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FREEDOM OF INFORMATION



Connecticut Freedom of Information Commission • 18-20 Trinity Street, Suite 100 • Hartford, CT 06106
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Nancy Burton,
Complainant(s)
against

Notice of Meeting

Docket #FIC 2013-172

Daniel C. Esty, Commissioner, State of Connecticut, Department of Energy and Environmental Protection; and State of Connecticut, Department of Energy and Environmental Protection,
Respondent(s)

September 10, 2013

Transmittal of Proposed Final Decision

In accordance with Section 4-179 of the Connecticut General Statutes, the Freedom of Information Commission hereby transmits to you the proposed finding and decision prepared by the hearing officer in the above-captioned matter.

This will notify you that the Commission will consider this matter for disposition at its meeting which will be held in the Freedom of Information Commission Hearing Room, 18-20 Trinity Street, 1st floor, Hartford, Connecticut, at **2 p.m. on Wednesday, October 9, 2013**. At that time and place you will be allowed to offer oral argument concerning this proposed finding and order. Oral argument shall be limited to ten (10) minutes. For good cause shown, however, the Commission may increase the period of time for argument. A request for additional time must be made in writing and should be filed with the Commission **ON OR BEFORE September 27, 2013**. Such request **MUST BE (1) copied to all parties, or if the parties are represented, to such representatives, and (2) include a notation indicating such notice to all parties or their representatives.**

Although a brief or memorandum of law is not required, if you decide to submit such a document, an **original and fourteen (14) copies** must be filed **ON OR BEFORE September 27, 2013**. **PLEASE NOTE: Any correspondence, brief or memorandum directed to the Commissioners by any party or representative of any party MUST BE (1) copied to all parties, or if the parties are represented, to such representatives, (2) include a notation indicating such notice to all parties or their representatives and (3) be limited to argument. NO NEW EVIDENCE MAY BE SUBMITTED.**

If you have already filed a brief or memorandum with the hearing officer and wish to have that document distributed to each member of the Commission, it is requested that **fourteen (14) copies** be filed **ON OR BEFORE September 27, 2013**, and that **notice be given to all parties or if the parties are represented, to their representatives, that such previously filed document is being submitted to the Commissioners for review.**

By Order of the Freedom of Information Commission

W. Paradis
Acting Clerk of the Commission

Notice to: Nancy Burton
Kenneth M. Collette, Esq.

9/10/13/FIC# 2013-172/Trans/wrbp/VDH//CAL

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FREEDOM OF INFORMATION COMMISSION
OF THE STATE OF CONNECTICUT

In The Matter of a Complaint by

Report of Hearing Officer

Nancy Burton,

Complainant

against

Docket #FIC 2013-172

Daniel C. Esty, Commissioner,
State of Connecticut, Department
of Energy and Environmental Protection,
and State of Connecticut, Department of
Energy and Environmental Protection,

Respondents

September 5, 2013

The above-captioned matter was heard as a contested case on August 13, 2013, at which time the complainant and the respondents appeared, stipulated to certain facts and presented testimony, exhibits and argument on the complaint.

Prior to the contested case hearing, by motion filed on August 6, 2013, the respondents moved to dismiss the complaint. The respondents contended that the appeal to the Commission was not timely filed. By email dated August 7, 2013, the complainant requested that the August 13, 2013 contested case hearing be continued, and that she be permitted two weeks to respond to the respondents' motion to dismiss. By order dated August 7, 2013, the hearing officer denied the complainant's motion to continue the August 13, 2013 hearing, but stated that the complainant could file an objection to the motion to dismiss up to, and including, August 13, 2013. The order advised the parties that the motion to dismiss would be taken up at the hearing.

