

**FREEDOM OF INFORMATION COMMISSION STATEMENT IN OPPOSITION TO  
RAISED BILL 6905, AN ACT CONCERNING THE AWARDING OF COSTS FOR  
APPEALS UNDER THE FREEDOM OF INFORMATION ACT.**

**March 2, 2015**

The Freedom of Information (“FOI”) Commission (“Commission”) opposes Raised Bill 6905, which would amend the FOI Act to require the Commission to pay attorney’s fees to a complainant who prevails in an appeal against the Commission.

The Commission objects on several grounds. First, the proposal does not define the term “complainant.” It appears that the term “complainant,” as used in the proposal, is intended to refer to a plaintiff/appellant who successfully appeals a decision of the Commission *to the court*. However, the term “complainant” typically refers to an individual who appeals a denial of access to public records or public meetings *to the Commission*; therefore, the proposal is unclear. Second, if, as it is assumed, the proposal pertains to appeals of Commission decisions to the court pursuant to the Uniform Administrative Procedure Act (Conn. Gen. Stat. §4-166 et seq.) (“UAPA”), such proposal is unnecessary as it duplicates a provision already contained in the UAPA at Conn. Gen. Stat. §4-183(l), which provides that:

[i]n all appeals taken under this section, costs may be taxed in favor of the prevailing party in the same manner, and to the same extent, that costs are allowed in judgments rendered by the Superior Court. No costs shall be taxed against the state, except as provided in section 4-184a.

Conn. Gen. Stat. §4-184a(b) provides, in relevant part, that:

[i]n any appeal by an aggrieved person of an agency decision taken in accordance with section 4-183 and in any appeal of the final judgment of the Superior Court under said section taken in accordance with section 51-197b, the court may, in its discretion, award to the prevailing party, other than the agency, reasonable fees and expenses in addition to other costs if such prevailing party files a request for an award of reasonable fees and expenses within thirty days of the issuance of the court’s decision and the court determines that the action of the agency was undertaken without any substantial justification.

“Reasonable fees and expenses” is defined in Conn. Gen. Stat. §4-184a(2), to include attorney’s fees.

The major difference between the existing attorney’s fees provision in Conn. Gen. Stat. §4-183(l), and the one contained in the proposal, is that, under Conn. Gen. Stat. §4-183(l), a prevailing party may collect attorney’s fees from a state agency only where the court determines that the agency’s action was undertaken “without any substantial justification.” Under the proposal, a plaintiff/appellant apparently would be entitled to attorney’s fees in all cases in which he or she “prevails.”

Although the “without any substantial justification” limitation in Conn. Gen. Stat. §4-183(l) creates a somewhat high hurdle to obtaining attorney’s fees from a state agency, it is an appropriately high hurdle, first, because, with respect to the Commission, it is an adjudicatory body that has an obligation to apply and interpret the law. It should not feel pressure to decide a case based upon a best guess as to how a court would decide the case on appeal, in an effort to avoid being taxed attorney’s fees. Second, the limitation also makes sense in light of the state’s present budgetary issues. More specifically, and as a practical matter, the Commission does not have money in its budget to cover routine awards of attorney’s fees; in fact, its budget has been repeatedly cut over the past several years, resulting in fewer staff and longer waits for those seeking adjudication of their FOI complaints. Simply put, the Commission submits that neither it, nor the state, can afford routinely to pay attorney’s fees to prevailing plaintiffs/appellants. Limiting the award of attorney’s fees to situations in which a state agency acted “without any substantial justification,” is appropriate and reasonable.

Another difference between Conn. Gen. Stat. §4-183(l) and the proposal is that the former applies to appeals taken from all state agency decisions, but the proposal pertains only to appeals of FOI Commission decisions. If the proposal is to be adopted, in lieu of the existing attorney’s fees provision in Conn. Gen. Stat. §4-183(l), it should be amended to require *all* state agencies to pay attorney’s fees to prevailing plaintiff/appellants. It is unclear why the Commission is singled out in this proposal.

Third, the Commission objects to the proposal because the word “prevail” is unclear and the term “prevail against the Commission” is inaccurate. First, the word “prevail” is not defined in the proposal. Does this mean that the plaintiff/appellant must prevail on every issue raised in the appeal, or would it be enough if the plaintiff/appellant prevailed on only one issue? Further, whether or not the plaintiff/appellant “prevailed” in an appeal is an issue that potentially would create additional litigation, resulting in the expenditure of both the Commission’s and the courts’ scarce resources.<sup>1</sup> Moreover, the term “prevail against the Commission” implies, incorrectly, that the FOI is a party to the underlying dispute over access to public records or public meetings. Although an appeal to the court from a decision of the Commission is captioned, for example, John Smith v. Freedom of Information Commission and the Town of XYZ, the underlying dispute, even on appeal, is between the complainant and the public agency that allegedly denied the complainant’s rights under the FOI Act. Thus, the term “prevail against the Commission” is inaccurate and inappropriate.

For all of the above reasons, the Commission urges the legislature to leave the law as it now stands and reject Raised Bill 6905.

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<sup>1</sup> The Commission notes that attorney’s fees statutes in several other states use the term “substantially prevail.”