reasonable basis" for denying the fee waiver request and that it had abused its discretion in doing so. (ROR, pp. 218-219.)

The city appeals.

II

General Statutes § 4-183 (j) governs this court's review of the merits of an agency's decision. This section provides that "[t]he 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: (1) In violation of constitutional or statutory provisions; (2) in excess of the statutory authority of the agency; (3) made upon unlawful procedure; (4) affected by other error of law; (5) clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record; or (6) arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion. If the court finds such prejudice, it shall sustain the appeal and, if appropriate, may render a judgment under

subsection (k) of this section or remand the case for further proceedings. For purposes of this section, a remand is a final judgment." Stated differently, "[j]udicial 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." (Internal quotation marks omitted.) *Schallenkamp v. DelPonte*, 229 Conn. 31, 40, 639 A.2d 1018 (1994). "[A]n agency's factual and discretionary determinations are to be accorded considerable weight by the courts. . . . Cases that present pure questions of law, however, invoke a broader standard of review than is ordinarily involved in deciding whether, in light of the evidence, the agency has acted unreasonably, arbitrarily, illegally or in abuse of its discretion." (Internal quotation marks omitted.) *Longley v. State Employees Retirement Commission*, 284 Conn. 149, 163, 931 A.2d 890 (2007).

III

Under the Freedom of Information Act, General Statutes § 1-200 et seq. (FOIA), the fee for a copy of any public record provided by a public agency, other than a state agency, shall not exceed fifty cents per page. General Statutes § 1-212 (a) (2).[3]

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[3] Section 1-212 (a) provides: "Any person applying in writing shall receive, promptly upon request, a plain or certified copy of any public record. The fee for any copy provided in accordance with the Freedom of Information Act: (1) By an executive, administrative or legislative office of the state, a state agency or a department, institution, bureau, board, commission, authority or official of the state, including a committee of, or created by,

Subsection (d) of § 1-212 nonetheless provides that "[t]he public agency shall waive any fee provided for in this section when . . . (3) [i]n its judgment, compliance with the applicant's request benefits the general welfare."[4] The ultimate issue before the commission was whether the city properly applied this subsection.

Statutory construction must focus initially on the language of the statute. See *Chief of Police v. Freedom of Information Commission*, 252 Conn. 377, 386, 746 A.2d 1264 (2000). The phrase "in its judgment" in § 1-212 (d) (3) is not uncommon in our statutes governing administrative agencies. See General Statutes § 8-23 (a) (1) (zoning commission may enact plan of redevelopment and improvement for districts that, "in its

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such an office, agency, department, institution, bureau, board, commission, authority or official, and also including any judicial office, official or body or committee thereof but only in respect to its or their administrative functions, shall not exceed twenty-five cents per page; and (2) By all other public agencies, as defined in section 1-200, shall not exceed fifty cents per page. If any copy provided in accordance with said Freedom of Information Act requires a transcription, or if any person applies for a transcription of a public record, the fee for such transcription shall not exceed the cost thereof to the public agency."

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Section 1-212 (d) provides: "(d) The public agency shall waive any fee provided for in this section when: (1) The person requesting the records is an indigent individual; (2) The records located are determined by the public agency to be exempt from disclosure under subsection (b) of section 1-210; (3) In its judgment, compliance with the applicant's request benefits the general welfare; or (4) The person requesting the record is an elected official of a political subdivision of the state and the official (A) obtains the record from an agency of the political subdivision in which the official serves, and (B) certifies that the record pertains to the official's duties."

judgment" contain special problems or opportunities); § 16-17 (department of public utility control to examine all accidents that, "in its judgment" require investigation); § 51-91 (a) (State-Wide Grievance Committee may subpoena any books or papers which, "in its judgment" may be relevant). The phrase appears once elsewhere in the FOIA. See General Statutes § 1-202 (FOIC, "in its judgment," may exempt certain public agencies from FOIA requirements.) There is no dispute that the use of the phrase "in its judgment" means that the agency has discretion in making a decision. See *Cunningham v. Planning & Zoning Commission*, 90 Conn. App. 273, 284-85, 876 A.2d 1257, cert. denied, 276 Conn. 915, 888 A.2d 83 (2005) (zoning regulation providing that commission may modify buffer and screening requirements if "in its judgment" the requirements are impractical means that commission "has the discretion" to determine screening and buffering area).[5]