At the commencement of the August 13, 2013 hearing, the hearing officer heard oral argument on the motion to dismiss. The respondents contended that the Commission was without jurisdiction to consider the instant complaint. Specifically, the respondents contended that the request for records in the case was sent and received by email dated October 9, 2012 (the "October 9th Request"). The respondents further contended that they did not respond to the October 9th Request within four business days. Therefore, according to the respondents, on October 16, 2012 the request was deemed denied by operation of law. Furthermore, the respondents contended that the complainant was required to file an appeal with the Commission by November 15, 2012. Finally, the respondents contended that, because the appeal was not filed by November 15, 2012, the respondents' subsequent correspondence to

complainant on March 14, 2013 enclosing some of the records requested on October 9, 2012 did not “re-trigger” the Commission’s jurisdiction over this matter.

In Town of West Hartford, et al. v. FOIC, et al., No. CV-87-0335670S, 1990 Conn. Super. LEXIS 163 (Conn. Super. Ct. July 26, 1990), the court considered the argument raised by the respondents in this case. In West Hartford, the complainants made an initial request for records on January 2, 1987. By letter dated January 7, 1987, the respondent offered to provide some of the requested records, but denied the request with respect to other records. By letter dated January 13, 1987, the complainants requested the offered records, and also requested the statutory basis the withholding of other records. By letter dated January 21, 1987, the respondent provided the complainants with certain records and the statutory basis for withholding records. Thereafter, on February 23, 1987, the complainants renewed their original request. No reply was forthcoming until on April 8, 1987, the respondent restated the reason previously given for the denial of some of the records. See id. *1-2. Thereafter, on April 15, 1987, an appeal was filed with the Commission, alleging that the respondent violated the Freedom of Information (“FOI”) Act by partially denying the request. See id. at *2.

The Superior Court found that the provisions prescribed in §§1-206(a) and (b)(1), G.S., of the FOI Act were mandatory and not directory. These provisions provide as follows:

Section 1-206(a), G.S., provides, in relevant part, as follows:

Any denial of the right to inspect or copy records . . . 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 . . . [within such four business day period] shall be deemed to be a denial.

Section 1-206(b)(1), G.S., provides, provides in relevant part, as follows:

Any person denied the right to inspect or copy records . . . 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. . . .

According to the Court, the respondent’s April 8, 1987 communication to the complainants after the Commission’s jurisdiction had run did not restart the jurisdictional clock. See Id. at *9. The Court held that when the Commission adjudicated such matter it did so without subject matter jurisdiction and it sustained the appeal.

However, the Connecticut Supreme Court reversed this decision, holding that because the appeal to the Commission was filed within thirty days of the written denial of April 8, 1987, the Commission did have subject matter jurisdiction to consider the appeal. See Town of West Hartford, et al. v. FOIC, et al., 218 Conn. 256, 260-63 (1991). In effect, the Supreme

Court reasoned that the respondent's April 8, 1987 communication to the complainant *had* restarted the Commission's subject matter jurisdiction over the appeal.

In this case, it is concluded that, when the respondents provided the complainant with some of the requested records on March 14, 2012, they failed (alleges the complainant) to provide her with other records and, thus, impliedly denied the request in part. In accordance with the Supreme Court's decision, because the complainant filed her appeal to the Commission within thirty days of her receipt of March 14, 2012 records, the Commission has jurisdiction to hear and decide this case. Accordingly, the respondents' motion to dismiss is denied.

After consideration of the entire record, the following facts are found and conclusions of law are reached:

