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CITY OF BRIDGEPORT ET AL. *v.* FREEDOM OF INFORMATION COMMISSION (AC 45287)

Bright, C. J., and Moll and Suarez, Js.

Syllabus

Pursuant to statute (§ 1-206 (a)), "[a]ny denial of the right to inspect or copy records provided for under section 1-210 shall be made to the person requesting such right by the public agency official who has custody or control of the public record, in writing, within four business days of such request . . . . Failure to comply with a request to so inspect or copy such public record within the applicable number of business days shall be deemed to be a denial."

Pursuant further to statute (§ 1-210), "(b) [n]othing in the Freedom of Information Act shall be construed to require disclosure of . . . (3) [r]ecords of law enforcement agencies not otherwise available to the public which records were compiled in connection with the detection or investigation of crime, if the disclosure of such records would not be in the public interest because it would result in the disclosure of (A) the identity of informants not otherwise known or the identity of witnesses not otherwise known whose safety would be endangered or who would be subject to threat or intimidation if their identity was made known . . . ."

The defendant Freedom of Information Commission appealed to this court from the judgment of the trial court sustaining the appeal filed by the plaintiffs, the Chief of Police of the Bridgeport Police Department, the Bridgeport Police Department, and the City of Bridgeport, from a final decision of the commission in connection with a complaint filed by D, who had been convicted of murder and was incarcerated. The final decision found that the plaintiffs violated the Freedom of Information Act (§ 1-200 et seq.) in handling D's request for records and ordered the plaintiffs to provide D with the requested records without certain redactions and to search for additional responsive records. In a letter dated August 6, 2019, D had requested, pursuant to statute (§ 1-212), copies of records in the police department's possession related to the criminal investigation of D and his criminal murder case. D's letter also requested that the plaintiffs respond to his request within fourteen days. By letter dated August 19, 2019, D filed a "notice of appeal" complaint with the commission, pursuant to statute (§ 1-206 (b) (1)), that the plaintiffs had not complied with his request of August 6, 2019. The complaint was received by the commission on August 20, 2019. By letter dated August 19, 2019, the Office of the City Attorney for the city responded to D's August 6, 2019 request, notifying him that they had received his August 6, 2019 request and would contact him in writing once the documents were available. On September 26, 2019, the plaintiffs filed an answer to D's complaint with the commission, asserting that the city attorney received D's request on August 19, 2019, and sent a letter to D acknowledging receipt the same day. The plaintiffs also noted in their answer to D's complaint that they were in the process of complying with D's request and would finish reviewing the documents for material exempt from disclosure by October 10, 2019. On November 13, 2019, the city attorney sent D's attorney the requested records. At a commission hearing on the merits of D's complaint, D informed the hearing officer that his attorney had received responsive documents from the plaintiffs but that the documents contained extensive redactions throughout. The hearing was continued to allow the plaintiffs to present testimony from a witness, J, a detective with the police department, regarding the plaintiffs' claimed exemptions from disclosure of the material that had been redacted. After the second hearing on the merits of the complaint, the hearing officer concluded that the plaintiffs violated the act by, inter alia, failing to conduct a thorough search for records responsive to D's request and redacting certain information. The hearing officer also concluded that the plaintiffs' failure to respond to D's request by August 12, 2019, constituted a constructive denial of the request by operation of § 1-206 (a). The commission approved the

hearing officer's decision, and the plaintiffs filed their administrative appeal with the trial court. The trial court concluded that the commission improperly determined that it had jurisdiction pursuant to § 1-206 (a) because no denial of D's request existed before August 26, 2019, at its earliest, as D's request directed the plaintiffs to respond within fourteen business days, and, because the plaintiffs did not receive D's request until August 19, 2019, the request could not have been deemed denied when D's complaint was received by the commission on August 20, 2019. In so concluding, the trial court interpreted the phrase "within four business days of such request" in § 1-206 (a) to mean four business days from the date that the request was received by the public agency. *Held*:

1. The trial court exceeded the scope of judicial review when it concluded that the commission lacked jurisdiction over D's complaint on the unpreserved issue regarding D's purported waiver of the four day response period set forth in § 1-206 (a), which was neither raised by the plaintiffs nor considered by the commission: because D alleged in his complaint a violation of the act, his complaint presented a claim that was within the class of cases that the commission had the authority and competence to decide; moreover, whether a complainant has been denied a right under the act went to the merits of every complaint before the commission and, thus, the denial of a request, either in fact or pursuant to § 1-206 (a), was an essential fact that went to the merits of the complaint before the commission and implicated the commission's authority to grant a complainant relief under the act, consequently, because the unpreserved issue regarding D's purported waiver of the four days to respond requirement did not implicate the commission's subject matter jurisdiction, the court improperly raised it on its own motion.
2. The commission could not prevail on its claim that its interpretation of § 1-206 (a) as authorizing an individual to file a complaint four business days after the date a request had been made was consistent with the plain language of the statute and was time-tested and reasonable: the commission's interpretation of § 1-206 (a) was not time-tested and had not been subject to judicial scrutiny and, thus, was not entitled to deference, as a review of the commission's published decisions revealed that its construction of the statute has varied and has been inconsistently applied, and, because the statute was silent as to whether a request made by mail and received on a later date would be considered denied four business days after the request was sent or after it was received, as opposed to a request made by a phone call or fax, which would be received the same day, the statute was ambiguous; moreover, the trial court's interpretation of § 1-206 (a) was proper because construing § 1-206 (a) to require that an agency receive a request before the four day period commences was consistent with the statute's emphasis on the agency's response, or lack thereof, to a request for public records; furthermore, this court concluded that, for purposes of determining whether a request sent by mail has been deemed denied pursuant to § 1-206 (a), the operative date is the date that the request was received by the public agency.
3. The trial court improperly sustained the plaintiffs' administrative appeal because the commission's finding that D's request was deemed denied pursuant to § 1-206 (a) before he filed his complaint on August 19, 2019, was reasonably supported by substantial evidence in the record: although the plaintiffs asserted that they did not receive D's request until August 19, 2019, they presented no evidence before the commission to rebut the presumption that D's request was received more than four business days before he filed his complaint with the commission, and, despite this lack of evidence, the trial court rejected the commission's conclusion that D's request was deemed denied on August 12, 2019, a conclusion the commission was entitled to make based on the presumption that a properly addressed letter had been delivered in a reasonable amount of time; moreover, the trial court, in reasoning that the commission's conclusion ignored the fact that the plaintiffs claimed that it did not receive D's request until August 19, 2019, relied on its understanding of mail from prisons and engaged in fact finding, as evidence of prison mail systems was not before the commission, and, thus, the trial court improperly substituted its assessment of the factual record for that of the commission, thereby exceeding the proper scope of judicial review.
4. The plaintiffs could not prevail on any of their alternative grounds for affirming the judgment of the trial court:

a. The plaintiffs could not prevail on their claim that the executive director of the commission violated the applicable statute (§ 1-206 (b) (2)) by failing to seek and obtain leave of the commission before scheduling a hearing on D's complaint; the executive director's decision to schedule a hearing on D's complaint was eminently reasonable, and the commission acted within the confines of its statutory authority by proceeding to investigate and adjudicate D's complaint, which was within the commission's jurisdiction, as the complaint alleged that the plaintiffs failed to comply with D's request; moreover, § 1-206 (a) required compliance with a request for public records, not merely assurances that the public agency would comply at some point in the future, and, in the present case, the plaintiffs conceded in their answer that they had not yet complied with D's request, not only at the time he filed his complaint, but also more than one month thereafter when the plaintiffs filed their answer, and the plaintiffs did not provide D's attorney with any responsive records until nearly three months after their August 19, 2019 letter acknowledging D's request, accordingly, under those circumstances, there was no basis for the executive director to question the commission's jurisdiction or to believe that docketing the complaint would perpetrate an injustice or constitute an abuse of the commission's administrative process, as set forth in § 1-206 (b) (2), as D still had not been provided copies of the records he sought at the time the plaintiffs filed their answer.

b. Contrary to the plaintiffs' claim, the commission did not abuse its discretion in failing to dismiss D's complaint without an evidentiary hearing; the plaintiffs' claim that, even if the commission correctly assessed its jurisdiction to hear D's complaint, § 1-206 (b) (4) and substantial commission precedent would have justified dismissing the matter without a full evidentiary hearing, was unavailing, as the commission acted well within the confines of its authority by proceeding to investigate and adjudicate D's complaint.

c. The plaintiffs could not prevail on their claim that the commission should have refused to consider the propriety of the plaintiffs' claimed exemptions under the act: the fact that the plaintiffs believed that they had complied with D's request by providing redacted copies of the responsive records did not resolve D's complaint that the plaintiffs had not complied with his request, as the plaintiffs' bore the burden of proving the propriety of the claimed exemptions to establish that they had complied with D's request, and, thus, D had no obligation to amend his complaint to allege that the plaintiffs violated the act by redacting portions of the responsive records, as such a claim was encompassed within the allegation that the plaintiffs had failed to comply with his request for all responsive records; moreover, because the plaintiffs bore the burden of proof as to any claimed exemption, they were not prejudiced by the commission's consideration of those exemptions as part of its consideration of D's complaint, especially as the hearing officer continued the hearing to another date to give the plaintiffs an opportunity to present evidence in support of their claimed exemptions.

d. The plaintiffs could not prevail on their claim that the administrative record clearly demonstrated that they had proved beyond a preponderance of the evidence that they appropriately redacted names and other identifiers of witnesses not known to the public in the responsive records and the commission's factual findings to the contrary were clearly erroneous and not reasonably supported by the evidence in the record: the commission's finding that the plaintiffs failed to prove that their redactions were proper pursuant to § 1-210 (b) (3) (A) was reasonably supported by substantial evidence in the record, as J, the plaintiffs' sole witness in support of the claimed exemptions, conceded that she was unaware of who testified at D's criminal trial and that she had no reason to believe that the identities of the witnesses were known, which flatly contradicted D's request for information regarding a specific witness that D identified by name; moreover, J's testimony provided nothing more than a generalized claim of possible safety risks if the redacted information were disclosed and was essentially a reiteration of department policy, and, as such, did not support a finding that disclosure of the names of specific witnesses in D's case would subject such witnesses to threat or harm, and the burden of proving the applicability of the exemption required the claimant of the exemption to provide more than conclusory language, generalized allegations or mere arguments of counsel.

Argued May 18—officially released October 24, 2023

Procedural History

Appeal from the decision of the defendant determining that the plaintiffs had violated the requirements of the Freedom of Information Act and ordering that they comply with those requirements by disclosing certain records to the complainant, brought to the Superior Court in the judicial district of New Britain and tried to the court, *Cordani*, *J.*; judgment sustaining the appeal, from which the defendant appealed to this court. *Reversed*; *judgment directed*.

Daniel L. McGee, commission counsel, with whom, on the brief, was *Colleen M. Murphy*, for the appellant (defendant).

Dina A. Scalo, with whom, on the brief, was *Michael C. Jankovsky*, for the appellees (plaintiffs).

