

FREEDOM OF INFORMATION COMMISSION
OF THE STATE OF CONNECTICUT

In the Matter of a Complaint by

FINAL DECISION

John Santanella,

Complainant

against

Docket #FIC 2019-0283

President, Board of Fire Commissioners,
Enfield Fire District No.1; and Board of Fire
Commissioners, Enfield Fire District No. 1,

Respondents

August 12, 2020

The above-captioned matter was heard as a contested case on July 25, 2019, at which time the complainant and the respondents appeared, stipulated to certain facts, and presented testimony, exhibits and argument on the complaint. A Report of Hearing Officer was issued on December 31, 2019 and considered for disposition by the Commission at its January 22, 2020 meeting. At that meeting, the Commission voted to remand the matter back to the hearing officer for an in camera inspection of records. On January 31, 2020 the hearing officer issued a Notice of Reopened Hearing for the purpose of taking evidence and hearing argument on the issues raised at the Commission's January 22, 2020 meeting.

A hearing was then conducted on February 28, 2020, at which time the complainant and the respondents again appeared, stipulated to certain facts, and presented additional testimony, exhibits and arguments on the complaint. Following the hearing, the respondents submitted a representative sample of the requested records for an in camera inspection.

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. By letter of complaint filed May 17, 2019, the complainant appealed to the Commission, alleging that the respondents violated the Freedom of Information ("FOI") Act by denying his request for copies of certain ballots cast by the voters of Enfield Fire District No. 1 (the "District").
3. It is found that the complainant made a May 7, 2019 request to the respondents for, among other records no longer at issue, copies of ballots, including absentee ballots, cast by the voters of the District concerning the purchase of new fire apparatus at a meeting on January 17, 2019.

4. It is found that the respondents, through counsel, denied the complainant's request for the ballots by email dated May 8, 2019.

5. It is found that the District was established on October 15, 1896, by the authority of Chapter LVII of Senate House Bill No. 306 enacted in 1893.

6. It is found that on April 28, 1964, pursuant to §7-324, G.S., the District elected to be governed by the provisions of §§7-324 through 7-329, G.S., to exercise all powers and duties granted by those statutes, and to continue its existing form of organization.

7. It is found that the District is a fire district within the meaning of §7-324, G.S., which provides in relevant part:

For the purposes of sections 7-324 to 7-329, inclusive, "district" means any fire district, sewer district, fire and sewer district, lighting district, village, beach or improvement association and any other district or association, except a school district, wholly within a town and having the power to make appropriations or to levy taxes....

8. It is found that the respondent Board of the District is the representative body or agency that governs the District.

9. It is found that the District held a meeting on January 17, 2019 for the legal voters and those non-resident electors entitled to vote in the District (i.e., owners of real property in the District) to vote on a proposal by the respondents to purchase new fire apparatus to replace a 1991 Pierce Arrow pumper and a 1988 Pierce Arrow 110-foot tower ladder. The projected cost of the pumper was reported to be \$825,000, while the cost of the aerial ladder was reported to be \$1.4 million.

10. It is found that the January 17, 2019 meeting was a meeting of the voters and electors of the District, and not a meeting of the respondent Board of Fire Commissioners. See Docket No. FIC 92-86, *Santella et al v. Third Taxing District of the City of Norwalk, et al.*, (a meeting of the electors of a special taxing district meeting is not a meeting of the electors' representatives). It is further found that the ballots requested by the complainant were cast by the voters and electors of the district, and not by their elected representatives on the Board of the District.

11. It is found that, at the time notice of the meeting was given, the respondents did not anticipate using absentee ballots, and that the notice did not mention absentee ballots.

12. The Commission takes administrative notice of the District by-laws, which provide in §4.6 that ballots for the election of Commissioners must be cast on the day of the District's annual meeting, and that balloting shall be from 6:00 a.m. to 8:00 p.m. at one or more of the District fire stations as advertised in the notice of meeting. The by-laws make no provision for voting procedures in cases other than the election of Commissioners. The by-laws also make no provision for the use of absentee ballots in any vote.

13. It is found that after the notice of meeting but before the meeting itself, the respondent President, at the request of taxpayers who would be unable to attend the meeting, decided to permit absentee ballots.

14. It is found that, on the day of the meeting, absentee ballots were also brought to a local nursing home for use of the residents. These residents were not the same taxpayers who had approached the President for permission to cast absentee ballots. The provision of absentee ballots to the nursing home residents had been pre-arranged, and the residents gathered in a meeting room at the nursing home, where the District's administrative assistant checked their IDs and gave them absentee ballots to complete. Some of the residents wrote their names on the back of the absentee ballots, although it appears that they were not directed to do so, since most of the residents did not do so.

