

Government Administration and Elections Committee  
13 FEB 15 Public Hearing Testimony  
RHB 6905

Testimony of David Godbout, 15 Cardinal Rd., East Lyme, CT 06333

## **SUPPORT RB 6905**

Objective of RHB 6905: To allow recovery of costs to litigants who are successful in a Freedom of Information Case proceeding seeking an order of a court to order the FOI Commission to hear a case

### **Reasons To Support**

#### **Introduction**

Our Freedom of Information Act generally requires the FOI Commission to hear cases that come before it.

CGS Sec. 1-206 also has provisions to allow the commission not to hear cases in which the commission finds either of three issues are associated with a case including:

- 1) Abuse of the commission's process
- 2) An injustice would be associated with holding a proceeding
- 3) The commission does not have jurisdiction to hear the case

Upon the commission making a finding of any or a combination of the three reasons the commission will not hear a case.

There is also a procedure to have a court review such a decision by the FOI Commission. The proceeding is not an appeal under CGS Sec. 1-184 but analogous to a writ of mandamus; its a petition for an order from the court to order the commission to hear a case that it previously ruled that a case was found to be contained in at least one of the exceptions for the commission to hear cases under the FOI Act.

Under our current FOI Act, such a petition, if a citizen is successful, does not allow for the recovery of any costs, either filing fees or attorney costs if a citizen is successful. This is different than with a successful appeal of a citizen to an administrative agency's decision.

The court hears arguments and bases its decision using the same requirements as with an appeal; that is, if any evidence has been brought up in the administrative hearing that supports the finding of the agency, the court will not substitute its judgment but must find for the agency. It is a high bar for a successful case for a citizen seeking an order of the court to order a hearing to be held at the FOI Commission.

One would think that such cases have a low chance of a citizen litigant winning such a case; after all, the executive director of the commission (required to be a licensed attorney) must first have a reason to believe that one of the three situations are associated with a case (abuse, injustice, or a jurisdictional issue is present). A hearing is then held before the full FOI Commission to make findings and decide that such matters is initiated by the commission itself, through the actions of the executive director of the commission, should not go forward.

The "reason to believe" is a high bar itself, akin to probable cause in criminal cases; more than a guess or personal opinion must be present but solid evidence of a case having one of the three issues being present.

However, CGS Sec. 1-206's provisions that allow the FOI Commission to decide not to hear a case was written, I would presume, that the parties involved with such a decision not to schedule cases, namely the executive director and the full commission itself, would follow the law, insure due process to litigants, and comply with Superior Court decisions in respect to the examination of these issues.

Yet the FOI Commission and its executive director have not shown the ability to properly decide these types of cases before it.

Examples of such improper decisions have been shown in Superior Court, in a series of 2013 cases incorporated into the New Britain case CV-13-5105870-S, filed in 2013 and decided in 2014.

In the series of FOI Cases that were the subject of petitions of the court to order hearings in matters before the FOI Commission, the court rejected the arguments of the FOI Commission. During this case the FOI Commission claimed:

1) that the executive director him/herself can decide what cases can be subject to a hearing on his/her own judgment

2) that the FOI Commission does not need to even hold hearings to decide not to schedule a case for a hearing ~ ie, they can just let a case languish (and after 1 yr, a citizen would have no appeal rights at all)

3) that the commission can limit the number of appeals that a citizen can file (ie a citizen files records requests and gets no responses then the citizen can only file a few cases ~ even though he is seeking all different types of records)

4) that the FOI Act limits the number of records a citizen may view

Of course, the judge in the 2013 case ruled that the reasons noted above are not reasons that can be used to support abuse, injustice, or jurisdictional issues. The judge also noted violations of due process of the FOI Commission during the proceedings of the FOI Commission.

The judge ordered hearings in many cases that the FOI Commission decided not to hear and rejected all of the arguments of the FOI Commission.

And the FOI Commission has refused to accept the judge's decision in respect to many reasons that the FOI Commission decided not to hear cases upon and continues to repeatedly state as reasons for not hearing cases, the same reasons that the court had already rejected in many other cases.

The FOI Commission still believes that it can decide not to hear cases because a person has another case pending before it; an argument that the court rejected already. How do we know this? Because even today, the FOI Commission through its executive director still lists this as the main reason for not scheduling cases filed before it, regardless of the merits of the cases before it.

Many cases involve citizens asking for records from an agency and never even getting a response, resulting in a complaint being filed by the requester to the FOI Commission. And this is required under the law, a citizen has no choice but to either file a complaint with the FOI Commission or abandon his quest to inspect public records in respect to the record request.

It seems as if the FOI Commission is forcing people to abandon obtaining records when such cases are decided not to be heard; it costs money to seek an order of the court, thousands of dollars, tens of thousands of dollars possibly. Just to get a hearing on a simple administrative case wherein the FOI Commission rules in direct conflict with a previous court decision.

To the FOI Commission its a game of attrition; make it too expensive for the public to obtain records and records will remain unknown to the public.

The FOI Commission has used CGS Sec. 1-206's provision to be able not to hear cases inappropriately and for reasons that the courts have found not to be acceptable. The FOI Commission ignores the courts and continues today to do so and will continue to do so unless some barrier is put up to prevent wholesale denial of access to public records and public meetings.

Allowing litigants who are successful in the petitions authorized under the law to seek out an order of the court to hold hearings is the only method to insure that the FOI Commission will think twice before violating its responsibility to hold hearings in matters before it. It is why the FOI Commission exists; to ignore the courts, common sense, and to state and make decisions not to schedule cases on grounds that a court, using the most protective standard to the FOI Commission's benefit, that result in adverse orders regarding the FOI Commission's behavior is one method to insure that litigants who are treated in such a manner (usually citizens seeking access to records that have been met with a denial of access to public records) at least can get relief from the costs associated with righting a clear wrong done upon them by the FOI Commission.

To reiterate, costs and fees are not currently recoverable to a successful citizen who seeks and wins an order of the court to order the FOI Commission to hold a hearing.

And the FOI Commission is deciding cases and not hearing cases simply to lower its burden in complying with the FOI Act (as they are tasked under the Act with hearing complaints); citizens have a right to have their cases heard.

Right now, today, the FOI Commission believes that citizens have no right to have their cases heard and a person seeking records is limited to the number of records one can view (since they are limited to the number of complaints one can file). However, courts have ruled time and time again - the Act is a burden upon an agency but it is one an agency must bear if we are to live in a free society. The FOI Commission is no exception.

Currently, the FOI Commission is ruling not to hear cases because they deem complaints to be abusive in for reasons that do not meet the standard of abuse and in cases where the reasons for abuse claimed by the FOI Commission have been clearly and expressly found by a court to be not abusive under the FOI Act 1-206's provisions in several administrative case decisions' the court ordered the FOI Commission to hear cases and ruled that none of the reasons argued by the commission had merit. Yet the commission continues on re-citing the same reasons for not scheduling cases that the court has rejected.

This bill offers some relief to citizens who have encountered the improper actions of the FOI Commission. Recommend ADOPTION OF BILL INTO LAW.

Submitted by; David Godbout 15 Cardinal Rd East Lyme, CT 06333