Opinion

BRIGHT, C. J. The defendant, the Freedom of Information Commission (commission), appeals from the judgment of the Superior Court sustaining the administrative appeal filed by the plaintiffs, the Chief of Police of the Bridgeport Police Department, the Bridgeport Police Department (department), and the city of Bridgeport (city), from a final decision of the commission regarding the complaint filed by Marlando Daley.[1] In its final decision, the commission found that the plaintiffs violated the Freedom of Information Act (act), General Statutes § 1-200 et seq., in handling Daley's request for records and ordered the plaintiffs to provide Daley with the requested records without certain redactions and to search for additional responsive records. On appeal, the commission claims that the court (1) exceeded the scope of judicial review when it sustained the plaintiffs' appeal on a ground neither raised by the plaintiffs nor considered by the commission, (2) misconstrued General Statutes § 1-206 (a) in concluding that Daley's request was not deemed denied pursuant to the statute until four business days after the request was received by the plaintiffs, and (3) improperly found that the plaintiffs received Daley's request on August 19, 2019.

The plaintiffs disagree with the commission's claims and contend that the judgment may be affirmed on the alternative grounds that the commission (1) violated § 1-206 (b) (2) by failing to seek leave of the commission before scheduling a hearing on Daley's complaint, (2) should have dismissed the appeal pursuant to § 1-206 (b) (4), (3) improperly decided issues not raised in Daley's complaint, and (4) improperly concluded that the plaintiffs failed to meet their burden of establishing that certain information in the records was exempt from disclosure pursuant to General Statutes § 1-210. We agree with the commission's first and third claims and reject the plaintiffs' alternative grounds for affirming the judgment. Accordingly, we reverse the judgment of the Superior Court.

The following facts, either as found by the hearing officer or undisputed in the record, and procedural history are relevant to the parties' claims. In October, 2011, Daley was convicted of murder and sentenced to forty years of incarceration in connection with the 2010 shooting death of a man in Bridgeport. See *State* v. *Daley*, 161 Conn. App. 861, 863, 129 A.3d 190 (2015), cert. denied, 320 Conn. 919, 132 A.3d 1093 (2016). In a letter dated August 6, 2019, and addressed to "Chie[f] o[f] Police Armando Perez," Daley requested, pursuant to General Statutes § 1-212,[2] copies of any and all records in the department's possession related to the criminal investigation of Daley and his criminal murder case. At the end of the letter, Daley stated: "Please respond to my request within (14) work days and/or to ask for additional time to respond. The info requested

herein is vital to justic[e] in the matter, so I thank you in advance for your time, effort, and assistance."

By letter dated August 19, 2019, Daley filed a "notice of appeal" (complaint) with the commission pursuant to § 1-206 (b) (1),[3] which was received by the commission on August 20, 2019. In the complaint, Daley claimed that the plaintiffs had not complied with his "freedom of information request dated August 6, 2019, to the [department] at 300 Congress Street, Bridgeport" and requested "that a civil penalty be applied due to noncompliance [with] the above dated request . . . ." The commission docketed the complaint and, thereafter, forwarded it to the plaintiffs on September 19, 2019. Also by letter dated August 19, 2019, the Office of the City Attorney for the city (city attorney) responded to Daley's August 6, 2019 request, notifying Daley that the plaintiffs had received his request and that they would contact him in writing when the documents were available.

The plaintiffs filed an answer to Daley's complaint with the commission on September 26, 2019, in which they asserted that the city attorney received Daley's request on August 19, 2019, and that the city attorney sent Daley a letter acknowledging receipt of his request that same day. The plaintiffs also noted that the department had located the requested records and would finish reviewing them for information exempt from disclosure under the act by October 10, 2019. Thus, the plaintiffs asserted that, "pursuant to . . . § 1-206 (b) (1), [the commission] does not have jurisdiction to hear [Daley's] complaint, as the [plaintiffs have] not denied [Daley] the right for a copy of the requested records. The [plaintiffs] respectfully [request] dismissal of [Daley's] complaint." By letter dated October 3, 2019, Daley acknowledged the plaintiffs' answer and requested that all responsive records be sent to the attorney representing him in connection with his petition for a writ of habeas corpus.

In a letter dated November 12, 2019, the commission notified Daley and the plaintiffs that a hearing officer would hold a hearing on the merits of Daley's complaint on December 6, 2019. On November 13, 2019, the city attorney sent Daley's attorney the requested records, noting that only "one [compact disc] record has been withheld pursuant to . . . § 1-210 (b) (3) (C)."[4]

At the December 6, 2019 hearing, Daley informed the hearing officer that his attorney had received responsive documents from the plaintiffs but complained about the extensive redactions throughout the materials. When the hearing officer asked counsel for the plaintiffs, Attorney Dina A. Scalo, if the records were redacted, Scalo responded that the plaintiffs had redacted the names of witnesses and other personal identifying information. The following exchange then occurred between the hearing officer and Scalo:

"[The Hearing Officer]: So, at this point there's not much I can do. You don't have a witness and you're going to need to submit the records for in camera inspection. . . .

"[Scalo]: The complaint was that he had not received the records. We received the complaint—actually, the complaint was dated the same day that we had received his request. So, as of now, we have sent all the records, we have been diligent in sending the records, we've been efficient in sending the records. We have utilized the ombudsman program. We've spoken with Attorney Harmon and she's been speaking, I'm assuming, with Mr. Daley to rectify this. No mention was made that the redactions were at issue here. The only issue is whether he had received the documents as far as I understand. . . . So, at this point, the city was in full compliance. We provided the documents free of cost as soon as we could. We gave them to the person that Mr. Daley wanted us to give them to. The redactions or what was redacted was never brought to the city attorney's office by Attorney Gallucci or Mr. Daley or Attorney Harmon working as ombudsman with Mr. Daley. So, as of now, we've not been given notice that the redactions were at issue. The complaint itself says he hasn't received copies of the records. So—

"[The Hearing Officer]: If you want me to continue the hearing you now have notice. I think it's implied—

"[Scalo]: Sure.

"[The Hearing Officer]: —when someone files an appeal here that they're saying I haven't gotten all the records. You might think you've complied but, in fact, you may have overredacted the records, which means that I could find that you violated [the act].

"[Scalo]: Okay.

"[The Hearing Officer]: So, why don't we continue the hearing. We will come back, I expect that you bring the records, I'll issue an order. You can bring the records with you. You should have a completed index and you should have a witness who is—can testify as to the redactions to the extent that you need a witness. So, if there's signed witness statements, they're exempt, and I don't need a witness to tell me that, but to the extent you're claiming other exemptions and you need a witness, you should bring a witness.

"[Scalo]: Okay."

The parties returned for another hearing on January 19, 2020, during which the plaintiffs presented testimony from Detective Joette Devan of the department regarding the claimed exemptions from disclosure. Following the hearing, the hearing officer issued a proposed final decision dated March 5, 2020. In that decision, the hearing officer concluded that the plaintiffs violated the act by failing to conduct a thorough search

for records responsive to Daley's request, by redacting certain information, and by withholding certain responsive records. The hearing officer did not address the plaintiffs' claim that the commission lacked jurisdiction over Daley's complaint, and the plaintiffs noted that omission in their memorandum of law to the commission. When the commission considered the hearing officer's proposed decision at a meeting on September 9, 2020, Scalo outlined the plaintiffs' jurisdictional claim as follows:

"So, the factual set up for this is set up in the proposed final decision in paragraph 2 through 4 I believe, but [Daley's] original . . . request is dated August 6, [2019], and it was received by the [plaintiffs] on August 19, [2019]. But the same day that the [city] received Daley's request, Daley filed a . . . complaint alleging noncompliance [with his] request. So, you know, at this point, it was clear under the act that, at the time the complaint was made, certainly there was no denial of the right. The city sent its acknowledgement letter indicating that it had received the request in compliance with the act. And then afterwards, the [plaintiffs] filed an answer with the commission pursuant to § 1-206 (b) (4) of the . . . act, specifically setting out these facts and indicating that the . . . records were being retrieved and reviewed and requesting that therefore [Daley's] complaint [be dismissed]; this answer wasn't acknowledged or ruled on and, as far as I can see, was not noted in the proposed final decision. So . . . it was really an instance of the [plaintiffs] being asked to defend against a complaint that, you know, again, at the time of the complaint, did not really allege any violation because no violation had then taken place. . . .

"But again, you know, at the time of the first hearing, the [plaintiffs] had complied as much as possible and, to that date, had not really been informed of the specific violation. I don't believe there was an amended complaint that was added into the record. So just the practical implications of requiring [an agency] to fairly and adequately prepare a defense for an original complaint that didn't allege a violation and then a violation that was alleged at the hearing, it doesn't make a lot of sense. . . . So . . . it's not quite expedient for any of us, for the [commission] and also the hearing officer to be asked to sustain the complaint that didn't allege a violation.

"So, our relief for that would be asking that [the proposed finding and decision] be . . . replaced with a finding from the hearing officer laying out the facts that [Daley's] complaint is dismissed pursuant to the answer that was originally filed."

After Scalo concluded her argument, the commission invited the hearing officer to respond. After noting that the plaintiffs did not raise their jurisdictional claim dur-

ing either of the hearings, the hearing officer explained "that the reason there is jurisdiction in this case is because there's something called a constructive denial in the [act]. So, I'm looking at the calendar from August of 2019, the request was made, it [is dated] August 6th, which was a Tuesday. So, assuming a couple of days to get to the [plaintiffs], there would have been a constructive denial of this request prior to August 19, which was [the date] that the [plaintiffs] responded. So, anyway, perhaps that was overlooked, but, in my opinion, there was a constructive denial of this request. So, the commission has jurisdiction over the matter."

The commission remanded the matter to the hearing officer to address the plaintiffs' claim that the commission lacked jurisdiction over Daley's complaint. In a proposed final decision dated October 13, 2020, the hearing officer found that the plaintiffs' failure to respond to Daley's August 6, 2019 request by August 12, 2019, constituted a constructive denial of the request by operation of § 1-206 (a). Accordingly, the hearing officer concluded that the commission had jurisdiction over Daley's complaint, as it was filed within thirty days of the constructive denial pursuant to § 1-206 (b) (1). As to the merits of the complaint, the hearing officer found that the plaintiffs violated §§ 1-210 (a) and 1-212 (a) by failing to conduct a thorough search of records in response to the complainant's request and by withholding and redacting responsive records. The hearing officer recommended that the commission order that the plaintiffs search for additional responsive records and redact only addresses, dates of birth, and phone numbers contained in those records.

The commission held another hearing to consider the new proposed final decision on November 18, 2020. At that hearing, the plaintiffs' counsel argued that, for purposes of determining whether a request has been constructively denied, "[i]t doesn't really make procedural sense to start the clock on the date that the request is written or that it is mailed out if it has not been received by the agency either due to mail delays or issues like that, issues outside of the control of the agency. It doesn't make procedural sense for an agency to have been deemed to violate the act before they've even been made aware of the request . . . or . . . received the request. There is a difference between jurisdiction to file the complaint, which seems to be what this § 1-206 (a) four day limit is for, it's for the complainant to be able to file the complaint, versus hearing a complaint on the merits when there has really been no substantive violation of the act, even considering this constructive denial theory, [on] the date that the complaint was filed. . . . So it's just not credible or practical to allow a complaint submitted on the very day that an agency received a request to go forward to a hearing on the merits, and, in this case, the hearing officer did have discretion to find . . . that there was

no substantive denial. . . .