15. It is found that, at the actual meeting of the District on the same day, a moderator was selected by vote of the District members, and the moderator ran the meeting in the same manner as other meetings of the District. The District's administrative assistant checked the District's members' names against the town's grand list, put the ballots in a box, and subsequently counted all of the ballots, including the absentee ballots, which were maintained separate from the ballots cast at the meeting.

16. The complainant believes, or suspects, that the respondents allowed District voters to cast absentee ballots throughout the day, and that the respondents sent members of the organization out into the community to solicit votes.

17. Section 1-200(5), G.S., defines "public records or files" as:

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.

18. 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 . . . (3) receive a copy of such records in accordance with section 1-212.

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

20. It is concluded that the requested ballots are public records within the meaning of §§1-200(5), 1-210 and 1-212, G.S.

21. The respondents, who are the custodians of the ballots, contend that the ballots are exempt from disclosure pursuant to §7-327, G.S., which provides in relevant part that items on the call of a meeting of a fire district may be submitted to the persons qualified to vote in such meeting “by paper ballots or by a ‘yes’ or ‘no’ vote on the voting machines ...”

22. Although §7-327, G.S., is silent on the issue of disclosure of the ballots or voting machine results used at a meeting of a fire district, the respondents contend that the use of the terms “ballot” and “voting machine” carries with it the legal presumption that ballots are confidential. The question before the Commission, therefore, is whether §7-327, G.S., by authorizing the use of paper ballots, also exempts those ballots from public disclosure.

23. The word “ballot” is not defined in Title 7 of the general statutes. “Ballot” is defined in §9-1(a), G.S., to mean “paper or other material containing the names of the candidates or a statement of a proposed constitutional amendment or other question or proposition to be voted on.”

24. Webster’s Third New International Dictionary, Merriam-Webster, 1993, p. 168, defines “ballot” to mean:

1a: a small ball dropped into a box or urn¹ *in secret voting*
b: a ticket or sheet of paper (as one printed with the candidates’ names or the proposition to be voted on) *used to cast a secret vote* (as during public elections) ... **2a:** the action or system of *secret voting* by the use of ballots or by any device for casting or recording votes (as a voting machine) [Emphasis added.]

25. Black’s Law Dictionary, West Publishing Co., 1979, defines “ballot” to mean:

... Process or means of voting, *usually in secret*, by written or printed tickets or slips of paper, or voting machine. Piece of paper or levers on voting machine on which the voter gives expression to his choice. ... A means, or instrumentality, by which a voter *secretly* indicates his will or choice so that it may be recorded as being in favor of a certain candidate or for or against a certain proposition or measure.... [Emphasis added.]

26. The Commission takes administrative notice of the fact that the right to cast a secret ballot has been a mainstay of the U.S. system of governance for at least a hundred years. Casting ballots in secret is thought to guard against coercion and bribery, and to be essential to the integrity of the electoral process.

27. The Commission observes that ballots were historically employed in order to secure secrecy, and the use of a ballot implies the secrecy of the process of casting a vote. As legal scholars observed in 1893:

¹ The word ballot comes from the Italian *ballotta*, meaning a “small ball used in voting.”

That the ballot, which for years has been used in every election district in this country, except for general elections in Kentucky, was employed in order to secure secrecy, and that its use implied secrecy, has been repeatedly decided by our courts, while the benefit which this secrecy conferred upon the individual voter and the community at large has often been dwelt upon by text-writers.

“American Secret Ballot Decisions,” *The American Law Register and Review*, February, 1893 (Charles Chauncy Binney, Esq.).

28. It is concluded that, by common usage and historical precedent, the process of casting a ballot is presumptively secret.

29. The respondents contend that if the process of casting a ballot is secret, then the actual ballots themselves must also necessarily be secret.

30. Respondents further contend that provisions of Title 9 of the general statutes, and the directive of the Secretary of the State, require that ballots not be disclosed to the public.

31. With respect to the respondents’ arguments concerning Title 9, the Commission has not previously determined whether ballots authorized by Title 7 of the General Statutes and cast at a Fire District meeting are exempt from disclosure, although the Commission has addressed related issues under Title 9.

32. Specifically, the Commission has previously considered the application of Connecticut’s Title 9 electoral statutes to the disclosure of ballots. See docket number 2018-0477, *Elizabeth Regan et al. v Town of East Hampton et al.* (“*Regan I*”); docket number FIC 2017-0741, *Elizabeth Regan et al v. Town of East Hampton, et al.* (“*Regan II*”); and docket number FIC 1997-394, *Romeo v. Musca et al.* In these cases, the Commission concluded that the Title 9 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 subject to disclosure under the FOI Act.

