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FREEDOM OF INFORMATION



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Emily Gianquinto,
Complainant(s)
against

Notice of Meeting

Docket #FIC 2013-219

Commissioner, State of Connecticut,
Department of Economic and Community
Development; and State of Connecticut,
Department of Economic and Community
Development,

Respondent(s)

January 8, 2014

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 Tuesday, February 11, 2014**. 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 January 30, 2014**. 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 January 30, 2014**. **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 January 30, 2014**, 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: Emily Gianquinto
Lorrie Lewis Adeyemi, Esq.

1/8/14/FIC# 2013-219/Trans/wrbp/MS/VDH/KKR

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FREEDOM OF INFORMATION COMMISSION
OF THE STATE OF CONNECTICUT

In The Matter of a Complaint by

Report of Hearing Officer

Emily Gianquinto,

Complainant

against

Docket #FIC 2013-219

Commissioner, State of Connecticut,
Department of Economic and Community
Development; and State of Connecticut,
Department of Economic and Community
Development,

Respondents

January 8, 2014

The above-captioned matter was heard as a contested case on November 21, 2013, at which time the complainant and the respondents appeared, stipulated to certain facts and presented testimony, exhibits and argument on the complaint.

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 letter dated March 26, 2013, the complainant requested copies of the following records:
 - a. Any and all correspondence from, to or copied to any employee, member or agent of the Department of Economic and Community Development ("DECD"), including but not limited to the State Historic Preservation Office ("SHPO"), concerning review by the United States Army Corps of Engineers ("Army Corps") of the industrial wind turbine projects proposed by BNE Energy, Inc. ("BNE") in Colebrook, Connecticut;
 - b. Any and all notes or other documents concerning review by the Army Corps of the industrial wind turbine projects proposed by BNE in Colebrook,

Connecticut;

- c. Any and all other notes or other documents, including but not limited to e-mail and other correspondence, concerning historic property known as Rock Hall, located in Colebrook, Connecticut, that were created, generated, received or otherwise came into the possession of the DECD and/or SHPO after May 19, 2011; and
- d. Any and all correspondence, notes or other documents, including but not limited to calendar notations and entries, reflecting communications between any employee, member or agent of DECD and/or SHPO and any principal, agent or employee of BNE, including but not limited to Gregory Zupkus, Paul Corey, Franca DeRosa, Lee Hoffman, Michael Libertine and Nicole Dentamaro, in relation to Rock Hall that were created, generated, received or otherwise came into the possession of the DECD and/or SHPO after May 19, 2011.

3. It is found that the complainant's March 26, 2013 request was a renewal of a request that was submitted to the respondents on December 13, 2012.¹ It is found that, on December 13, 2012, the complainant sought records responsive to the requests described in paragraph 2a-d, above, dating back to September 13, 2012. It is further found that the December 13, 2012 request was an "update" to a request that the complainant had originally submitted to the respondents on September 13, 2012. It is found that, in connection with the September 13, 2012 request, the complainant had filed an appeal with the Commission, but later withdrew the appeal based on the respondents' provision of records. See Emily Gianquinto v. Comm'r, State of CT, Dep't of Econ. and Cmty. Dev., et al., Docket #FIC 2012-546 (withdrawn Feb. 6, 2013).

4. It is found that, by letter dated December 14, 2012, the respondents acknowledged the complainant's December 13, 2012 request. It is further found that, by email dated March 28, 2013, and in response to the March 26, 2013 request, the respondents informed the complainant that they had just received the requested records from their colleagues at the Office of the Arts.² It is further found that the respondents indicated that they were going to review the records for exempt material and, once their review was completed, they would notify the complainant.

¹ At the hearing, the complainant clarified that her March 26, 2013 request sought responsive records from September 13, 2012 (the timeframe set forth in the December 13th request) through March 26, 2013 (the date the instant request was submitted to the respondents).

² The Office of the Arts is an office within the DECD dedicated to developing and strengthening the arts in Connecticut.

5. By letter dated April 10, 2013 and filed April 12, 2013, the complainant appealed to this Commission, alleging that the respondents violated the Freedom of Information (“FOI”) Act by denying her request for a copy of the records described in paragraph 2, above.

6. 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.

7. 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.

8. 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.”