"So, accordingly, as to the jurisdiction issue, the [plaintiffs] ask that the proposed final decision be overturned in full with the finding that [Daley's] August 19th complaint is dismissed either due to lack of subject matter jurisdiction altogether or lack of a meaningful substantive denial or violation of the act at the time of the complaint." The commission, however, approved the hearing officer's amended decision at the conclusion of the hearing and issued a final decision dated November 18, 2020.[5] The plaintiffs filed an administrative appeal in the Superior Court pursuant to General Statutes § 4-183.

In the plaintiffs' brief in support of their administrative appeal, they claimed: (1) the commission "had a duty to refrain from scheduling a hearing unless or until leave of the commission was granted" pursuant to § 1-206 (b) (2); (2) that, "even if by the letter of the law [Daley] had not received a response in four business days, given the circumstances of this case, there was no reasonable justification for the commission to hold a hearing on this matter, much less two full hearings and an in camera inspection"; (3) "the commission's decision to expand the scope of the issues before it in this matter to those not fairly and timely raised in [Daley's complaint] constitutes an arbitrary and capricious abuse of discretion"; and (4) "the commission's finding that redaction of witness identifiers was improper is not supported by the evidence in the record."

In its brief in opposition to the plaintiffs' appeal, the commission argued that, on its face, Daley's complaint was sufficient to establish the commission's jurisdiction, and the plaintiffs' answer further supported that conclusion. The commission also argued that the hearing officer did not expand the scope of the issues raised in Daley's complaint because "the plaintiffs' decision to withhold several records from disclosure does not warrant a separate and distinct allegation. Rather, it is a defense to nondisclosure, which must necessarily be considered by the hearing officer in order to determine whether the plaintiffs have violated the . . . act." Finally, the commission argued that the evidence in the record supports its conclusion that the plaintiffs failed to prove the applicability of the exemption set forth in § 1-210 (b) (3) (A).

The plaintiffs filed a reply brief in which they argued that, assuming that the commission is correct that Daley's request was denied pursuant to statute when he did not receive a response to his request within four days after it was sent, their "compliance thereafter cured any supposed technical violation of the [act] such that there was no justifiable reason for considering the merits of [Daley's complaint] at two separate hearings."

The court held a hearing on January 20, 2022. Although the plaintiffs had not argued that Daley's request affording the plaintiffs fourteen business days to respond rendered the "deemed denied" provision of § 1-206 (a) ineffective, the court queried whether Daley's request could be deemed denied under § 1-206 (a) before those fourteen days had passed. Counsel for the commission, Attorney Danielle L. McGee, responded in the affirmative and engaged in the following exchange with the court:

"The Court: Really?

"[McGee]: Certainly here, [Daley] is saying, I really need these records presumably within fourteen working days.

"The Court: Yeah. . . . Ask for more time if you need it.

"[McGee]: Right. And, then, in this case, based on the number of days that transpired, I believe he waited thirteen days, thirteen calendar days, and then, on [August] 14, he filed his appeal in this case. So, I think he—

"The Court: Which is before the fourteen business days, you realize that. . . .

"[McGee]: I would acknowledge that [Daley filed the complaint before the fourteen business days had passed]. Sure. . . . But, under the statute, he did have the right by that fifth business day statutorily to file his appeal. Now, by the time we get to the hearing, if that was something to be raised by the plaintiffs, they certainly could have done so, and I think [the plaintiffs' counsel] already alluded to this, there was no questioning about the number of days that had transpired in terms of the mail, did he actually mail it on [August 6, 2019], I mean those are the kinds of questions that the [plaintiffs] are supposed to be asking during the evidentiary hearing to tease out whether there really is . . . a jurisdictional issue, which didn't happen in this case.

"So, based on the timeline, the commission had jurisdiction to open the case. We did receive the . . . answer from the plaintiffs, it's part of the record. An answer is essentially—it's a responsive pleading. It's not evidence. [The plaintiffs] can say we haven't denied the request; we're working on it. Is there a substantive denial or a decision about a substantive denial at that point on part of the commission? No. That's for the evidentiary hearing.

"Now, is it deemed denied by virtue of the appeal? Yes. For purposes of jurisdiction, it's deemed denied. So, from the perspective of the timeline, what was alleged in the complaint, and what was indicated in the answer that they were working on it, [the plaintiffs] hadn't fully complied, but they were working on it,

certainly the commission had jurisdiction to move forward."

On January 21, 2022, the court issued a memorandum of decision sustaining the plaintiffs' appeal, vacating the commission's final decision, and remanding the matter to the commission with direction to dismiss Daley's complaint. The court concluded that the commission improperly determined that it had jurisdiction pursuant to § 1-206 (a) for two reasons. The court first concluded that, because the request for records directed the plaintiffs to respond within fourteen business days, "no denial could exist, and therefore no statutory jurisdiction could exist, before August 26, 2019, at the earliest." In the alternative, the court concluded that, because the plaintiffs did not receive Daley's request until August 19, 2019, the request could not have been deemed denied when Daley's complaint was received by the commission on August 20, 2019. In so concluding, the court interpreted the phrase "within four business days of such request" in § 1-206 (a) to mean four business days from the date that the request is received by the public agency. The court reasoned that "[n]o case and controversy can exist, and no denial deemed, until the agency has at least four business days to actually consider the request." This appeal followed.

As a preliminary matter, we first set forth the well established standard of review in administrative appeals. We are "guided by the limited scope of judicial review afforded by the Uniform Administrative Procedure Act; General Statutes § 4-166 et seq.; to the determinations made by an administrative agency. [W]e 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. . . . Even as to questions of law, [t]he court's ultimate duty is only to decide whether, in light of the evidence, the [agency] has acted unreasonably, arbitrarily, illegally, or in abuse of its discretion. . . . Conclusions of law reached by the administrative agency must stand if the court determines that they resulted from a correct application of the law to the facts found and could reasonably and logically follow from such facts. . . . Neither this court nor the trial court may retry the case or substitute its own judgment for that of the [administrative agency]." (Citation omitted; internal quotation marks omitted.) *Aronow* v. *Freedom of Information Commission*, 189 Conn. App. 842, 858, 209 A.3d 695, cert. denied, 332 Conn. 910, 210 A.3d 566 (2019).

I

The commission first claims that the court exceeded the scope of judicial review when it concluded that the commission lacked jurisdiction over Daley's complaint on a ground neither raised by the plaintiffs nor considered by the commission. We agree.

The following principles regarding reviewability of unpreserved claims are relevant to the commission's claim. Our Supreme Court recently explained that "there is a difference between bypassing an administrative procedure on the ground that the agency has no jurisdiction over the matter, which raises an exhaustion issue, and failing, within the context of an administrative proceeding, to preserve for review a claim that the agency has no jurisdiction. When [as in the present case] a party has failed to preserve a claim before an administrative agency, the exhaustion doctrine does not apply; instead, we apply the ordinary rules governing appellate review of unpreserved claims." *Board of Education* v. *Commission on Human Rights & Opportunities*, 344 Conn. 603, 622–23, 280 A.3d 424 (2022).

"[I]t is the appellant's responsibility to present such a claim clearly to the trial court so that the trial court may consider it and, if it is meritorious, take appropriate action. That is the basis for the requirement that ordinarily [the appellant] must raise in the trial court the issues that he intends to raise on appeal. . . . This rule applies to appeals from administrative proceedings as well. . . . A party to an administrative proceeding cannot be allowed to participate fully at hearings and then, on appeal, raise claims that were not asserted before the board [or agency]. . . . [T]o allow a court to set aside an agency's determination [on] a ground not theretofore presented . . . deprives the [agency] of an opportunity to consider the matter, make its ruling, and state the reasons for its action." (Citations omitted; internal quotation marks omitted.) *Direct Energy Services, LLC* v. *Public Utilities Regulatory Authority*, 347 Conn. 101, 148, 296 A.3d 795 (2023).

"[W]ith respect to unpreserved issues that do not involve subject matter jurisdiction, plain error or constitutional error, if the reviewing court would have the discretion to review the issue if raised by a party because important considerations of justice outweigh the interest in enforcing procedural rules governing the preservation of claims and adversarial principles, the court may raise the claim sua sponte, as long as it provides an opportunity for all parties to be heard on the issue. In other words, if an exceptional circumstance exists that would justify review of an unpreserved claim if raised by a party, the reviewing court may raise the issue sua sponte. Of course . . . if a party objecting to the reviewing court's sua sponte consideration of the claim can demonstrate that it would be unfairly prejudiced by such consideration, it would be inappropriate for the [reviewing court] to consider such a claim. . . . Although . . . all of the circumstances in which a reviewing court may raise an issue sua sponte cannot be catalogued, we also reiterate that our system is an adversarial one in which the burden ordinarily is on the parties to frame the issues, and the presumption

is that issues not raised by the parties are deemed waived." (Footnotes omitted.) *Blumberg Associates Worldwide, Inc.* v. *Brown & Brown of Connecticut, Inc.*, 311 Conn. 123, 162–64, 84 A.3d 840 (2014).

In the present case, the plaintiffs never argued before the commission that the "deemed denied" provision of § 1-206 (a) did not apply due to Daley's request for a response within fourteen business days. Thus, the commission did not address, as the Superior Court did, whether Daley's request for a response within fourteen business days rendered the four day period set forth in § 1-206 (a) ineffective. The plaintiffs also did not raise that issue in their administrative appeal. Instead, they argued that, "even if the plaintiffs grant that a constructive denial ought to be treated as a denial for jurisdiction purposes (which, in instances where the agency has not yet received/processed a request, such as in this case, the plaintiffs believe it should not), the commission conflates the statutory ability to file a complaint with the entitlement to a hearing on the merits of that complaint. . . . [E]ven if by the letter of the law [Daley] had not received a response in four business days, given the circumstances of this case, there was no reasonable justification for the commission to hold a hearing on this matter, much less two full hearings and an in camera inspection."

Nevertheless, the Superior Court raised the issue, sua sponte, at oral argument on the plaintiffs' administrative appeal and sustained the appeal on that ground. Although the court did not identify any exceptional circumstances justifying its sua sponte consideration of the unpreserved issue, it determined that the issue implicated the commission's subject matter jurisdiction. Consequently, whether the court properly raised that issue sua sponte turns on whether the issue implicates the commission's subject matter jurisdiction.[6] See *Blumberg Associates Worldwide, Inc.* v. *Brown & Brown of Connecticut, Inc.*, supra, 311 Conn. 161 ("reviewing court not only can but must address an issue implicating subject matter jurisdiction whenever it arises, regardless of how the issue comes to the court's attention"); see also *Blakely* v. *Danbury Hospital*, 323 Conn. 741, 753, 754, 150 A.3d 1109 (2016) ("[a] defendant's right to assert a defense based on a jurisdictional statutory time limit cannot be waived," but "a defendant's right to a defense under an ordinary statute of limitations may be waived").

Our Supreme Court recently discussed an analogous issue in *Board of Education* v. *Commission on Human Rights & Opportunities*, supra, 344 Conn. 603. In that case, the New Haven Board of Education (board) claimed that the Commission on Human Rights and Opportunities (CHRO) lacked jurisdiction over a claim for discriminatory public accommodations practices in violation of General Statutes § 46a-64 because a public

school is not a place of public accommodation. Id., 632. The Superior Court declined to consider the claim, and the board appealed. On appeal, the board conceded that its claim was unpreserved, as it did not raise the claim before the CHRO, but it argued that the court was required to address it "because it was jurisdictional, and a jurisdictional claim may be raised at any time." Id., 632–33.