33. In *Regan I*, the Commission concluded that the statutes in Title 9 comprehensively set forth the process by which records of elections, including paper ballots, must be secured, retained, and ultimately destroyed.

34. Specifically, the Commission took note of §§9-309, 9-310, 9-311, 9-311a and 9-311b, G.S.

35. 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.

36. 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.

37. 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.

38. With respect to Connecticut’s electoral statutes as contained in Title 9 of the General Statutes, the Commission also takes administrative notice of a formal opinion of the Secretary of the State dated August 27, 2018, which states:

Connecticut’s electoral statutes—when read as a whole, and in the context of legislative history and Connecticut’s Constitution—prohibit routine public inspection of ballots....For this reason it is the opinion of the Secretary 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.

39. Therefore, the Commission concluded in both *Regan I* and *Regan II* that public access to the requested paper ballots was comprehensively governed by the state

elections statutes set forth above, and that those statutes “otherwise provided” that the ballots were not public records subject to disclosure under the FOI Act.

40. However, Title 9 of the General Statutes by its express terms applies only to a municipal, state or federal election, primary or recanvass, and not to an election conducted by a Fire District as defined in Title 7.² Further, Title 7 does not comprehensively govern the treatment of ballots; indeed, it is silent on that issue, apart from providing for the process of voting by ballot.

41. It is therefore concluded that the Secretary of the State’s opinion, and the Commission’s decisions in *Regan* and *Romeo*, above, do not control the disposition of ballots cast pursuant to Title 7.

42. The respondents nonetheless contend that since the *process* of casting votes secretly at the respondents’ January 17, 2019 meeting was proper, the ballots themselves must therefore not be subject to public disclosure.

43. It is concluded that §7-327, G.S., by granting the voters of fire districts the right to vote “by paper ballots or by a ‘yes’ or ‘no’ vote on the voting machines, implies that the ballots themselves are confidential after they are cast.

44. The question is whether this implication expresses an exception to disclosure under the FOI Act.

45. In *Chief of Police v. Freedom of Information Commission*, 252 Conn. 377, 398-99 (2000), our Supreme Court observed that the reference to federal and state law in §1-210(a) “suggests ... a reference to federal and state laws, that, *by their terms*, provide for confidentiality of records or some other similar shield from public disclosure.” [emphasis added]. See also *Commissioner of Emergency Services & Public Protection v. Freedom of Information Commission*, 330 Conn. 372 (2018). In *Pictometry International Corp. v. Freedom of Information Commission*, *supra*, 307 Conn. 684, 672 (2013) our Supreme Court elaborated:

[B]oth this court and the Appellate Court consistently have required that any exemption from disclosure under the "otherwise provided" language of § 1-210 (a) be based on express terms in the state or federal law that either provide for the confidentiality of the documents or otherwise limit disclosure, copying, or distribution of the documents at issue. Such a requirement is consistent with the well established principle that "[o]ur construction of the [act] must be guided by the policy favoring disclosure and exceptions to disclosure must be narrowly construed." (Internal quotation marks omitted.)

² The complainant testified that when he sought relief from the Office of the Secretary of the State, he was told that they had no jurisdiction over the respondents.

46. Guided by the decisions of our Supreme Court, the Commission must determine whether the grant of the right to cast secret ballots in §7-327 provides, *by its express terms*, for the confidentiality of ballots themselves. Only if §7-327, G.S., provides by its terms for the confidentiality of ballots may the Commission conclude that §7-327, G.S., “otherwise provides” for the nondisclosure of public records under §1-210(a), G.S.

47. It is concluded that §7-327, G.S., is silent on the status of ballots themselves, and that its plain language does not expressly provide for the confidentiality of ballots after those ballots are cast.

48. It is therefore concluded that the respondents violated §1-210(a), G.S., when they declined to provide copies of the requested absentee ballots to the complainant.

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 the complainant, free of charge, copies of the requested absentee ballots.
2. In complying with paragraph 1 of this order, the respondents shall redact the names of individual voters if written on the ballots.

Approved by Order of the Freedom of Information Commission at its regular meeting of August 12, 2020.

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:

JOHN SANTANELLA, 1204 Enfield Street, Enfield, CT 06082

PRESIDENT, BOARD OF FIRE COMMISSIONERS, ENFIELD FIRE DISTRICT #1; AND BOARD OF FIRE COMMISSIONERS, ENFIELD FIRE DISTRICT #1,
c/o Attorney Carl T. Landolina, 487 Spring Street, Windsor Locks, CT 06096

Cynthia A. Cannata
Acting Clerk of the Commission