HHB-CV-11-6009271S	:	**SUPERIOR COURT**
PAUL J. GARLASCO	:	**J.D. OF NEW BRITAIN**
V.	:	**AT NEW BRITAIN**
FREEDOM OF INFORMATION COMMISSION	:	**FEBRUARY 2, 2012**

MEMORANDUM OF DECISION

This is an administrative appeal from a decision of the Freedom of Information ("FOI") Commission brought pursuant to Conn. Gen. Stat. §§1-206(d) and §4-183(b). The plaintiff seeks review of the decision of the FOI Commission in Paul Garlasco v. First Selectman, Town of Bridgewater; and Town of Bridgewater, Docket #FIC 2010-062.

In Docket #FIC 2008-609, Paul Garlasco v. Amy Allingham, Treasurer, Town of Bridgewater, and Docket #FIC 2009-583, Paul Garlasco v. Amy Allingham, Treasurer, Town of Bridgewater, the FOI Commission adjudicated two matters pertaining to requests by the plaintiff to the Town of Bridgewater ("town") for copies of cancelled checks written off the Burnham Fund account during the preceding several years. In each of these two matters, the Commission found that the town did not maintain those records.

On January 21, 2010, the plaintiff again requested from the town copies of the cancelled checks written off the Burnham Fund account, but this time, asked that the first selectman "print out the front and back of all checks for the period January 1, 2000 to the present....from online access." (R. 222). The plaintiff further requested: "[f]or years prior to UBS, please simply provide me with a release so I may acquire the copies at my own expense." (R. 222)

By email, dated January 25, 2010, the town acknowledged the request, informed the plaintiff that a search for responsive records would be conducted, and that the plaintiff would be notified if any such records were located. (R. 223). The town further informed the plaintiff that it did not have the ability to simply "print out the check[s]" from online access, but offered to, and did, contact UBS, which, at one time managed the account, to ask whether UBS maintained the documents the plaintiff was seeking and whether such documents could be obtained from UBS. (R. 365). To the extent the plaintiff sought a release from the town to permit him to acquire documents directly from UBS, the town denied such request. (R. 365).

On February 2, 2010, the plaintiff appealed to the Commission, claiming that the town violated the FOI Act by failing to comply with the request. (R. 1).

A contested case hearing in this matter was held on September 30, 2011 and October 29, 2011. (R. 22). At such hearing, the first selectman's assistant, testified unequivocally that because of security concerns, the town had, at no time, established an online banking relationship with any financial institution, and that therefore the town did not have the ability to "print out checks from online access," as requested by the plaintiff. (R. 166-167). However, after receiving the plaintiff's request, the town contacted UBS, and determined that, although the town's UBS account was closed, UBS still had computer access to checks

written off the Burnham Trust account, but only for the preceding eighteen months. (R. 365). UBS provided to the town copies of the two cancelled checks that were written off the Burnham Fund account during that eighteen month period, and the town, in turn, provided such documents to the plaintiff. (R. 366-368). In addition, the plaintiff subpoenaed to the hearing in this matter a representative from Merrill Lynch, the institution that managed the Burnham Trust account subsequent to UBS. (R. 40). The representative provided, to both the plaintiff and the town, copies of eight cancelled checks drawn off the Burnham Fund account. (R. 59, 279).

At the hearing in this matter, the plaintiff contended that the town could have established and is required by law to establish and maintain an online banking relationship with its "broker," and, had it done so, it would have had access to the cancelled checks, copies of which the town then could have printed out from its computer and provided to him. (R. 119, 152). The plaintiff claimed the town's decision not to set up online banking with its financial institution violated Conn. Gen. Stat. §1-211, and resulted in the denial of access by the public to the requested records. (R. 210-212).

Based upon the substantial evidence presented at the hearing, the hearing officer found that: the town does not maintain copies of the cancelled checks; does not now have, nor has it ever had, an online banking relationship with its financial institution; and that the town is not required by Conn. Gen. Stat. §1-211 or the case law to establish or maintain an online banking relationship with its financial institution. (R. 383-384). The hearing officer concluded that the town did not violate the FOI Act as alleged in the complaint. (R. 385). The hearing officer gave serious consideration to, but declined to impose a civil penalty against the plaintiff, for filing the complaint with the Commission "frivolously, without reasonably grounds and solely for the purpose of harassing" the town. (R. 384-385).

At a special meeting on January 28, 2011, the Commission unanimously adopted the hearing officer's report (R. 439). On March 2, 2011, the plaintiff filed this appeal, claiming procedural error, and also, that the findings of fact and conclusions of law in the Commission's decision are erroneous.

Conn. Gen. Stat. §1-206(d) requires that appeals from decisions of the FOIC must be brought in accordance with Conn. Gen. Stat. §4-183(j), which provides that:

> The court shall not substitute its judgment for that of the agency as to the weight of 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 provision; (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 record; or (6) arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion. (Emphasis added).

The court may not substitute its judgment for that of the agency as to the weight of evidence on questions of fact. Conn. Gen. Stat. §4-183(j). A reviewing court is required to defer to the subordinate facts found by the Commission, if there is substantial evidence to support those findings. Dufraine v. Commission on Human Rights & Opportunities, 236 Conn. 250, 259, 673 A.2d 101 (1996); Newtown v. Keeney, 234 Conn. 312, 319-20, 661 A.2d 589 (1995).