In rejecting that claim, our Supreme Court first noted "the ongoing confusion as to whether the failure to plead or prove an essential fact [for purposes of invoking a statutory remedy] implicates the [tribunal's] subject matter jurisdiction or its statutory authority." (Internal quotation marks omitted.) Id., 633. The court explained that, "[o]nce it is determined that a tribunal has authority or competence to decide the class of cases to which the action belongs, the issue of subject matter jurisdiction is resolved in favor of entertaining the action. . . . [T]he question of whether the action belongs to the class of cases that the tribunal has authority to decide is [s]eparate and distinct from . . . the question of whether a [tribunal] . . . properly exercises its statutory authority to act. . . . A challenge to the tribunal's statutory authority raises a claim of statutory construction that is not jurisdictional. . . . [A] claim that a party has failed to allege or to establish an element of a statutory remedy implicates the tribunal's statutory authority and the legal sufficiency of the complaint, not the tribunal's subject matter jurisdiction." (Citations omitted; internal quotation marks omitted.) Id., 633–34.

Applying those principles, the court reasoned that "the complaint alleged that the board had violated § 46a-64 by discriminating against [a student] on the basis of his disabilities in a place of public accommodation. Such a claim is within the class of cases that the [CHRO] has authority or competence to decide. . . . [T]herefore . . . the [CHRO] had subject matter jurisdiction to entertain the complaint. . . .

"In support of its claim to the contrary, the board essentially contends that, because a public school is *not* a place of public accommodation *as a matter of law*, the [CHRO] lacked subject matter jurisdiction. We disagree. In the cases . . . regarding the distinction between statutory authority and subject matter jurisdiction, the alleged jurisdictional deficiencies also involved questions of law. We concluded that the trial court's jurisdiction was not implicated in any of these cases, but, instead, the claims implicated the trial court's statutory authority and the legal sufficiency of the complaints. . . . We conclude, therefore, that the board's claim that the trial referee incorrectly determined that a public school is a place of public accommodation is not reviewable because it does not implicate the commission's subject matter jurisdiction." (Citations

omitted; emphasis in original; footnote omitted.) Id., 634–35.

The same reasoning applies in the present case. Pursuant to General Statutes § 1-205 (d), the "commission shall have the power to investigate all alleged violations of said [act] and may for the purpose of investigating any violation hold a hearing . . . and to require the production for examination of any books and papers which the commission deems relevant in any matter under investigation or in question."[7] Daley's complaint, which was received by the commission on August 19, 2019, alleged that the plaintiffs violated the act by failing to comply with his August 6, 2019 request. Accordingly, because Daley alleged a violation of the act, there is no question that his complaint presented a claim that is within the class of cases that the commission has the authority and competence to decide. See *Board of Education* v. *Commission on Human Rights & Opportunities*, supra, 344 Conn. 634. Furthermore, the issue raised by the Superior Court in the present case—whether Daley's request was deemed denied pursuant to § 1-206 (a)—is "a claim that a party has failed to allege or to establish an element of a statutory remedy [which] implicates the [commission's] statutory authority and the legal sufficiency of the complaint." Id., 633–34. Indeed, whether a complainant has been denied a right under the act goes to the merits of every complaint before the commission. See General Statutes § 1-205 (d) (commission has authority "to investigate all *alleged violations of* [*the*] *act*" (emphasis added)). Thus, a denial of a request, either in fact or pursuant to § 1-206 (a), is an essential fact that goes to the merits of a complaint before the commission. Whether that fact has been established does not implicate the commission's jurisdiction, as it would be a "bizarre result that the failure to prove an essential fact at trial deprives the [tribunal] of subject matter jurisdiction." *In re Jose B.*, 303 Conn. 569, 579, 34 A.3d 975 (2012). Instead, it implicates the commission's authority to grant a complainant relief under the act. Consequently, because the unpreserved issue regarding Daley's purported waiver of the requirement to respond within four days does not implicate the commission's subject matter jurisdiction, the court improperly raised it on its own motion.[8] See *Brownstone Exploration & Discovery Park, LLC* v. *Borodkin*, 220 Conn. App. 806, 820, 299 A.3d 1189 (2023) ("a trial court generally acts in excess of its authority when it raises and considers, sua sponte, issues not raised or briefed by the parties"); *Greene* v. *Keating*, 156 Conn. App. 854, 861, 115 A.3d 512 (2015) (concluding "that the [trial] court acted in excess of its authority when it raised and considered, sua sponte, a ground for summary judgment not raised or briefed by the parties").

Therefore, we agree with the commission that the court exceeded the scope of judicial review and

"improperly traveled a different path rather than determining whether the [commission] properly trod on the stepping stones of the path it took." (Internal quotation marks omitted.) *Dortenzio* v. *Freedom of Information Commission*, 42 Conn. App. 402, 409, 67 A.2d 978 (1996).

II

As to the court's alternative basis for sustaining the plaintiffs' appeal, the commission claims that the court misconstrued § 1-206 (a) in concluding that a request may not be deemed denied until four business days after the agency received the request. The commission argues that its interpretation of § 1-206 (a) as authorizing an individual to file a complaint with the commission after four business days from the date the request was made is consistent with the plain language of the statute and "is also time-tested, reasonable, and does not yield absurd or unworkable results." In contrast, the plaintiffs contend that the statute is ambiguous, as demonstrated by the competing interpretations advanced by the commission and the Superior Court, and that the present case demonstrates "how inefficient and impractical the [commission's] interpretation can be when applied to a real-world case." We conclude that the court properly construed § 1-206 (a) as requiring that a public agency receive a request for public records before that request can be deemed denied.

We begin with the applicable standard of review. "Although the interpretation of statutes is ultimately a question of law . . . it is the well established practice of this court to accord great deference to the construction given [a] statute by the agency charged with its enforcement." (Internal quotation marks omitted.) *Nettleton* v. *C & L Diners, LLC*, 219 Conn. App. 648, 664, 296 A.3d 173 (2023).

"[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 . . . . Conversely, an agency's interpretation of a statute is accorded deference when the agency's interpretation has been formally articulated and applied for an extended period of time, and that interpretation is reasonable. . . . Deference is warranted in such circumstances because a time-tested interpretation, like judicial review, provides an opportunity for aggrieved parties to contest that interpretation. Moreover, in certain circumstances, the legislature's failure to make changes to a long-standing agency interpretation implies its acquiescence to the agency's construction of the statute. . . . For these reasons, this court long has adhered to the principle that when a governmental agency's time-tested interpretation [of a statute] is reasonable it should be accorded great weight by the

courts." (Internal quotation marks omitted.) *Commissioner of Public Safety* v. *Freedom of Information Commission*, 312 Conn. 513, 547, 93 A.3d 1142 (2014); see also *Tuxis Ohr's Fuel, Inc.* v. *Administrator, Unemployment Compensation Act*, 309 Conn. 412, 422–23, 72 A.3d 13 (2013). "A consideration of whether an interpretation is time-tested takes into account both the length of time since it first was articulated and the number of formal decisions applying that interpretation." *Sarrazin* v. *Coastal, Inc.*, 311 Conn. 581, 611 n.20, 89 A.3d 841 (2014).

In the present case, the commission's interpretation of § 1-206 (a) is not time-tested, as a review of the commission's published decisions reveals that its construction of the statute has varied. Compare *Weinstein* v. *Assistant Attorney General*, Freedom of Information Commission, Docket No. FIC 1999-494 (May 10, 2000) ("[s]ection 1-206 . . . does not require that a requester wait four business days following the receipt of a request by an agency before filing an appeal"), with *Peak* v. *Superintendent of Schools*, Freedom of Information Commission, Docket No. FIC 2019-0598 (August 12, 2020) p. 3 ("[I]f during the four business days *following the public agency's receipt of such request*, a requestor does not receive a written acknowledgment from the public agency, the requestor may file a complaint with the [c]ommission on the fifth business day. In effect, this provision deems a public agency's silence during the four business days *following receipt of a public records request to be a constructive denial of such request*." (Emphasis added.)). In fact, the commission has routinely dismissed complaints when it finds that a request was never received by a respondent. See, e.g., *Gawlik* v. *Quiros*, Freedom of Information Commission, Docket No. FIC 2021-0345 (February 8, 2023) p. 2 (commission found "that at the time of the complaint, the respondents had not received the . . . request and therefore had not denied the complainant's request for records" and dismissed complaint based on conclusions "that the complainant had no right to appeal under § 1-206 (b) (1) . . . and that the respondents did not violate the [act]"); *Kaminski* v. *Commissioner of Correction*, Freedom of Information Commission, Docket No. FIC 2021-0567 (September 14, 2022) p. 2 (same); *Carattini* v. *Perez*, Freedom of Information Commission, Docket No. FIC 2020-0141 (March 23, 2022) pp. 2–3 (commission dismissed complaint because respondents had not received request until after complaint was filed with commission and, therefore, "had not denied the complainant's request for records, or denied any other right under the [act]"); *Wright* v. *Chairperson, Board of Pardons & Paroles*, Freedom of Information Commission, Docket No. FIC 2020-0213 (October 27, 2021) p. 3 (commission found that respondents had not received complainant's request until after complaint was filed with commission

and, therefore, dismissed complaint because "the respondents had not denied the complainant's request for records or denied any other right under the [act] . . . at the time the complaint . . . was filed"); *Bracken* v. *Osanitsch*, Freedom of Information Commission, Docket No. FIC 2019-0083 (June 26, 2019) p. 2 ("[b]ecause it is found that the respondents did not receive the complainant's . . . request letters for the records . . . it is concluded that the respondents did not violate the [act]"); *Lane* v. *Chief*, *Police Dept.*, Freedom of Information Commission, Docket No. FIC 2017-0747 (June 27, 2018) p. 2 (commission found that respondents first became aware of request after complaint was filed with commission but also found that respondents did not violate act because they did not maintain records requested by complainant); but see *Dixon* v. *Perez*, Freedom of Information Commission, Docket No. FIC 2016-0427 (April 12, 2017) pp. 2–8 (although counsel for respondents claimed that respondents did not receive complainant's request until after complaint was filed with commission, commission held evidentiary hearing and considered objections to claimed exemptions). Accordingly, the commission's interpretation of § 1-206 (a) as allowing a complaint to be filed four business days after a request is sent by a complainant to a public agency—as opposed to four business days after a request is received by the public agency—cannot be considered time-tested, as it has not been consistently applied.

