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Joe Wojtas and the New London Day,
Complainant(s)
against

Information Technology Director, Town of Stonington; First Selectman, Town of Stonington; and Town of Stonington,
Respondent(s)

Notice of Meeting

Docket #FIC 2014-309

April 1, 2015

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, lst floor, Hartford, Connecticut, at **2 p.m. on Wednesday, April 22, 2015.** 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 April 10, 2015***. 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 April 10, 2015***. **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 **fifteen (15) copies** be filed ***ON OR BEFORE April 10, 2015***, 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: Joe Wojtas
Thomas Londregan, Esq.

2015-04-01/FIC# 2014-309/Trans/wrbp/KKR//TAH

FREEDOM OF INFORMATION COMMISSION
OF THE STATE OF CONNECTICUT

In the Matter of a Complaint by

Joe Wojtas and the New London Day,

Complainants

against

Information Technology Director, Town of Stonington; First Selectman, Town of Stonington; and Town of Stonington,

Respondents

Report of Hearing Officer

Docket #FIC 2014-309

April 1, 2015

The above-captioned matter was heard as a contested case on February 24, 2015, at which time the complainants and the respondents appeared 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 email dated February 13, 2014, the complainants requested from the respondents copies of transcripts of all text messages, emails and cell phone calls sent or received on First Selectman Ed Haberek's ("Haberek") town-issued Blackberry during 2011 and 2012 ("the requested records").

3. It is found that, by email dated February 18, 2014, the respondents acknowledged the request, described in paragraph 2, above.

4. It is found that, by email dated March 14, 2014, respondents' counsel informed the complainants that he expected to receive copies of the requested records from his clients either that day or the following business day, and that "the town and Ed Haberek will review them."

5. It is found that, several times during March and May, 2014, the complainants asked the respondents when they could expect to receive the requested records, to which the respondents replied, by email dated May 10, 2014, that "the process [of complying] is somewhat overwhelming and that it "will take at least another month or two."

6. By letter dated May 13, 2014 and filed May 16, 2014, the complainant appealed to this Commission, alleging that the respondents violated the Freedom of Information ("FOI") Act by failing to comply with the request for records, described in paragraph 2, above.

7. Approximately two weeks prior to the hearing in this matter, the respondents provided to the complainants a copy of the transcripts of only the requested text messages, from which they redacted all "personal" text messages and all phone numbers related thereto. It is found, however, that the respondents maintain other records, responsive to the request, described in paragraph 2, above, that they had not provided to the complainants, as of the date of the hearing.

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. (Emphasis added).

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 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 requested records are public records within the meaning of §§1-200(5), 1-210(a), and 1-212(a), G.S.

12. At the hearing in this matter, the respondents claimed that the portions of the requested records consisting of personal text, email and cell phone messages, are not "public records" under the FOI Act, because they do not "relate to the conduct of the public's business."

13. At the conclusion of the hearing in this matter, the respondents submitted an unredacted copy of the transcripts of only the requested text messages for in camera inspection

by the Commission ("in camera records").[1] It is found that the in camera records include, in addition to the text messages themselves, the time, date and related phone number for each message.

14. On the index to the in camera records, the respondents claimed that the portions of the in camera records consisting of "personal" text messages and the related phone numbers, are not "public records," under §1-200(5), G.S. Alternatively, the respondents claimed that the redacted portions are exempt from disclosure under §1-210(b)(2), G.S.

15. The Commission previously has considered whether personal email messages sent and received by a public employee on a government-issued computer are "public records," under §1-200(5), G.S.

16. In Hardie Burgin v. Chief, Police Department, Town of East Hampton, Docket #FIC 2011-704 (July 11, 2012), the Commission found that personal emails sent and received by a police officer, on town-issued equipment, during business hours, related to the conduct of the public's business because they revealed "an inappropriate mixing of the officer's professional and private life."

17. In Hardie Burgin v. Chief, Police Department, Town of East Hampton, Docket FIC 2012-089 (December 12, 2012), the Commission concluded that personal emails sent and received by the chief of police, on town-issued equipment, during business hours, did not relate to the conduct of the public's business because such emails did not reveal an "inappropriate mixing of the officer's professional and private life."

18. The Commission also has previously considered the reverse situation i.e., whether emails sent and/or received by a public employee on his or her personal computer are "public records," within the meaning of §1-200(5), G.S., and consistently held that if the content of the emails relates to the conduct of the public's business, such records are "public records," within the meaning of §1-200(5), G.S. See, e.g., Robert Willis v. Director, Park and Recreation Department, Town of Woodbury, Docket#FIC 2013-298 (January 8, 2014); Susan Chapman v. Monika Thiel, Selectman, Town of New Fairfield, Docket #FIC 2011-307 (April 7, 2012); Stamford Professional Fire Fighters Association v. Chief, Springdale Fire Co., Docket #FIC 2010-795 (October 12, 2011); Gail Anne Shea v. Planning and Zoning Commission, Town of Stonington, Docket #FIC 2006-679 (October 24, 2007); Richard Rowlenson and Gemini Networks Inc. v. John Fonfara, Co-Chairman, State of Connecticut, General Assembly, Energy and Technology Committee, Docket #FIC 2005-408 (June 14, 2006); Mark O. Weeks v. First Selectman, Town of Canterbury, Docket #FIC 2004-323 (July 13, 2005).

