

FREEDOM OF INFORMATION COMMISSION
OF THE STATE OF CONNECTICUT

In the Matter of a Complaint by

FINAL DECISION

Elizabeth Regan and Rivereast
News Bulletin,

Complainant

against

Docket #FIC 2018-0477

Town Manager, Town of East Hampton;
and Town of East Hampton,

Respondents

June 12, 2019

The above-captioned matter was heard as a contested case on October 30, 2018, 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 an election was held on November 7, 2017, in the Town of East Hampton, and that a recanvass was required due to a “close vote.” See §9-311a, G.S. Such recanvass was held on November 13, 2017.
3. It is found that, by email dated August 8, 2018, the complainants requested an opportunity to inspect “all the ballots that were handcounted during the Nov. 13, 2017 recount.”
4. By letter to the complainants dated August 28, 2018, the respondents denied the request, described in paragraph 3, above, based on the FOI Commission’s prior decisions in Elizabeth Regan and Rivereast News Bulletin v. Town Manager, Town of East Hampton, et al., Docket #FIC 2017-0741 (August 8, 2018) (Regan I), and Romeo v. Veronica Musca, Republican Registrar of Voters, Town of Greenwich, et al., Docket #FIC 1997-394 (July 8, 1998), and an opinion of the Secretary of the State, described in paragraph 11 of the findings, below.
5. By email dated August 28, 2018, and filed August 29, 2018, the complainants appealed to this Commission, alleging that the respondents violated the FOI Act by failing to comply with their request to inspect the ballots.

6. The Commission takes administrative notice of the findings of fact and conclusions of law in Regan I, in which the Commission concluded that “public access to the requested paper ballots is governed by the state elections statutes...and that the respondents therefore did not violate the [Freedom of Information] Act by denying the complainants’ request...to inspect the paper ballots....”

7. Notice of Hearing and Order to Show Cause in this matter was issued to the parties on October 9, 2018. By letter dated October 12, 2018, and addressed to the Commission’s executive director, the respondents requested that the executive director cancel the scheduled contested case hearing and not reschedule it without first seeking and obtaining leave of the Commission, citing §1-206(b)(2), G.S.¹ According to the respondents, conducting a hearing in this matter would constitute an abuse of the Commission’s administrative process because “this exact case has already been decided in [Regan I].” In addition, the respondents argued that the matter is moot because the ballots at issue had been destroyed at the direction of the Secretary of the State.

8. By email dated October 22, 2018, the parties were informed by the Commission’s staff that argument on the respondents’ October 12, 2018 request would be addressed by the hearing officer at the hearing in this matter. Nevertheless, by letter dated October 24, 2018, counsel for the respondents “demand[ed]” that the executive director cancel the contested case hearing in this matter for the reasons set forth in the October 12, 2018 letter. Such demand was denied by the executive director in a written ruling dated October 26, 2018.

9. At the hearing in this matter, the hearing officer, treating the October 12, 2018 letter as a motion to dismiss the complaint for lack of subject matter jurisdiction, declined to rule on such motion until after the parties presented evidence and argument on the complaint.

10. It is found that, upon receipt of the request, described in paragraph 3, above, the respondents requested a formal written opinion from the Secretary of the State, pursuant to §9-3, G.S., as to the following questions:

(a) To what extent does Title 9 of the General Statutes control the public’s access to election documents, in particular, ballots of a municipal election and referendum, after the expiration of the one hundred eighty day impoundment period set forth in [§9-310, G.S.]?; and

(b) Are ballots of a municipal election and referendum subject to disclosure pursuant to a request for inspection under the [FOI] Act....?

¹ Section 1-206(b)(2), G.S., 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 notes that the respondents filed their motion after the case was scheduled for a contested case hearing.

11. It is found that, in a letter dated August 27, 2018, the Secretary of the State opined that “Connecticut’s electoral statutes...prohibit routine public inspection of ballots.” In addition, the Secretary of the State wrote that it is her opinion and her instruction that:

ballots of individual voters not be made available for public inspection and be destroyed at the expiration of any statutorily or court ordered impoundment period. In this particular case, therefore, it is the opinion of this office that the ballots securely preserved by the Town must remain in their secure transfer cases for a period of one hundred eighty days from the date of the November 2017 general municipal election in the Town. At the expiration of that period, the municipal clerk shall open the transfer cases that contain such ballots and such ballots shall be destroyed without public inspection.

12. It is found that, upon receipt of the opinion letter from the Secretary of the State, the respondents denied the request at issue in this case, in part, based on the Secretary of the State’s opinion (see paragraph 4 of the findings, above).

13. It is found that, on August 28, 2018, the requested records were destroyed at the direction of the Secretary of the State.

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

“[p]ublic 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.

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

[e]xcept 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 inspect such records promptly during regular office or business hours...or...receive a copy of such records in accordance with section 1-212. (Emphasis added).

16. 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.”