In construing statutes such as the FOIA, court must also look to the "legislative policy it was designed to implement." (Internal quotation marks omitted.) *Chief of Police v. Freedom of Information Commission*, supra, 252 Conn. 386. The overarching purpose of the FOIA is to "facilitate public access to government records by making such

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[5] There is also no dispute that the phrase "applicant's request" in § 1-212 (d) (3) refers to the request for a fee waiver rather than the underlying request for records. Therefore, under the statute, the judgment that the agency must exercise concerns whether the applicant's request for a fee waiver, not the request for records, benefits the general welfare.

records available at a reasonably low cost." *Williams v. FOIC*, 108 Conn. App. 471, 484-85, 948 A.2d 1058 (2008). But "[t]he goal of public access is not the only concern addressed in the statute. Instead, by shifting some of the financial burden onto the requestor through the fee schedule provisions, the legislature has also manifested a second concern, namely, not to overburden agencies with the expense of complying with the act." Id., 485.

Our appellate courts have not yet had an opportunity to interpret or review the application of § 1-212 (d) (3). "[T]he traditional deference accorded to an agency's interpretation of a statutory term is unwarranted when the construction of a statute . . . has not previously been subjected to judicial scrutiny [or to] . . . a governmental agency's time-tested interpretation. . . . Consequently, an agency's interpretation of a statute is accorded deference when the agency's interpretation has been formally articulated for an extended period of time, and that interpretation is reasonable." *Longley v. State Employees Retirement Commission*, supra, 284 Conn. 163-64.

A review of FOIC decisions reveals that, for over twenty years, FOIC has taken a highly deferential position toward review of public agency fee waiver decisions. From the earliest case in 1987 to the present, the FOIC has looked primarily to determine simply whether the public agency exercised its judgment in determining whether a fee waiver was in the public interest. As long as the agency exercised some judgment in

making the decision, the commission has not questioned that judgment. See *Graboski v. First Selectman, Tax Collector and Assessor of the Town of Simsbury,* Freedom of Information Commission, Docket No. FIC 1987-098 (July 8, 1987) ("It is found that the respondents did not make a judgment that compliance with the complainant's request benefitted the general welfare and that, therefore, their failure to waive copying fees did not violate § 1-15, G.S.");[6] *Tegeler & Connecticut Civil Liberties Union Foundation v. Connecticut Housing Finance Authority,* Freedom of Information Commission, Docket No. FIC 1997-081 (December 10, 1997) (respondent's decision that complainants' request "would not benefit the public welfare" and that "if [it] were required to waive fees on the grounds argued by the complainants [it] would have to waive the fees for all advocacy groups" was "neither arbitrary nor capricious."); *Anderson v. Assessor, Office of Assessor, Town of Old Saybrook*, Freedom of Information Commission, Docket No. FIC 1998-067 (July 8, 1998) ("It is concluded that the judgment concerning benefits to the general welfare, and the resulting waiver of fees, pursuant to § 1-15(d)(3), G.S., is in the sole discretion of the respondents."); *Pillarella v. Middletown Town and City Clerk*, Freedom of Information Commission, Docket No. FIC 92-331 (May 26, 1993) ("It is found that the respondent exercised his judgment to deny the fee waiver in good faith, and the Commission finds nothing in this case to cause it to second guess that

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Section 1-15 was the precursor to General Statutes § 1-212 (d) (3).

judgment."); *Fromer v. Goebel, Chief Operation Officer,* Freedom of Information Commission, Docket No. FIC 2000-126 (July 12, 2000) ("it is concluded that nothing in § 1-212(d)(3), G.S., authorizes the Commission to require that the respondent waive copying fees once the respondent has determined that compliance would not benefit the public interest."); *Yaremich & New Haven Register v. Board of Fire Commissions,* Freedom of Information Commission, Docket No. FIC 2006-680 (June 13, 2007) ("It is concluded that the judgment concerning the benefits to the general welfare, and the resulting waiver of fees, pursuant to § 1-212(d)(3), G.S., is within the discretion of the respondent."); *Brown & The Connecticut Post v. Chief, Police Department, Town of Stratford*, Freedom of Information Commission, Docket No. FIC 2007-154 (February 27, 2008) ("It is found that § 1-212(d), G.S., vests the discretion to determine whether compliance with the complainant's request benefits the general welfare with the respondent, and that the respondent did not abuse his discretion by declining to make such a determination.").