In addition, we disagree with the commission's claim that its interpretation of § 1-206 (a) has been subjected to judicial scrutiny based on various Superior Court decisions. See *Sedensky* v. *Freedom of Information Commission*, Superior Court, judicial district of New Britain, Docket No. CV-13-6022849-S (November 26, 2013) ("[§ 1-206 (a)] provides that a request for information under the [act] is constructively denied if there is no response from the public agency within four business days of the request"); *Smith* v. *Freedom of Information Commission*, Superior Court, judicial district of New Britain, Docket No. CV-12-5015684-S (June 7, 2013) (court rejected contention that agency had only four days to respond to request pursuant to § 1-206 (a) because that provision "does not resolve whether a response is prompt" but, rather, "merely allows a complainant to file a complaint with the [commission] after four days by deeming that a denial has occurred"), aff'd, *Smith* v. *Freedom of Information Commission*, 146 Conn. App. 909, 78 A.3d 307 (2013); *Smith* v. *Freedom of Information Commission*, Superior Court, judicial district of New Britain, Docket No. CV-11-5015510-S (August 30, 2012) (54 Conn. L. Rptr. 614, 616) (noting that § 1-206 (a) allows requester to appeal to commission "without having to wait indefinitely for compliance that may never be forthcoming" (internal quotation marks omitted)). Although those decisions discuss the

statute, none of those cases involved a request for documents mailed to a public agency, and, instead, involved requests for documents that were received by the agency on the same date that they were made. See *Sedensky* v. *Freedom of Information Commission*, supra (initial written request for records submitted via facsimile, and complainant renewed that written request by leaving voicemail messages); *Smith* v. *Freedom of Information Commission*, supra, Superior Court, Docket No. CV-12-5015684-S (written request hand delivered to agency); *Smith* v. *Freedom of Information Commission*, supra, Superior Court, Docket No. CV-11-5015510-S (written request was dated October 19, 2010, and respondent responded by telephone that same date). Accordingly, the present issue has not been subjected to judicial scrutiny.

Thus, because the commission's interpretation of § 1-206 (a) is not time-tested and has not been subjected to judicial scrutiny, it is not entitled to deference, and, therefore, our review is plenary. See *Dept. of Public Safety* v. *State Board of Labor Relations*, 296 Conn. 594, 601, 996 A.2d 729 (2010) (when agency had interpreted statute only twice and neither decision had been subjected to judicial scrutiny, agency's interpretation was not entitled to deference and court's review is plenary). "When construing a statute, [o]ur fundamental objective is to ascertain and give effect to the apparent intent of the legislature. . . . 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 the 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. . . . When a statute is not plain and unambiguous, we also look for interpretive guidance to the legislative history and circumstances surrounding its enactment, to the legislative policy it was designed to implement, and to its relationship to existing legislation and common law principles governing the same general subject matter . . . ." (Internal quotation marks omitted.) *Commissioner of Public Safety* v. *Freedom of Information Commission*, supra, 312 Conn. 527.

We begin with the language of the statute. Section 1-206 provides in relevant part: "(a) Any denial of the right to inspect or copy records provided for under section 1-210 shall be made to the person requesting such right by the public agency official who has custody or control of the public record, in writing, within four business days of such request . . . . Failure to comply with a request to so inspect or copy such public record within the applicable number of business days shall be deemed to be a denial.

"(b) (1) Any person denied the right to inspect or copy records under section 1-210 . . . or denied any other right conferred by the [act] may appeal therefrom to the [commission], by filing a notice of appeal with said commission. A notice of appeal shall be filed not later than thirty days after such denial . . . . For purposes of this subsection, such notice of appeal shall be deemed to be filed on the date it is received by said commission or on the date it is postmarked, if received more than thirty days after the date of the denial from which such appeal is taken."

Our Supreme Court previously has construed § 1-206[9] and concluded that it "merely ensures an expedient right of appeal for those who do not desire to await a written denial. Although written denial of a request for disclosure of public records is required . . . there is no statutory recourse against a public agency for failure to comply with this requirement. Without the statutory denial provision, therefore, if a public agency failed to respond to a request, the person seeking disclosure would have no further recourse because the right of appeal to the [commission] in § [1-206 (b)] is the right to appeal a denial. . . . [Section 1-206 (b)] affords a right to appeal to the [commission] any denial, whether written or statutory, of a request for disclosure of public records." (Citation omitted.) *West Hartford* v. *Freedom of Information Commission*, 218 Conn. 256, 261–62, 588 A.2d 1368 (1991).

Because the request in that case was received on the same date that it was made, the court did not address the issue presented here—whether the four day deemed denied period is calculated from the mailing of a request or the receipt thereof.[10] This issue is unique to requests made by mail because when a request is made in-person, by phone, or by email during normal business hours, it will be received on the same date that it is made, whereas requests sent by mail will be received on a later date. With regard to the use of the mail, although § 1-206 (b) specifies that a notice of appeal will be deemed filed either when it is received by the commission or when it is postmarked, subsection (a) does not specify whether a request will be deemed denied four business days after the request was sent or after it was received. Because the statute is silent on this point, "we read the statute in context to determine whether the language is susceptible to more than one reasonable interpretation." (Internal quotation marks omitted.) *Hicks* v. *State*, 297 Conn. 798, 802, 1 A.3d 39 (2010).

In construing § 1-206 (a) in the present case, the court reasoned that, "[w]ith such a tight time frame of four business days, the meaning of the statutory words 'within four business days of such request' . . . means four business days from the date that the request is received or filed, for if § 1-206 (a) does not mean the foregoing, then we will continually have 'deemed deni-

als' before the request is actually received and considered by the agency." In contrast, the commission argues that "§ 1-206 (a) can only reasonably be interpreted to mean that a person may appeal four business days from the date the request is made." We conclude that the statute is ambiguous, as both interpretations are plausible. See *Commissioner of Correction* v. *Freedom of Information Commission*, 307 Conn. 53, 68–69, 52 A.3d 636 (2012) ("[b]ecause we believe that both of these interpretations are plausible, we conclude that the language . . . is ambiguous").

Neither party directs our attention to any relevant extratextual evidence of the meaning of § 1-206 (a) as to the precise issue before us, and our own review of the legislative history has revealed none.[11] Nevertheless, we conclude that, when § 1-206 (a) is read in context, the Superior Court's interpretation is the more reasonable one. See *Clark* v. *Waterford*, *Cohanzie Fire Dept.*, 346 Conn. 711, 728, 295 A.3d 889 (2023) ("[w]hen statutory language, even if ambiguous for purposes of § 1-2z, provides greater support for an interpretation of the statute than does the legislative history, we must yield to the implications of the statutory language, particularly when the legislative history is more general in nature and does not furnish any evidence of legislative intent with respect to the specific point of law at issue").

The references to a request in § 1-206 (a) involve an agency's *response* to a request under the act, which necessarily requires receipt of the request. Specifically, the statute provides that a denial "shall be made to the person requesting such right by the public agency official who has custody or control of the public record, in writing, within four business days of such request" and that "[f]ailure to comply with a request to so inspect or copy such public record within the applicable number of business days shall be deemed to be a denial." General Statutes § 1-206 (a). Because an agency can neither deny nor comply with a request it has not received, construing § 1-206 (a) as requiring that an agency receive a request before the four day period commences is consistent with the statute's emphasis on the agency's response, or lack thereof, to a request for public records.

Our Supreme Court applied similar reasoning in *Seramonte Associates*, *LLC* v. *Hamden*, 345 Conn. 76, 91, 282 A.3d 1253 (2022), in which the court concluded that "the word 'submit' in [General Statutes] § 12-63c (a) unambiguously requires that the income and expense information be received by the assessor by June 1." The court reasoned that interpreting the statute as requiring receipt "produce[d] a more harmonious result with our existing case law. See *PJM & Associates*, *LC* v. *Bridgeport*, [292 Conn. 125, 142, 971 A.2d 24 (2009)] ('[u]nder . . . [§ 12-63c (d)], a penalty may be imposed if the

required information never reaches the assessor because the property owner does not provide the information'); see also, e.g., *State* v. *Jones*, 314 Conn. 410, 418–19, 102 A.3d 694 (2014) (holding that phrase 'shall *submit* to the jury . . . [a]ll exhibits received in evidence' not only requires that trial court 'send' exhibits to jury but also that jury has 'a meaningful opportunity to study and consider an exhibit during its deliberations' . . .)). Although *PJM & Associates, LC*, did not specifically address the meaning of the word 'submit' in § 12-63c (a), the underlying premise of that case is that it is the lack of receipt of the information that triggers the penalty. . . . This case law constitutes persuasive authority that the common usage of the word 'submit' contemplates not only transmission but also receipt. . . . [T]he assessor is not in a position to study and consider income expense information until it is received, not merely postmarked." (Citation omitted; emphasis in original; footnote omitted.) *Seramonte Associates, LLC* v. *Hamden*, supra, 87–88.

Likewise, in the present case, an agency is not able to deny or comply with a request "until it is received, not merely postmarked." Id., 88. Thus, because § 1-206 (a) concerns a public agency's response to a request for public records, which can only be triggered by the receipt of such request, we conclude that the statutory language provides greater support for interpreting the statute as requiring that a request is received before the four day period begins. We are not persuaded by the commission's arguments to the contrary.

First, the commission argues that "[t]he plain language of the statute does *not* provide that a person may only appeal from a statutory denial four business days *from the date a public agency receives or files the request*, as determined by the [Superior] [C]ourt." (Emphasis in original; internal quotation marks omitted.) Given that the statute is silent as to whether it is the mailing or the receipt of a request that triggers the four day period for a public agency to respond, the commission's proffered interpretation is susceptible to the same challenge. Moreover, although not stated expressly, requiring that a request be received before measuring an agency's response is consistent with the language used in the statute, which concerns the agency's response to a request.

Second, the commission argues that requiring receipt of a request is impractical because an individual "may have no way of knowing when the public agency has received . . . his request" and because "the commission could not determine jurisdiction."[12] The commission further argues that "it would be illogical and fundamentally unfair to require a requester to wait indefinitely for the public agency to notify them that a request has been received or filed, when such notification may never come." The commission's concerns are

unfounded, as both this court and our Supreme Court have recognized that "the mailing of a properly addressed letter creates a presumption of timely notice unless contrary evidence is presented." *Daniels* v. *Statewide Grievance Committee*, 72 Conn. App. 203, 211, 804 A.2d 1027 (2002); see also *Echavarria* v. *National Grange Mutual Ins. Co.*, 275 Conn. 408, 418–19, 880 A.2d 882 (2005) ("a properly stamped and addressed letter that is placed into a mailbox or handed over to the United States Postal Service raises a rebuttable presumption that it will be received"); *Merrill Lynch, Pierce, Fenner & Smith, Inc.* v. *Cole*, 189 Conn. 518, 532–33, 457 A.2d 656 (1983) (holding that trial court "was justified in presuming that the confirmation slip was received in the due course of mail"); *Console* v. *Torchinsky*, 97 Conn. 353, 356, 116 A. 613 (1922) (recognizing "presumption of due delivery and receipt arising from the mailing of a properly-addressed letter"). Thus, an individual is entitled to presume that a properly addressed request for records sent by mail will be received within a few days after it is mailed, and, in the absence of evidence to the contrary, the commission may presume the same. In fact, the hearing officer in the present case did precisely that when she stated: "So, I'm looking at the calendar from August of 2019, the request was made, it [is dated] August 6th, which was a Tuesday. So, *assuming a couple of days to get to the* [*plaintiffs*], there would have been a constructive denial of this request prior to August 19, which was [the date] that the [plaintiffs] responded." (Emphasis added.)