19. In Daniel Schwartz v. Rachel Krinsky Rudnick, Assistant Director of Compliance/Privacy, State of Connecticut, University of Connecticut, Docket #FIC 2009-2010 (March 10, 2010), the Commission considered whether phone numbers contained in phone bills for certain university-issued cell phones and land-lines were "public records," when such phone numbers did not relate to university business. The Commission concluded that, because the redacted phone numbers reflected the fact that a public employee used government-owned or

[1]The respondents also provided a redacted copy of such transcripts to the Commission.

issued equipment for personal reasons, the phone numbers were related to the conduct of the public's business within the meaning of §1-200(5), G.S.

20. Applying the principles articulated in the case law cited in paragraphs 16 – 19, above, and based upon careful inspection of the in camera records, it is found that the content of the text messages at issue is purely personal and does not reflect an "inappropriate mixing of Haberek's professional and private life," such as, for example, using his position of authority to obtain kick-backs from contractors seeking to do business with the town.

21. Accordingly, it is concluded that the text messages withheld from the complainants are not "public records" within the meaning of §1-200(5), G.S.[2]

22. It is concluded, therefore, that the respondents did not violate the FOI Act by redacting the content of the text messages.

23. However, with regard to the redacted phone numbers, it is found, as in Schwartz, that the phone numbers reflected the fact that a government employee "use[d] government-owned or issued equipment on government time" and that, therefore, such information relates to the conduct of the public's business.

24. It is concluded, therefore, that the phone numbers withheld from the complainants are "public records."

25. With regard to the respondents' claim that the phone numbers are exempt from disclosure pursuant to §1-210(b)(2), G.S., the Supreme Court set forth the test for that exemption in Perkins v. Freedom of Information Commission, 228 Conn. 158, 175 (1993), which test has been the standard for disclosure of records pursuant to that exemption since 1993.

26. Specifically, under the Perkins test, the claimant must first establish that the files in question are personnel, medical or similar files. Second, the claimant must show that disclosure of the records would constitute an invasion of personal privacy. In determining whether disclosure would constitute an invasion of personal privacy, the claimant must establish both of two elements: first, that the information sought does not pertain to legitimate matters of public concern, and second, that disclosure of such information is highly offensive to a reasonable person.

27. It is found that the phone numbers at issue herein are not "personnel, medical [or] similar files," under §1-210(b)(2), G.S. Even assuming they are "personnel, medical [or] similar files," however, it is found that the respondents failed to provide any evidence regarding, and therefore failed to prove, either prong of the Perkins test.

28. Accordingly, it is concluded that the respondents violated the FOI Act by redacting such phone numbers.

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[2]In light of this conclusion, the Commission need not consider the respondents' alternative claim that the text messages are exempt from disclosure pursuant to §1-210(b)(2), G.S.

29. In addition, with regard to whether or not the respondents promptly complied with the request, described in paragraph 2, above, it is found that the respondents waited until January 2015, approximately 10 months after receiving such request, to begin reviewing the responsive records, because, they claimed, they asked Haberek to review them and, month after month, they hoped he would do so. It is found, however, that Haberek did not do so and resigned in the fall of 2014.

30. Accordingly, it is concluded that the respondents violated the promptness provisions of §§1-210(a) and 1-212(a), G.S., with regard to the phone numbers and the text messages other than those found not to be public records herein.

31. With regard to the remainder of the records responsive to the request, described in paragraph 2, above (i.e., email messages and cell phone calls), it is found that the respondents had compiled but not reviewed such records as of the date of the hearing in this matter, and they did not provide such records to the Commission for in camera inspection. Nonetheless, the respondents claimed that those portions of such records consisting of personal emails and transcripts of cell phone calls are not "public records." However, without the opportunity to inspect the records in camera, the Commission is unable to make any determination regarding whether the portions of such records claimed to be personal "relate to the conduct of the public's business." It is further found that the respondents did not offer any evidence that such portions are otherwise exempt from disclosure.

32. Accordingly, it is found that the respondents failed to prove that the records, described in paragraph 31, above, are not "public records," or that such records are exempt from disclosure.

33. Based upon the foregoing, it is concluded that the respondents violated the FOI Act by failing to comply with the request, described in paragraph 2, above, for such records.

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

1. Forthwith, the respondents shall provide a copy of the in camera records, free of charge, to the complainants.

2. In complying with the paragraph 1 of the order, above, the respondents may redact only the content of the text messages claimed on the index.

3. Within two weeks of the date of the Notice of Final Decision in this matter, the respondents shall provide an unredacted copy of the email and cell phone messages, including the related cell phone numbers, if any, responsive to the request described in paragraph 2, above, to the complainants, free of charge.

Kathleen K. Ross
As Hearing Officer

FIC 2014-309/hor/kkr/04012015