The reviewing court should not retry the case and should uphold the agency's decision if reasonably supported by the evidence. Caldor Inc. v. Mary M. Heslin, Commissioner of Consumer Protection, 215 Conn. 590, 596 (1990); cert. denied, 498 U.S. 1088 (1991),

Madow v. Muzio, 176 Conn. 374, 376 (1978); C&H Enterprises, Inc. v. Commissioner of Motor Vehicles, 176 Conn. 11, 12-13 (1978); Williams v. Liquor Control Commission, 175 Conn. 409, 414 (1978). The question to be answered by a reviewing court is not whether the court would have reached the same conclusion, but whether the record before the administrative agency supports the action taken. Hospital of St. Raphael v. Commission on Hospitals and Health Care, 182 Conn. 314, 318 (1980). The "substantial evidence" standard requires that the administrative decision be upheld "[i]f the administrative record provides a "substantial basis of fact from which the fact in issue can be reasonably inferred." Adriani v. Commission on Human Rights and Opportunities, 200 Conn. 307, 315 (1991); Lawrence v. Kozlowski, 171 Conn. 705, 713 (1976), cert. denied, 431 U.S. 969 (1977). Specifically concerning questions of law, the Connecticut Supreme Court has long held that, when reviewing agency decisions, the courts should "accord great deference to the construction given [a] statute by the agency charged with its enforcement." Perkins at 165; Ottochian v. FOIC, 221 Conn. 393 (1992); Board of Trustees of Woodstock Academy v. FOIC, 181 Conn. 544 (1980); Anderson v. Ludgin, 175 Conn. 545, 555 (1978); Corey v. Avco-Lycoming Division, 163 Conn. 309, 326 (1972) (Loisell, J. concurring); Clark v. Town Council, 145 Conn. 476, 485 (1958); Downer v. Liquor Control Commission, 134 Conn. 555, 561 (1948). In fact, the practical interpretation of legislative acts by governmental agencies responsible for their administration is not only a "recognized aid to statutory construction". Local 1186 v. Board of Education, 182 Conn. 93, 105 (1980); Jones v. Civil Service Commission, 175 Conn. 504, 508 (1978). It is also "high evidence of what the law is." Board of Trustees of Woodstock Academy v. FOIC, *supra* at 552.

While pure questions of law do invoke a broader standard of review, State Board of Labor Relations v. FOIC; State Board of Mediation and Arbitration v. FOIC, 244 Conn. 487,

493-494 (1998); Connecticut Light & Power Co. v. Texas-Ohio Power, Inc., 243 Conn. 635, 642-644 (1998), where a statutory provision is subject to more than one plausible construction, the one favored by the agency charged with enforcing the statute will be given deference. Bridgeport Hospital v. Commission on Human Rights & Opportunities, 232 Conn. 91, 110 (1995); Starr v. Commissioner of Environmental Protection, 226 Conn. 358, 376 (1993). "[W]hen an agency must make a case-by-case determination of matters that fall within the department's expertise, a deferential standard of review is proper even if the particular legal issue is a novel one." Rudy's Limousine Service, Inc v. Department of Transportation, 78 Conn. App. 80, 94 (2003). Even where an agency's interpretation on an issue of law has not previously been subject to judicial review, if the agency's interpretation of its statute is "time-tested and reasonable," it deserves deference from a court. Longley v. State Employees Retirement Commission, 284 Conn. 149, 166 (2006).

Plaintiff claims that the Commission's factual finding that the town does not maintain copies of the requested checks is erroneous. (Pl. Br. at 1). The plaintiff appears to raise on appeal is not whether the town actually, physically, maintains copies of the requested records, which factual issue was adjudicated by the Commission on two prior occasions, but rather whether the town is legally required to establish and maintain an online banking relationship with the financial institution managing the Burnham Fund account, which would enable the town to print out copies of the requested cancelled checks from its computer. The focus of this appeal is limited to the plaintiff's argument that the Commission improperly interpreted Conn. Gen. Stat. §1-211 as applied to the facts of this case.

The plaintiff incorrectly argues that Conn. Gen. Stat. §1-211 requires a public agency to establish and maintain an online banking relationship with its financial institution. There is nothing in the plain language of that statute that would require a public agency to do so.

Conn. Gen. Stat. §1-211 subsection (a) clearly states that the statute applies only to public records that are maintained in the public agency's computer storage system. Because the town, in the present case, does not maintain the requested records in its computer storage system, it is not required by Conn. Gen. Stat. §1-211(a) to provide copies of such records from such computer storage system. In addition there is nothing in subsection (a) that requires a public agency to acquire public records, via an online relationship with its broker.

The plain language of Conn. Gen. Stat. §1-211(b) and (c) does not support the plaintiff's interpretation that the town is obligated to engage in online banking. Subsection (b) provides that a public agency may not enter into a contract with any person if such contract impairs the right of the public under the Freedom of Information Act to inspect or copy the agency's nonexempt public records existing on-line in, or stored on, a device or medium used in connection with its computer system. The language of subsection (b) clearly applies only to records existing in the public agency's computer system. The uncontroverted testimony at the hearing was that the town does not maintain the requested cancelled checks in its computer system, nor did it ever have online access to the cancelled checks via an online banking relationship with its financial institution. There is no evidence in the record regarding the town having acquired a computer system, equipment or software, and nothing requires a town to acquire a computer system, equipment or software, or to establish an online banking relationship with its broker.

In each of the cases relied on by the plaintiff, the requester sought information or records already existing and maintained in the public agency's computer database. The issue before the courts was the cost of programming and/or formatting the database containing the information or records, so that the requester could obtain such information or records in the

desired format. These cases are obviously inapposite to the issue in the present case. The plaintiff has cited no authority that supports his interpretation of Conn. Gen. Stat. §1-211.

There is ample and substantial evidence in the record on which the findings of fact have reasonably been based. The Commission's conclusion that Conn. Gen. Stat. §1-211 is not applicable to the present case is reasonable and is supported by the plain language of that statute. The appeal is dismissed.

By the Court,

Owens

OWENS, J.T.R.