9. It is found that the respondents maintain the records described in paragraph 2, above, and it is therefore concluded that such records are “public records” and must be disclosed in accordance with §§1-210(a) and 1-212(a), G.S., unless they are exempt from disclosure.

10. It is found that the requested records are related to an Army Corps of Engineers’ (“Army Corps”) review of the impact on a historic property related to a project in Colebrook, Connecticut. It is further found that the complainant submitted the request (as well as the previous requests) on behalf of her clients, who own the historic property. It is further found that, as part of its impact review, the Army Corps is required to consult with the State Historic Preservation Office.³ It is further found that the bulk of the

³ It is found that, in the summer of 2011, the Commission on Culture and Tourism merged with Department of Economic and Community Development. The State Historic Preservation Office is one of the offices within the Commission on Culture and Tourism.

complainant's request pertains to the records generated during the mandatory consultation between federal and state authorities. It is found that the complainant submitted her original September 13, 2012 request for records when the mandatory consultation process commenced. See ¶3, above.

11. It is found that, on June 5, 2013, the respondents provided the complainant with 610 pages of records.

12. With regard to the production, the complainant contended that the records were not provided to her promptly. The complainant noted that many of the records were duplicative of records that had been previously provided to her, while other records were outside of the time parameters she had set. In addition, the complainant contended that certain emails were "text" files, which seemed to indicate that the document had been altered and, as a result, certain metadata was missing from the records.

13. The Commission has previously opined that the word "promptly" in §1-210, G.S., means "quickly and without undue delay, taking into account all of the factors presented by a particular request . . . [including] the volume of statements requested; the amount of personnel time necessary to comply with the request; the time by which the requester needs the information contained in the statements; 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 loss of the personnel time involved in complying with the request." See FOI Commission Advisory Opinion #51 (Jan. 11, 1982). The Commission also recommended in Advisory Opinion #51 that, if immediate compliance is not possible, the agency should explain the circumstances to the requester.

14. At the hearing on this matter, the respondents contended that, other than six draft letters, all of the records had been provided to the complainant in the form in which they were maintained. The respondents further contended that the six letters withheld from the complainant were exempt from disclosure pursuant to §1-210(b)(1), G.S.

15. It is found that, at the time of the request giving rise to the instant matter, Attorney Amy Filotto was one of DECD's two in-house legal counsels, and one her duties included serving as the agency's Freedom of Information Officer. It is found that some of Attorney Filotto's other duties at such time included responsibility for all housing and community development matters, writing legal opinions, drafting legislation and regulations, as well as serving as the legal liaison with U.S. Department of Housing and Urban Development and the Office of the Attorney General.

16. With regard to the records that were provided to the complainant, it is found that it is the DECD's policy to handle FOI requests in the order in which they are received. It is further found that the respondents informed the complainant of such policy in a December 13, 2012 acknowledgement letter, and also informed her that, at that time, twenty-one requests for access and/or copies were pending before the agency, some of which were quite voluminous. It is further found that the respondents informed the

complainant that, “although the DECD’s legal unit coordinates responses to FOI requests, it does not possess the underlying documents responsive to your requests and as such our response to your requests is dependent on what we receive directly from project staff.”

17. It is found that some of the FOI requests pending with the respondents at the time of the instant request involved several hundreds of responsive records, while others involved thousands. It is found that some involved sensitive information. For example, it is found that one such pending request, involving an underground electrical cable and actual and potential locations of sensitive, non-burial Native American resources, required both legal counsel and the State Historic Preservation Officer to review the responsive records word by word. It is found that another pending FOI request dealt with an executive order, and involved approximately 600 pages of responsive records.

18. It is found that, in this case, when the respondents received the complainant’s December 13, 2012 request and later her March 26, 2013 renewed request, they logged the requests into their system. It is found that, once the requests were logged in, the respondents identified staff who might maintain records responsive to the requests. It is found that, within one day, the requests were scanned into the system and forwarded to the identified staff members. It is further found that the respondents instructed the staff members receiving the requests to review all of their files, hardcopy as well as electronic files, for responsive records, and to review the requests and consider whether other staff members might maintain responsive records. It is found that any staff member who believed that another agency member maintained responsive records was further instructed to forward the requests to such individual. It is further found that all staff members who received the requests were directed to forward the responsive records to the respondents’ legal unit.