Furthermore, as noted previously in this opinion, the commission has applied this interpretation of the statute and determined that a complaint was premature when the underlying request was not received by a respondent at the time the complaint was filed with the commission. See, e.g., *Weathers* v. *Perez*, Freedom of Information Commission, Docket No. FIC 2019-0677 (August 11, 2021) pp. 2–3 (after ordering respondents to produce evidence of when they received request, commission concluded that complaint was filed before request was received and, therefore, respondents did not violate act). Accordingly, we are not persuaded that our construction of the statute is impractical, as the commission has applied it previously, or that it is fundamentally unfair to require that a request be received before it can be deemed denied.

Finally, the commission argues that the court's interpretation of the statute is contrary to both the legislative policy of allowing all individuals prompt access to public records and the presumption that records maintained by public agencies are publicly available. We disagree. "[T]he overarching legislative policy of [the act] is one that favors the open conduct of government and free public access to government records." (Internal quotation marks omitted.) *Clerk of the Common*

Council v. *Freedom of Information Commission*, 215 Conn. App. 404, 413, 283 A.3d 1 (2022). To require that a request be received by a public agency before it is deemed to be denied by that agency in no way undermines the purpose of the act; it simply requires that an agency be made aware of a request for access. The same legislative policy is served, as individuals are not denied prompt access to records due to a requirement that a request for such access be received by the agency.

In sum, when the statute is read in context, the language used supports construing § 1-206 (a) as requiring that a request be received by the agency before the request may be deemed denied by operation of the statute. Therefore, we conclude that, for purposes of determining whether a request sent by mail has been deemed denied pursuant to § 1-206 (a), the operative date is the date that the request was received by the public agency.

III

Last, the commission claims that, "even assuming arguendo that the trial court's interpretation of . . . § 1-206 (a) is correct . . . there is no evidence in the record upon which the commission or the trial court could have relied to conclude that the plaintiffs did not receive Daley's request until August 19, 2019." We agree.

In applying § 1-206 (a), the hearing officer found that Daley's request had been deemed denied by the time that he filed his complaint with the commission. The plaintiffs argued before the Superior Court that such a conclusion was not possible because the department did not receive Daley's request until the very day that Daley mailed his complaint to the commission. Although the plaintiffs asserted before the commission that they did not receive Daley's request until August 19, 2019, when the city attorney acknowledged receipt of the request, they presented no evidence of when the request actually was received by the department. The plaintiffs presented a single witness, who testified solely about the plaintiffs' claimed exemptions from disclosure. The only discussion about when Daley's request was received is found in the representations made by Scalo before the hearing officer and the commission. Such representations by counsel, however, are not evidence. See *Travelers Property & Casualty Co.* v. *Christie*, 99 Conn. App. 747, 761, 916 A.2d 114 (2007) ("[E]vidence . . . is the means by which alleged matters of fact are properly submitted to the trier of fact for the purpose of proving a fact in issue. . . . It is well settled that representations of counsel are not, legally speaking, evidence." (Internal quotation marks omitted.)).

Despite this lack of evidence before the commission supporting the plaintiffs' contention, the court, in sustaining the plaintiffs' administrative appeal, rejected the

commission's conclusion that Daley's request was deemed denied on August 12, 2019, reasoning that such a conclusion "ignores the fact that the plaintiffs did not receive [Daley's] request until August 19, 2019." The court also found that, "[i]n view of the complainant's incarceration, it is not surprising that the plaintiffs did not receive the August 6, 2019 . . . request until August 19, 2019. Mail from prisons is generally known to be delayed because of prison procedures. The foregoing fact is, or should have been, known by the [commission]."

Thus, the court engaged in its own fact finding, and did so, in part, based on its own understanding of mail delivery from prisons, evidence of which was not before the commission. By doing so, the court substituted its assessment of the factual record for that of the commission and thereby exceeded the proper scope of judicial review. See General Statutes § 4-183 (j) ("[t]he court shall not substitute its judgment for that of the agency as to the weight of the evidence on questions of fact"). Instead, the court should have reviewed the record before the commission to determine whether there was substantial evidence in the record to support the commission's conclusion that Daley's request was deemed denied before he filed his complaint with the commission. See *Strong* v. *Conservation Commission*, 28 Conn. App. 435, 440, 611 A.2d 427 (1992) ("The [Superior Court's] standard of review in an administrative appeal is to determine whether there is substantial evidence in the record that reasonably supports the administrative decision. . . . If the record provides such substantial evidence, the court should not substitute its judgment for that of the agency." (Citation omitted.)), appeal dismissed, 226 Conn. 227, 627 A.2d 431 (1993). On the basis of our review of the record, we conclude that there was.

Like the Superior Court, our review "is limited to determining whether the agency's findings are supported by substantial and competent evidence and whether the agency's decision exceeds its statutory authority or constitutes an abuse of discretion. . . . [E]vidence is sufficient to sustain an agency finding if it affords a substantial basis of fact from which the fact in issue can be reasonably inferred. . . . In determining whether an administrative finding is supported by substantial evidence, the reviewing court must defer to the agency's assessment of the credibility of the witnesses and to the agency's right to believe or disbelieve the evidence presented by any witness . . . . As with any administrative appeal, our role is not to reexamine the evidence presented to the [commission] or to substitute our judgment for the agency's expertise, but, rather, to determine whether there was substantial evidence to support its conclusions. . . . If the decision of the agency is reasonably supported by the evidence in the record, it must be sustained." (Citations omitted; inter-

nal quotation marks omitted.) *Board of Education* v. *Commission on Human Rights & Opportunities*, 212 Conn. App. 578, 586–87, 276 A.3d 447, cert. denied, 345 Conn. 902, 282 A.3d 466 (2022).

The commission argues that "[t]he record is devoid of evidence of the date that the [department] (the agency to [which] the request was directed and [the agency] responsible for compliance) received the request." According to the commission, "[a]bsent such evidence, it is reasonable to infer that Daley's request was received by the [department] within days of August 6, 2019, and that the [department] received, reviewed, and forwarded Daley's request to its attorneys (that is, the [city attorney])." The commission further contends that "Daley should not be deprived of his right to appeal to the [commission] when the plaintiffs failed to present evidence on this issue." The plaintiffs respond that their "alleged failure to develop the administrative record is a direct result of the [commission's] choice not to make any substantive findings of fact as to the receipt of the request, because it had already determined that, in light of the date of the [request] and [complaint], no further investigation was required." We agree with the commission.

As we concluded in part I of this opinion, the denial of a request for public records is an essential fact for purposes of invoking the commission's authority pursuant to § 1-206 (b) (1). In the present case, Daley's complaint, which was dated August 19, 2019, and received by the commission on August 20, 2019, alleged that the plaintiffs had failed to comply with his request dated August 6, 2019. In their answer, the plaintiffs claimed that Daley's request had not been denied because the department did not receive the request until August 19, 2019, when they immediately responded to it. Although such a claim is a defense to an alleged violation of the act, the plaintiffs failed to offer any evidence in support of their allegation. Accordingly, Daley sufficiently alleged the essential fact that his request had been denied, as he alleged that, as of August 19, 2019, the plaintiffs had not complied with his August 6, 2019 request. As we explained in part II of this opinion, in the absence of evidence to the contrary, the commission was entitled to presume that a properly addressed letter was delivered within a reasonable amount of time. The hearing officer in the present case reasoned that a reasonable time for Daley's request to be received by the plaintiffs was "a couple of days" and, therefore, concluded that "there would have been a constructive denial of this request prior to August 19 [2019] . . . ."

The propriety of that presumption in the present case is supported by the evidence in the record. In particular, the commission notes that the plaintiffs introduced a copy of Daley's response to their answer, which was dated Thursday, October 3, 2019, and was stamped

"received" Tuesday, October 8, 2019, the third business day after it presumably was sent. In addition, Daley's complaint was dated August 19, 2019, and was received by the commission on August 20, 2019. Given how many days passed between when those letters were dated and when they were received and considering the absence of any evidence of when the department actually received Daley's request, the hearing officer reasonably may have presumed that Daley's request had been received by the plaintiffs more than four business days before Daley filed his complaint. Consequently, because the plaintiffs failed to offer any evidence as to when the department received Daley's request, they failed to rebut the presumption that Daley's request was received more than four business days before he filed his complaint with the commission. Thus, we conclude that the commission's finding that Daley's request was deemed denied pursuant to § 1-206 (a) before he filed his complaint on August 19, 2019, is reasonably supported by substantial evidence in the record. Accordingly, the court improperly sustained the plaintiffs' administrative appeal.

IV

Because we conclude that the court improperly sustained the plaintiffs' administrative appeal, we consider the plaintiffs' alternative grounds for affirming the judgment of the Superior Court.

A

The plaintiffs first claim that the executive director of the commission violated § 1-206 (b) (2) by failing to seek leave of the commission before scheduling a hearing on Daley's complaint. We disagree.

Section 1-206 (b) (2) provides in relevant part: "If the executive director of the commission has reason to believe an appeal under subdivision (1) of this subsection or subsection (c) of this section (A) presents a claim beyond the commission's jurisdiction; (B) would perpetrate an injustice; or (C) would constitute an abuse of the commission's administrative process, the executive director shall not schedule the appeal for hearing without first seeking and obtaining leave of the commission. The commission shall provide due notice to the parties and review affidavits and written argument that the parties may submit and grant or deny such leave summarily at its next regular meeting. The commission shall grant such leave unless it finds that the appeal: (i) Does not present a claim within the commission's jurisdiction; (ii) would perpetrate an injustice; or (iii) would constitute an abuse of the commission's administrative process."

In support of their claim, the plaintiffs note that, prior to the first scheduled hearing, they filed their answer confirming "that [Daley's] request was in progress, not denied" and argue that "given the assurances by the

[plaintiffs] that they fully intended to respond to Daley's request and produce nonexempt records, there was [a] basis for the [commission] to conclude that proceeding with an evidentiary hearing would work an injustice against the [plaintiffs], or would constitute an abuse of the administrative process. The [executive director's] decision not to refrain from scheduling a hearing in light of these facts, and instead to schedule multiple evidentiary hearings with a full examination of all claims of exemption is definitionally outside the statutory authority of the [commission] as set forth in the . . . act." We are not persuaded.

As previously noted in part I of this opinion, there is no question that a complaint alleging a violation of the act is within the commission's jurisdiction, and Daley's complaint alleged that the plaintiffs had failed to comply with his August 6, 2019 request. Section 1-206 (a) provides that "[f]ailure to *comply* with a request to so inspect or copy such public record within the applicable number of business days shall be deemed to be a denial."[13] (Emphasis added.) Because, for purposes of filing a complaint with the commission, the act requires *compliance* with a request for public records—not simply "assurances" that the agency will comply at some point in the future—the plaintiffs conceded in their answer that they had not complied with Daley's request, not only at the time that he filed his complaint, but also more than one month thereafter when the plaintiffs filed their answer. In fact, the plaintiffs did not provide Daley's attorney with any responsive records until November 13, 2019, nearly three months after their August 19, 2019 letter acknowledging Daley's request. Accordingly, under those circumstances, there was no basis for the executive director to question the commission's jurisdiction or to believe that docketing the complaint would perpetrate an injustice or constitute an abuse of the administrative process, as Daley still had not been provided copies of the records he sought at the time the plaintiffs filed their answer. Consequently, we conclude that the executive director's decision to schedule the matter for an evidentiary hearing was eminently reasonable, and the commission acted well within the confines of its statutory authority by proceeding to investigate and adjudicate Daley's complaint. See General Statutes § 1-205.