In the present case, FOIC found that the city had no "objective, fair, or reasonable basis" for denying the defendants' fee waiver. (ROR, p. 219.) While determining whether the public agency has an "objective, fair, or reasonable basis" for a fee waiver decision does not necessarily deprive the agency of all discretion in making the decision, the standard of "objective, fair, and reasonable basis" is apparently one that the commission had not used

before this case in reviewing a decision under subsection (d) (3). Rather, the commission and the court had applied that standard in assessing the validity of fee waivers under subsection (d) (1) of section 1-212. See *May v. Freedom of Information Commission*, Superior Court, Judicial District of New Britain, Docket No. HHB CV 06-4011456 (April 30, 2007, *Schuman, J.)* Subsection (d) (1) provides that the agency shall waive the copying fee when "[t]he person requesting the records is an indigent individual." It does not contain language, as does (d) (3), explicitly providing that the agency shall decide the matter "in its judgment." Thus, there is a basis for greater FOIC review of a decision under (d) (1) than one under (d) (3). The standard of "objective, fair, and reasonable" is hence unnecessary in reviewing fee waiver decisions under (d) (3).

The commission also found that the city "did not take into consideration the purpose for which the information was sought or the benefit to the public from its disclosure and publication." (ROR, p. 218.) Subsection (d) (3), however, nowhere requires this analysis, but instead only requires the public agency to exercise its own judgment as to whether compliance with a fee waiver request "benefits the general welfare." "The FOIA does not require that the Commission or this court embark upon an analysis of an [applicant's] motive for requesting certain information." *Croughwell v. Freedom of Information Commission*, Superior Court, Judicial District of New Britain, Docket No. CV 98-0492638 (May 7, 1999, *McLachan, J.*). Requiring public agencies to articulate these nonstatutory criteria will

inevitably lead to the commission's questioning of the agency's judgment on highly subjective issues concerning the importance to the public of the disclosure request. Such close scrutiny goes well beyond the highly deferential review contemplated by the statute and traditionally employed by the commission. Further, in many cases the agency will simply lack sufficient information to determine the purpose for the disclosure or the benefit of disclosure to the public.

The city's rationale in denying the fee waiver was essentially two-fold. First, it concluded that the court complaint sought by the defendants was already public and the subject of newspaper articles. The complaint, of course, was part of the public records of the superior court. See *Clerk of the Superior Court v. Freedom of Information Commission*, 278 Conn. 28, 42-43, 895 A.2d 743 (2006).[7] The city thus rationally concluded that this case was not one in which a fee waiver would put something in the public domain that was previously unknown or difficult to obtain.[8]

Second, the city had concerns about the financial impact of the many FOIA requests it received given that the city itself was in a financial crisis. Contrary to the defendants'

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[7] It is unclear why the defendants sought to obtain a court complaint from the city rather than from the court.

[8] Contrary to the defendants' suggestion, the city did not have to determine whether an article published in the Prison Legal News benefited the general welfare, but rather only whether it would benefit the general welfare to provide a copy of the court complaint free of charge. See note 5 supra.

arguments, this concern was fully legitimate. As stated, the legislature sought in FOIA "not to overburden agencies with the expense of complying with the act." *Williams v. FOIC*, supra, 108 Conn. App. 484-85. There is no dispute that the defendants were not indigent and could afford the $27.50 copying fee in this case. Hence, the city could grant public access to the document in question and, at the same time, avoid adverse financial consequences in future cases by disclosing the document and then declining to waive the copying costs. Such an approach is fully in keeping with the spirit of the FOIA. Id.

Thus, the city did exactly what it was supposed to do - exercise its judgment as to whether a waiver of the copying fee benefitted the general welfare. The city reasonably concluded that a fee waiver was not necessary to put the requested records into the public domain.[9] The commission had no authority to substitute its judgment for that of the city or to second guess the city's decision. Therefore, the commission's decision was in excess of its statutory authority and cannot stand. See General Statutes § 4-183 (j) (2).

In view of this conclusion it is unnecessary to reach the other arguments advanced by the city.

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Accordingly, even if the FOIC had authority to review whether the public agency's decision was "objective, fair, or reasonable," the city's decision would meet the test.

IV

For the foregoing reasons, the court sustains the appeal and reverses the decision of the commission requiring the city to provide a copy of the requested records free of charge.

It is so ordered.

(Schuman, J.)

Carl J. Schuman
Judge, Superior Court

STEPHEN GOLDSCHMIDT
COURT OFFICER