17. Section 9-309, G.S., provides that after the election polls are closed, the moderator must immediately lock the voting tabulator and announce the vote totals, vote checkers must record the number of votes received, and the moderator must prepare a preliminary list from the vote totals for transmission to the Secretary of the State. Section 9-309, G.S., further provides that:

[w]hile such announcement is being made, ample opportunity shall be given to any person lawfully present to compare the results so announced with the result totals provided by the tabulator and any necessary corrections shall then and there be made by the moderator, checkers and registrars or assistant registrars, after which the compartments of the voting tabulator shall be closed and locked. In canvassing, recording and announcing the result, the election officials shall be guided by any instructions furnished by the Secretary of the State.

18. Section 9-310, G.S., provides:

[i]f it is determined that a recanvass is required pursuant to section 9-311 or 9-311a, immediately upon such determination the tabulators, write-in ballots, absentee ballots, moderators' returns and all other notes, worksheets or written materials used at the election shall be impounded at the direction of the Secretary of the State. Such package shall be preserved for one hundred eighty days after such election and may be opened and its contents examined in accordance with section 9-311 or upon an order of a court of competent jurisdiction. At the end of one hundred eighty days, unless otherwise ordered by the court, such package and its contents may be destroyed. (Emphasis added).

19. Section 9-311, G.S., provides that “all recanvassing procedures shall be open to the public,” and further sets forth the specific procedures for unsealing the tabulator and paper ballots in order to conduct the recanvass.

20. In Regan I and in the Romeo decision, the Commission concluded that the Connecticut General Statutes governing elections, “otherwise provide[]” for public access to the records of elections, and therefore, under §1-210(a), G.S., such records are not public records subject to disclosure under the FOI Act.

21. The complainants argued, at the hearing in this matter, that Regan I does not control the outcome of the instant matter because, in Regan I, the request for the paper ballots was made and the contested case hearing was held, during the 180 day impoundment period provided for in §9-310, G.S., and in the instant case, the request for the paper ballots was made after the expiration of that period. According to the complainants, after the expiration of the 180 day impoundment period, such records become public records subject to disclosure under the FOI Act. The complainants, in their post-hearing brief, dated March 15, 2019, did not point to any provision in the general statutes or elsewhere that would support this claim, and the Commission is not aware of any such provision.²

22. The Commission disagrees with the complainants' claim that at the expiration of the 180 impoundment period, the paper ballots become public records. The Secretary of the State's opinion, which is presumed to be correct, pursuant to §9-3, G.S.,³ in fact, states that such records are not subject to public inspection after the expiration of the 180 day impoundment period, but rather, should be destroyed without public inspection. But even if the complainants' interpretation of the elections statutes is correct, and the ballots became public records upon the expiration of the 180 day impoundment period, the requested ballots no longer exist, and the Commission cannot order the respondents to provide records they do not maintain.

23. At the hearing in this matter, the complainants' stated that they are seeking an order from the Commission imposing a penalty against the respondents for destroying the requested paper ballots. However, the destruction of the ballots in this case was authorized by the Secretary of the State in accordance with §9-310, G.S. But even if the destruction was not authorized, this Commission is not empowered to enforce the criminal penalties set forth in §1-240, G.S., for improper destruction of public records.

24. Based on the findings that the requested records are not public records, and that such records no longer exist, it is concluded that this Commission lacks jurisdiction over the complaint in this matter.

25. Accordingly, the respondents' motion to dismiss is granted.

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.

² Although the complainants obtained counsel to represent them after the hearing was concluded, and counsel sought, and was granted two extensions of time in which to file a brief, such brief did not address the legal issue in the case. Rather, counsel argued in his brief that the respondents improperly destroyed the ballots and that this Commission should "sanction" the respondents for such improper behavior.

³ Section 9-3, G.S., provides, in relevant part: "(a) The Secretary of the State, by virtue of the office, shall be the Commissioner of Elections of the state, with such powers and duties relating to the conduct of elections as are prescribed by law and, unless otherwise provided by state statute, the Secretary's regulations, declaratory rulings, instructions and opinions, if in written form, and any order issued under subsection (b) of this section, shall be presumed as correctly interpreting and effectuating the administration of elections and primaries under this title...."

Approved by Order of the Freedom of Information Commission at its regular meeting of June 12, 2019.



Cynthia A. Cannata
Acting Clerk of the Commission

PURSUANT TO SECTION 4-180(c), G.S., THE FOLLOWING ARE THE NAMES OF EACH PARTY AND THE MOST RECENT MAILING ADDRESS, PROVIDED TO THE FREEDOM OF INFORMATION COMMISSION, OF THE PARTIES OR THEIR AUTHORIZED REPRESENTATIVE.

THE PARTIES TO THIS CONTESTED CASE ARE:

ELIZABETH REGAN AND RIVEREAST NEWS BULLETIN, c/o Attorney Kenneth J. Krayeske, Kenneth J. Krayeske Law Offices, 255 Main Street, 5th Floor, Hartford, CT 06106

TOWN MANAGER, TOWN OF EAST HAMPTON; AND TOWN OF EAST HAMPTON, c/o Attorney Richard D. Carella, Updike, Kelly & Spellacy, P. C., 100 Pearl Street, Hartford, CT 06103



Cynthia A. Cannata
Acting Clerk of the Commission