B

The plaintiffs next claim that, "even if the [commission] correctly assessed that it had jurisdiction to consider Daley's complaint . . . § 1-206 (b) (4) and substantial [commission] precedent would have justified dismissing the matter without a full evidentiary hearing." Again, we are not persuaded.

Section 1-206 (b) (4) provides: "Notwithstanding any provision of this subsection to the contrary, in the case of an appeal to the commission of a denial by a public

agency, the commission may, upon motion of such agency, confirm the action of the agency and dismiss the appeal without a hearing if it finds, after examining the notice of appeal and construing all allegations most favorably to the appellant, that (A) the agency has not violated the [act], or (B) the agency has committed a technical violation of the [act] that constitutes a harmless error that does not infringe the appellant's rights under said act."

The plaintiffs simply repeat their argument regarding § 1-206 (b) (2) in support of their claim that the commission abused its discretion in failing to dismiss Daley's complaint without an evidentiary hearing pursuant to § 1-206 (b) (4). They again argue that, on the basis of the allegation in Daley's complaint and the facts alleged in the plaintiffs' answer, the commission "had ample information before it to justify choosing not to schedule an evidentiary hearing, either because the complaint did not sufficiently allege that the [plaintiffs] violated the . . . act, or, even assuming that a constructive denial was appropriately found, the [plaintiffs'] assurances that the request was in progress evidenced at most a technical violation of the . . . act which obviated the need to hold a full evidentiary hearing."

For the same reasons stated in part IV A of this opinion, we are not persuaded that the commission abused its discretion by declining to dismiss Daley's complaint without an evidentiary hearing.

C

The plaintiffs also claim that the commission "should have limited the scope of its inquiry to the facts and allegations that existed at the time of the complaint, and the failure to do so evidences procedural errors and abuses of discretion that further [justify] vacating the final decision." According to the plaintiffs, "[a]ny contentions raised by [Daley] at the hearing, specifically with respect to the disputed redactions, should not have been considered by the hearing officer due to being outside the scope of the complaint, consistent with commission precedent." They argue that "[l]imiting a fact-finding investigation to those issues fairly raised in the complaint is one of the most fundamental principles of jurisprudence, and its importance is rooted in the need for the other party to have sufficient notice of the issues in dispute." We are not persuaded.

The plaintiffs cite three of the commission's decisions in which, according to the plaintiffs, the commission limited the scope of its inquiry to the issues raised in the complaint. See *Hennessy* v. *Hunt*, Freedom of Information Commission, Docket No. FIC 2020-0576 (August 10, 2022) p. 4 (commission concluded that complaint alleging that agency violated act by failing to take vote and "give some indication of the specific topic to be addressed [in] the executive session" did not fairly

raise "improper purpose executive session allegation"); *Book* v. *Mayor, City of Bridgeport*, Freedom of Information Commission, Docket No. FIC 2019-0499 (November 13, 2019) p. 3 (commission declined to make findings regarding promptness of respondents' response to request because "alleged lack of promptness not fairly raised in" complaint); *Morton* v. *First Selectman*, Freedom of Information Commission, Docket No. FIC 2015-326 (January 13, 2016) p. 2 (commission declined to make findings regarding allegations made during hearing concerning respondents' actions related to separate complaint pending before commission). Notably, however, those cases did not involve a respondent's failure to comply fully with a request based on claimed exemptions from disclosure under the act.

The act "makes disclosure of public records the statutory norm. . . . [I]t is well established that the general rule under the [act] is disclosure, and any exception to that rule will be narrowly construed in light of the general policy of openness expressed in the [act]. . . . [Thus] [t]he burden of proving the applicability of an exception [to disclosure under the act] rests upon the party claiming it." (Internal quotation marks omitted.) *Lewin* v. *Freedom of Information Commission*, 91 Conn. App. 521, 526, 881 A.2d 519, cert. denied, 276 Conn. 921, 888 A.2d 88 (2005).

In the present case, in which Daley alleged that the plaintiffs failed to comply with his request, the fact that the plaintiffs believed that they complied by providing redacted copies of the responsive records did not resolve Daley's complaint that the plaintiffs had not complied with his request. Indeed, the plaintiffs bore the burden of proving the propriety of the exemptions they claimed to establish that they had complied with Daley's request. Thus, Daley had no obligation to amend his complaint to allege that the plaintiffs violated the act by redacting portions of the responsive records, as such a claim is encompassed within the allegation that the plaintiffs failed to comply with his request for *all* responsive records. Furthermore, because the plaintiffs bore the burden of proof as to any claimed exemption, they were not prejudiced by the commission's consideration of those exemptions as part of its consideration of Daley's complaint. This is particularly true in the present case, in which the hearing officer continued the hearing to another date to give the plaintiffs an opportunity to present evidence in support of their claimed exemptions.

Accordingly, we disagree with the plaintiffs' contention that the commission should have refused to consider the propriety of the plaintiffs' claimed exemptions under the act.

D

Finally, the plaintiffs claim that "the administrative

record clearly demonstrates that the [plaintiffs] proved beyond a preponderance of the evidence that, among other things, the [the plaintiffs] appropriately redacted names and other identifiers of witnesses not known to the public; the [commission's] factual findings to the contrary are clearly erroneous and not reasonably supported by the evidence in the record." We disagree.

"[T]he present case involves applying the well settled meaning of [the exemptions laid out in] § 1-210 (b) . . . to the facts of this particular case. The appropriate standard of judicial review, therefore, is whether the commission's factual determinations are reasonably supported by substantial evidence in the record taken as a whole." (Internal quotation marks omitted.) *Director, Dept. of Information Technology* v. *Freedom of Information Commission*, 274 Conn. 179, 187, 874 A.2d 785 (2005).

The following additional facts are relevant to the plaintiffs' claim. The plaintiffs redacted the names, addresses, dates of birth, phone numbers and photographs of witnesses in the responsive records. The plaintiffs claimed that the information was exempt from disclosure pursuant to § 1-210 (b) (3) (A), which provides in relevant part: "Nothing in the [act] shall be construed to require disclosure of . . . [r]ecords of law enforcement agencies not otherwise available to the public which records were compiled in connection with the detection or investigation of crime, if the disclosure of such records would not be in the public interest because it would result in the disclosure of . . . the identity of informants not otherwise known or the identity of witnesses not otherwise known whose safety would be endangered or who would be subject to threat or intimidation if their identity was made known . . . ." As previously noted in this opinion, the plaintiffs presented a single witness, Detective Devan, who testified in support of the claimed exemptions. In its final decision, the commission made the following findings with regard to Devan's testimony in support of the application of § 1-210: "The [plaintiffs'] witness, a detective with the department, testified that, generally, the department strives to keep the names of witnesses confidential for their protection and so that witnesses will come forward. It is found that the [plaintiffs] failed to prove that the identity of the specific witnesses at issue are not otherwise known; and further failed to prove that the safety of these specific witnesses would be endangered, or that they would be subject to threat or intimidation if their identities were disclosed."

On appeal, the plaintiffs argue that the commission's findings in this regard "fail to accurately represent the scope of . . . Devan's testimony." The plaintiffs rely on Devan's testimony that, based on her knowledge of the case and what was available to the department, she had no reason to believe that the identities of the

witnesses are otherwise known and that "[i]n this case as well as any other case the possibility [that the witnesses at issue would be subject to threat or intimidation if their identities were known] exists. . . ." Leaving aside that Devan's testimony is stated in general terms, the probative force of her testimony was diminished due to her testimony that, "based on what I saw in the police reports, I have no way of knowing who testified at trial." The plaintiffs' counsel further undermined the plaintiffs' position when she explained to the hearing officer that, "based on the information that we have available to us we are operating under the assumption that all witnesses are unknown unless given information to the contrary. So, we don't have access to all of the prosecutorial information or what happened at trial." Cf. *Lewin* v. *Freedom of Information Commission*, supra, 91 Conn. App. 526 ("[T]he general rule under the [act] is disclosure, and any exception to that rule will be narrowly construed in light of the general policy of openness expressed in the [act]. . . . [Thus] [t]he burden of proving the applicability of an exception [to disclosure under the act] rests upon the party claiming it." (Internal quotation marks omitted.)). Moreover, Daley explained during the hearing that he was looking for information regarding a specific witness and, although that witness did not testify at his criminal trial, Daley referred to the witness by name. Thus, Devan's testimony that the witnesses' identities were not otherwise known was flatly contradicted by Daley's testimony identifying at least one of the witnesses by name.

Finally, Devan's testimony is stated in general terms, as she expressed nothing more than a department policy of not disclosing names of witnesses due to general concerns for witness safety in *all cases*, which does not support a finding that disclosure of the names of specific witnesses in Daley's case would subject such witnesses to threat or harm. The burden of proving the applicability of an exemption under the act "requires the claimant of the exemption to provide more than conclusory language, generalized allegations or mere arguments of counsel. Rather, a sufficiently detailed record must reflect the reasons why an exemption applies to the materials requested." (Internal quotation marks omitted.) *Director*, *Dept. of Information Technology* v. *Freedom of Information Commission*, supra, 274 Conn. 191–92. For this reason, "generalized claims of a possible safety risk do not satisfy the [plaintiffs'] burden of proving the applicability of an exemption from disclosure under the act." Id., 193; see also *New Haven* v. *Freedom of Information Commission*, 205 Conn. 767, 776, 535 A.2d 1297 (1988) ("[T]he claimant of the exemption [must] provide more than conclusory language, generalized allegations or mere arguments of counsel. Rather, a sufficiently detailed record must reflect the reasons why an exemption applies to the materials requested.").

Accordingly, given that the plaintiffs' only witness in support of the redactions of the names of witnesses conceded that she was unaware of who testified at trial and was unable to provide anything more than a generalized claim of possible safety risks if the information was disclosed, the commission's finding that the plaintiffs failed to prove the applicability of § 1-210 (b) (3) (A) is reasonably supported by substantial evidence in the record.

The judgment is reversed and the case is remanded with direction to dismiss the plaintiffs' administrative appeal.

In this opinion the other judges concurred.

[1] The plaintiffs did not name Daley as a party in their administrative appeal, and he is not a party to the present appeal.

[2] General Statutes § 1-212 (a) provides in relevant part: "Any person applying in writing shall receive, promptly upon request, a plain, facsimile, electronic or certified copy of any public record. The type of copy provided shall be within the discretion of the public agency, except (1) the agency shall provide a certified copy whenever requested, and (2) if the applicant does not have access to a computer or facsimile machine, the public agency shall not send the applicant an electronic or facsimile copy. . . ."

General Statutes § 1-210 (a) provides in relevant part: "Except as otherwise provided by any federal law or state statute, all records maintained or kept on file by any public agency, whether or not such records are required by any law or by any rule or regulation, shall be public records and every person shall have the right to (1) inspect such records promptly during regular office or business hours, (2) copy such records in accordance with subsection (g) of section 1-212, or (3) receive a copy of such records in accordance with section 1-212. Any agency rule or regulation, or part thereof, that conflicts with the provisions of this subsection or diminishes or curtails in any way the rights granted by this subsection shall be void. . . ."