1. The respondents are public agencies within the meaning of §1-200(1), G.S.
2. It is found that, by email dated October 9, 2012, the complainant requested that the respondents provide her with a copy of the following records:
 - a. All records of deleted emails from the email address: daniel.esty@ct.gov;
 - b. All records of "old" emails received on August 23, 2012 at the email address: daniel.esty@ct.gov;
 - c. All records of emails claimed to have been sent, but which were not received at the email address: daniel.esty@ct.gov; and
 - d. All records of emails between: daniel.esty@ct.gov and NancyBurtonCT@aol.com.
3. It is found that the respondents did not acknowledge the October 9th Request within four business days. It is further found that the complainant did not file an appeal with the Commission within thirty days of the respondents' failure to acknowledge her request.
4. It is found that, on February 14, 2013, in the context of a contested case hearing concerning a separate FOI complaint, the complainant offered the October 9th Request for records as evidence. See Nancy Burton v. Daniel Esty, Commissioner, State of Connecticut, Department of Energy and Environmental Protection, et al., Docket #FIC 2012-486. It is found that the records request was accepted into evidence. See id., Ex. C.
5. It is found that, by email dated March 14, 2013, the respondents forwarded the complainant eight attachments, and stated that they hoped that these records satisfied the October 9th Request.
6. By letter dated and filed March 21, 2013, the complainant appealed to this Commission, alleging that the respondents violated the FOI Act by failing to provide her with all of the records responsive to her request.

7. In addition to requesting a finding that the respondents violated the FOI Act, the complainant requested that the Commission impose a civil penalty against the respondent commissioner.

8. Section 1-200(5), G.S., provides:

“Public records or files” means any recorded data or information relating to the conduct of the public’s business prepared, owned, used, received or retained by a public agency, or to which a public agency is entitled to receive a copy by law or contract under section 1-218, whether such data or information be handwritten, typed, tape-recorded, printed, photostated, photographed or recorded by any other method.

9. Section 1-210(a), G.S., provides in relevant part that:

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.

10. Section 1-212(a), G.S., provides in relevant part that “[a]ny person applying in writing shall receive, promptly upon request, a plain, facsimile, electronic or certified copy of any public record.”

11. It is found that the records requested by the complainant are public records within the meaning of §§1-200(5), 1-210(a), 1-212(a), G.S.

12. It is found that the complainant sent the original October 9th Request for records in this case to the respondent commissioner.

13. It is found that the respondents have a formal process for responding to FOI requests. As a general matter, it is found that all FOI requests received by the respondents, including those received by the respondent commissioner, are forwarded to the respondents’ FOI Administrator, MaryLou Kramer. It is found that, once Ms. Kramer receives a request, she reviews it and acknowledges receipt of the same. Thereafter, it is found that Ms. Kramer forwards the request to the department and/or office within the respondent agency that she believes maintains records responsive to the request. It is found that the records are then gathered and reviewed for exemptions, and then returned to Ms. Kramer. Thereafter, it is found that Mr. Kramer provides the responsive records to the requester.

14. It is found that, as of August 13, 2013, the respondents have processed and responded to approximately 300 FOI requests during the 2013 calendar year.

15. The respondents readily conceded at the contested case hearing that, in this case, the October 9th Request somehow “fell through the cracks” of their process.

16. It is found that, between October 9, 2012 and February 14, 2013, the complainant did not correspond with the respondents about the October 9th Request. It is found that, on February 14, 2013, when the complainant offered the October 9th Request as evidence in the context of a hearing on another matter, the respondents realized that the October 9th Request had not been responded to and further realized that the complainant continued to desire the electronic records described in paragraph 2, above.

17. It is found that the respondents do not know why the October 9th Request was not processed in the usual manner. However, it is found that their failure to process the request in a timely manner was not intentional.

18. It is found that, shortly before the contested case hearing in the instant matter, the respondents re-searched their electronic records and discovered additional responsive records. The respondents provided these records to the complainant at the start of the August 13, 2013 hearing.

19. Upon a review of the additional records provided to her, the complainant conceded that she was now satisfied that she had all of the records responsive to her request. However, the complainant remained very concerned with the time it took to obtain these records.

20. It is concluded that the respondents violated the promptness requirements of the FOI Act.

21. With regard to the request for the imposition of civil penalties, it is found that, based on the facts and circumstances of this case, no such order is merited.

The following order by the Commission is hereby recommended on the basis of the record concerning the above-captioned complaint:

1. Henceforth, the respondents shall strictly comply with the promptness requirements of §§1-210(a) and 1-212(a), G.S.


Valicia Dee Harmon
as Hearing Officer