19. It is found that the responsive records were provided to the legal unit and were reviewed and prepared for the complainant as soon as the two request described in paragraph 17, above, were completed.

20. With regard to duplicates, it is found that it is the respondents’ policy to produce responsive internal emails both from the responder and the recipient. With regard to the form of certain records, it is found that the emails were produced to the complainant in the form of text files because the respondents decided copy all responsive emails to a shared drive, and then exported the records into a text file. It is found that the respondents chose this method to facilitate the legal unit’s review of the records. It is further found that none of the metadata pertaining to these emails was lost, destroyed, or otherwise erased during this process. With regard to records produced to the complainant which were outside of the request timeframe, it is found that it is the respondents’ policy to be over inclusive, rather than under inclusive. Specifically, if a responsive email is within the requested timeframe, but is transmitting a document outside of the requested timeframe, the respondents consider both the email and the attachment responsive, and would produce both records to a requester.

21. Finally, it is found that, after the respondents' legal unit received all of the responsive records on March 28, 2013, it took the unit 69 days to review the records for exemptions and provide them to the complainant. It is found that the records were provided to the complainant electronically and all fees were waived.

22. Based on the facts and circumstances of this case, it is concluded that the respondents promptly provided the requested records to the complainant.

23. With regard to the six records that were withheld from disclosure, the complainant made a motion at the contested case hearing to have the Commission conduct an in camera inspection. The hearing officer granted the complainant's motion

24. On November 29, 2013, the respondents submitted twenty pages of records to the Commission for an in camera review (hereinafter the "in camera records"). The in camera records, which contained the bates-stamp identifiers indicated below, can be described as follows: one three-page letter (IC-2013-219-003-005), one two-page letter (IC-2013-219-008-009), three versions of one two-page letter (2012-018)⁴, one one-page letter (IC-2013-219-021), one three-page letter and the email to which it was attached (IC-2013-219-023-026) and one two-page letter and the email to which it was attached (IC-2013-219-028-030).

25. Section 1-210(b)(1), G.S., provides, in relevant part, that the FOI Act shall not require mandatory disclosure of: "preliminary drafts or notes provided the public agency has determined that the public interest in withholding such documents clearly outweighs the public interest in disclosure...."

26. Section 1-210(e)(1), G.S., additionally, provides in pertinent part that:

[D]isclosure shall be required of (1) interagency or intra-agency memoranda or letters, advisory opinions, recommendations or any report comprising part of the process by which governmental decisions and policies are formulated, except disclosure shall not be required of a preliminary draft of a memorandum, prepared by a member of the staff of a public agency, which is subject to revision prior to submission to or discussion among the members of such agency....

27. Upon careful review of the in camera records, it is found that five of the documents are multiple versions of draft letters directed to private entities and private individuals. It is found that one letter is a draft letter directed to the Army Corps.

28. It is found that the substance of the letters concerns the respondents' interpretation of its role under the National Historic Preservation Act and its implementing

⁴ For purposes of clarity, while this letter is described as a two-page letter, one of the versions of the letter carries over onto a third page.

regulations. The respondents testified that the in camera records were withheld from disclosure because they are important letters which were substantially modified, and they believe that, with regard to the standard set forth in §1-210(b)(1), G.S., “as a matter of public policy, it is very important for the agency to speak with one voice.” It is found that none of the in camera records are signed letters. It is further found that each of the letters is part of the public agency’s “preliminary, deliberative and predecisional process.” See Van Norstrand v. FOIC, 211 Conn. 339, 344 (1989). Finally, it is found that the final, signed versions of all of these letters have been disclosed to the complainant.

29. It is further found that none of the in camera records can be fairly construed as an interagency or intra-agency memoranda or letter, advisory opinion, recommendation or a report comprising part of the process by which governmental decisions or policies are formulated, within the meaning of §1-210(e)(1), G.S.

30. Accordingly, it is concluded that the in camera records are exempt from mandatory disclosure by virtue of §§1-210(b)(1) and 1-210(e)(1), G.S.

31. It is further concluded that that the respondents did not violate the disclosure provisions of §§1-210(a) and 1-212(a), G.S., by denying the complainant’s request for copies of the in camera records.

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

1. The complaint is dismissed.


Commissioner Matthew Streeter
as Hearing Officer