Although § 1-210 was the subject of technical amendments since the events giving rise to the present appeal; see Public Acts 2019, No. 19-43, § 1; Public Acts 2019, No. 19-123, § 3; Public Acts 2021, No. 21-120, § 6; Public Acts 2023, No. 23-197, § 1; those amendments have no bearing on the merits of this appeal. In the interest of simplicity, we refer to the current revision of the statute.

[3] General Statutes § 1-206 (b) (1) provides in relevant part: "Any person denied the right to inspect or copy records under section 1-210 or wrongfully denied the right to attend any meeting of a public agency or denied any other right conferred by the [act] may appeal therefrom to the [commission], by filing a notice of appeal with said commission. A notice of appeal shall be filed not later than thirty days after such denial . . . . Upon receipt of such notice, the commission shall serve upon all parties, by certified or registered mail or by electronic transmission, a copy of such notice together with any other notice or order of such commission. . . ."

Although § 1-206 was the subject of technical amendments since the events giving rise to the present appeal; see Public Acts 2019, No. 19-64, § 14; Public Acts 2021, No. 21-2, § 148; Public Acts 2023, No. 23-200, § 1; those amendments have no bearing on the merits of this appeal. In the interest of simplicity, we refer to the current revision of the statute.

[4] General Statutes § 1-210 (b) provides in relevant part: "Nothing in the [act] shall be construed to require disclosure of . . . (3) Records of law enforcement agencies not otherwise available to the public which records were compiled in connection with the detection or investigation of crime, if the disclosure of such records would not be in the public interest because it would result in the disclosure of . . . (C) signed statements of witnesses . . . ."

[5] The final decision again failed to address the plaintiffs' jurisdictional claim. After the plaintiffs filed their administrative appeal, the court remanded the matter to the commission to correct the final decision in that respect. The commission issued a corrected final decision on April 7, 2021, which also is dated November 18, 2020.

[6] In support of their claim that the court properly found that Daley had waived the application of § 1-206 (a), the plaintiffs argue that the deemed

denied provision is not jurisdictional and, therefore, "that the four day rule can be waived by the requester." In the present case, because the alleged waiver of the four day period would not confer jurisdiction on the commission, Daley could waive his statutory right to file a complaint with the commission, even assuming that the deemed denied provision is jurisdictional. See *A Better Way Wholesale Autos, Inc.* v. *Saint Paul*, 338 Conn. 651, 662, 258 A.3d 1244 (2021) ("subject matter jurisdiction, *if lacking, may not be conferred by the parties*" (emphasis added; internal quotation marks omitted)). Indeed, there is no question that "federal and state constitutional and statutory rights can be waived . . . ." (Internal quotation marks omitted.) *State* v. *Morel-Vargas*, 343 Conn. 247, 259, 273 A.3d 661 (2022).

We note that, in response to the plaintiffs' argument that the deemed denied provision is subject to waiver, the commission argues in its reply brief that it has "consistently interpreted . . . § 1-206 as jurisdictional" and "consistently dismisses complaints that are not filed within the time limitations set forth in . . . § 1-206." It also contends that "there is ample authority that supports the proposition that the statutory time limitations set forth in the [act] are jurisdictional" and cite, inter alia, *West Hartford* v. *Freedom of Information Commission*, 218 Conn. 256, 262 n.5, 588 A.2d 1368 (1991) (noting that "the thirty day period for filing a notice of appeal with the [commission] . . . relates to the subject matter jurisdiction of the [commission]").

Given that the issue raised by the court does not involve the thirty day time limitation set forth in § 1-206 (b), our Supreme Court's observation in *West Hartford* v. *Freedom of Information Commission*, supra, 218 Conn. 256, does not resolve the issue presented in the present case. In other words, whether the thirty day appeal period set forth in § 1-206 (b) is jurisdictional is a separate issue from whether a request has been deemed denied pursuant to § 1-206 (a). During oral argument before this court, counsel for the commission recognized this distinction. When asked how the commission knew that Daley's request was sent on August 6, 2019, counsel responded: "Well, we don't know that because the question wasn't asked, Your Honor. But *I still don't believe that it impacts the commission's jurisdiction based on the language of the statute*." (Emphasis added.) Counsel for the commission also noted that, although the date that the plaintiffs received the request could have impacted the merits of the complaint, there was no evidence of that date. Considering the commission's position at oral argument before this court, we are not persuaded by its reliance on its prior decisions to support its argument that the deemed denied provision is jurisdictional.

[7] Although § 1-205 (d) was amended since the events giving rise to the present appeal; see Public Acts 2019, No. 19-64, § 22; this amendment has no bearing on the merits of this appeal. In the interest of simplicity, we refer to the current revision of the statute.

[8] The plaintiffs claim that their "argument that the [commission] erred in considering [Daley's complaint] due to [the] lack of a denial was well preserved before both the [commission] and the [Superior Court], and the . . . court's reliance upon uncontested evidence in the record to substantiate that claim is squarely within the scope of its judicial review." According to the plaintiffs, "the doctrine of waiver is well established and readily applicable to the facts of this case." The commission responds that, in light of the plaintiffs' failure to raise the issue before the commission, "there is no evidence in the record upon which the . . . court could have relied to reach its conclusion that Daley waived his right to appeal from a constructive denial . . . ." We agree with the commission.

The record reflects that the plaintiffs claimed that they had not denied Daley's request because they responded to it on the same day that they received it and informed him that they were reviewing the requested records. That claim is distinct from the issue raised by the court involving waiver of the deemed denied provision in § 1-206 (a). Accordingly, we disagree with the plaintiffs' contention that the issue of waiver was subsumed within their argument to the commission that they had not denied Daley's request when he filed his complaint with the commission.

Moreover, because the issue was not raised before the commission, no evidence was presented regarding it and, therefore, the evidence in the record does not support a finding of waiver. "It is well established that [w]aiver is a question of fact." (Internal quotation marks omitted.) *Worth Construction Co.* v. *Dept. of Public Works*, 139 Conn. App. 65, 68, 54 A.3d 627 (2012). "[W]aiver is the intentional relinquishment or abandonment of a known right or privilege. . . . [A] necessary element to waiver is the requisite knowledge of the right. . . . It must be shown that the party

understood its rights and voluntarily relinquished them anyway." (Citations omitted; internal quotation marks omitted.) Id., 70–71. Thus, "[t]he basic conception of a waiver is that it is intentional; it cannot be established by a consent given under a mistake of fact." (Internal quotation marks omitted.) Id., 71.

In the present case, the only evidence of waiver relied on by the court was Daley's request providing the plaintiffs with fourteen business days to respond to his request. Although Daley's request may be understood to provide the plaintiffs with more time than the act allows, there is no indication that Daley waived his right to file a complaint with the commission if the plaintiffs did not comply with his request within four business days. Indeed, there is no evidence regarding Daley's knowledge of § 1-206 (a) or what rights he intended to relinquish by giving the plaintiffs fourteen business days to respond to his request. Accordingly, we are not persuaded by the plaintiffs' contentions.

[9] In *West Hartford* v. *Freedom of Information Commission*, 218 Conn. 256, 588 A.2d 1368 (1991), the court construed General Statutes (Rev. to 1987) § 1-21i, which was recodified at § 1-206 in 1999. General Statutes (Rev. to 1987) § 1-21i provided in relevant part: "Any denial of the right to inspect or copy [public] records provided for under section 1-19 shall be made to the person requesting such right . . . within four business days of such request. Failure to comply with a request to so inspect or copy such public record within such four business day period shall be deemed to be a denial.

"(b) Any person denied the right to inspect or copy records under section 1-19 . . . may appeal therefrom to the freedom of information commission, by filing a notice of appeal with said commission. A notice of appeal shall be filed within thirty days after such denial. . . ."

[10] To be clear, the question of when an appeal can be filed is distinct from the question of whether the agency violated the act. See *Gemmell* v. *Hodge*, Freedom of Information Commission, Docket No. FIC 2006-433 (August 22, 2007) ("§ 1-206 (a) . . . does not establish a time limit by which a public agency must respond to a records request but rather that section provides a definite time period beyond which a requester may invoke the right to appeal to [the] commission pursuant to § 1-206 (b) (1)"); *Fletcher* v. *Taylor*, Freedom of Information Commission, Docket No. FIC 2001-534 (May 22, 2002) ("the denial provisions in § 1-206 (a) . . . do not create a right for which the commission can find a violation of the [act], but rather that section provides a definite time period beyond which a requester may invoke the right to appeal to [the] commission"); *Groten* v. *Goshen Assessor*, Freedom of Information Commission, Docket No. FIC 92-235 (March 10, 1993) p. 4 (concluding that § 1-206 (a) "does not define a four-day response as either prompt or not prompt, but rather sets a time limit for the agency to issue a denial, after the expiration of which time limit the request is deemed denied and an appeal may be taken"). Consequently, the act does not mandate that a public agency's failure to disclose requested records within four business days after receiving a records request constitutes a violation of the act. See, e.g., *Smith* v. *Freedom of Information Commission*, supra, Superior Court Docket No. CV-12-5015684-S (court rejected contention that public agency had only four days to respond to request pursuant to § 1-206 (a) because that provision "does not resolve whether a response is prompt" but, rather, "merely allows a complainant to file a complaint with the [commission] after four days by deeming that a denial has occurred"). Rather, the act requires "prompt" access, which is not reduced to a number of days. See General Statutes § 1-210 ("every person shall have the right to . . . inspect such records *promptly* during regular office or business hours" (emphasis added)); General Statutes §1-212 (a) ("[a]ny person applying in writing shall receive, *promptly upon request*, a . . . copy of any public record" (emphasis added)); *Lash* v. *Freedom of Information Commission*, 300 Conn. 511, 521 n.7, 14 A.3d 998 (2011) (court emphasized its "agreement with [this court's] conclusion that the commission's imposition of a two week time limit for compliance with a freedom of information request was an arbitrary limitation").

As the commission has explained, the issue of promptness "is a particularly fact-based question" involving the consideration of various factors, including "the volume of records requested; the time and personnel required to comply with a request; the time by which the person requesting records needs them; the time constraints under which the agency must complete its other work; the importance of the records to the requester, if ascertainable; and the importance to the public of completing the other agency business without the loss of the personnel time involved in complying with the request."

(Internal quotation marks omitted.) *Lucarelli* v. *Chief, Police Dept.*, Freedom of Information Commission, Docket No. FIC 2008-631 (July 22, 2009).

[11] In its reply brief, the commission notes that "the legislative history suggests that our legislature intended to afford requesters swift access to public records and an almost immediate right to review of a denial by the commission." It highlights general statements from the legislative history that an appeal to the commission would be a " 'simple' " and " 'speedy process' " and that the act would provide for " 'an immediate method of appeal' to the commission." (Emphasis omitted.). These general references to the simplicity and speediness of the appeals process provide little insight as to whether the four day period begins after a request is received or after it is sent. Indeed, under either interpretation, the process is simple and expeditious, and a complainant will be able to file a complaint with the commission in a matter of days after submitting a request.

[12] As we concluded in part I of this opinion, however, whether a request has been denied pursuant to § 1-206 (a) does not implicate the commission's jurisdiction. Instead, a denial of a request for public records is an essential fact as to the commission's authority under the act.

[13] See footnote 10 of this opinion.