

FREEDOM OF INFORMATION COMMISSION
OF THE STATE OF CONNECTICUT

In the Matter of a Complaint by

FINAL DECISION

Jennifer Holme and David Markatos,

Complainants

against

Docket #FIC 2019-0671

Town Planner, Town of New Canaan,
and Town of New Canaan,

Respondents

January 12, 2022

The above-captioned matter was heard as a contested case on March 4, 2021 and April 30, 2021, at which times the complainants and the respondents appeared, stipulated to certain facts and presented testimony, exhibits and argument on the complaint. Due to the COVID-19 pandemic and the state's response to it, the hearings were conducted remotely.¹ For purposes of hearing, the matter was consolidated with the Docket #FIC 2019-0551; Jennifer Holme and David Markatos v. Director of Inland Wetlands & Watercourses, Town of New Canaan; Planning & Zoning Department, Town of New Canaan; Chairman, Town Council, Town of New Canaan; and Town Planner, Town of New Canaan.

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 October 21, 2019, the complainants requested that Lynn Brooks Avni, the Town Planner, provide them with access to the following records:

[a]ll internal and external communications, including, but not limited to, printed (hardcopy) correspondence and electronic messages, including any attachments, sent to or from John Goodwin (either directly or as a cc: or bcc: recipient) and any of the following individuals:

1. Sharon Prince;
2. Bob Prince;
3. Michael Chen;

¹ On March 14, 2020, the Governor issued Executive Order 7B, which suspended the requirement to conduct public meetings in person.

4. Rod Khattabi;
5. Gail Pflederer;
6. Krishna Patel;
7. Barbara Gould;
8. Rob Mallozzi;
9. Kevin Moynihan;
10. Steve Kleppin;
11. Steve Palmer;
12. Keisha Fink;
13. Lynn Brooks Avni;
14. Lola Sweeney;
15. Daniel Stepanek;
16. Kathleen Holland;
17. Ted O'Hanlan
18. Diana Neeves;
19. Ira Bloom; and
20. Mark DeWaele;

that address, refer to, or reference any of the following:

1. Grace Farms;
2. Grace Farms Foundation;
3. Grace Community Church;
4. Grace;
5. GFF; and
6. GCC;

during the following time period:

June 1, 2015 through and including March 27, 2019.

3. By letter dated November 6, 2019, and filed November 7, 2019², the complainants appealed to this Commission, alleging that the respondents violated the FOI Act by failing to provide them with access to all of the requested records.

4. At the time of the request, §1-200(5), G.S., provided:

“[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

² On March 25, 2020, the Governor issued Executive Order 7M, thereby suspending the provisions of Conn. Gen. Stat. §1-206(b)(1), which requires the Freedom of Information Commission to hear and decide an appeal within one year after the filing of such appeal. Executive Order 7M is applicable to any appeal pending with the Commission on the issuance date and to any appeal filed on or after such date, through June 30, 2021. Consequently, the Commission retains jurisdiction over this matter.

data or information be handwritten, typed, tape-recorded, printed, photostated, photographed or recorded by any other method.

5. 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 (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.

6. 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.”

7. It is found that the records requested by the complainants are public records within the meaning of §§1-200(5), 1-210(a), 1-212(a), G.S., and must be disclosed unless they are exempt from disclosure.

8. The Commission notes that the request issued to Ms. Brooks Avni in this case is identical to the request issued to Ms. Brooks Avni for Mr. John Goodwin’s records in Docket #FIC 2019-0551; Jennifer Holme and David Markatos v. Director of Inland Wetlands & Watercourses, Town of New Canaan, et al. When questioned by hearing officer as to why the appeal in the instant case needed to proceed, the complainants explained that they re-requested Mr. Goodwin’s records from Ms. Brooks Avni in case the Commission determined it did not have jurisdiction over the request issued to Ms. Brooks Avni in Docket #FIC 2019-0551.

9. It is found that the respondents provided the records responsive to the instant request to the complainants on July 2, 2019, September 18, 2019, January 10, 2020 and February 16, 2021. See ¶¶ 13, 22, 23 and 26, below.

10. The complainants contended that there should be more records responsive to the request. The complainants also contended that the records that they did receive were not provided to them in a prompt manner.

11. In response, the respondents contended that they had conducted a thorough search for records in response to complicated request and had disclosed all responsive records without redactions to the complainants, including records that were originally claimed to be exempt from disclosure pursuant to the attorney-client privileged.

12. Mary Margaret Pitt, the town’s Project Coordinator, appeared and testified for the respondents at both contested case hearings.

13. With respect to the search conducted for Mr. Goodwin's records, it is found that the town searched Mr. Goodwin's town email account in accordance with the terms and the timeframes set forth in the request. It is found that all responsive records were fully disclosed to the complainants by July 2, 2019.

14. It is found that Mr. Goodwin searched both of his personal email accounts and found no records responsive to the request.

15. It found that, with respect to the search of Mr. Goodwin's other non-town email accounts, the search for responsive records became a bit more complicated. Specifically, it is found that Mr. Goodwin is a financial advisor at Morgan Stanley Smith Barney LLC ("Morgan Stanley") and had used business email accounts to send and receive communications relating to his role as the Chairman of the Planning and Zoning Commission.

16. It is found that Attorney Ira Bloom contacted Morgan Stanley and requested that that company conduct a search of Mr. Goodwin's business email in accordance with the terms and timeframes provided in the request. It is found that Morgan Stanley agreed to perform the search.³

17. It is found that, by email dated September 4, 2019, a Morgan Stanley representative contacted Attorney Bloom and the complainants' counsel to inform them that Morgan Stanley had performed the search and located over 1,000 emails on Morgan Stanley's email server responsive to the request. However, it is found that the representative further stated that Morgan Stanley had run the search for responsive records limited to the period September 1, 2016 through January 31, 2018 (as opposed to the timeframe set forth in the request issued to Ms. Brooks Avni with respect to Mr. Goodwin's records, which was June 1, 2015 through and including March 27, 2019) (the "first search"). In accordance with a request made by the complainants' counsel, the representative stated that Morgan Stanley would re-run the search for the time periods June 1, 2015 through August 31, 2016 and February 1, 2018 through June 30, 2019.

18. It is found that, on September 5, 2019, a Morgan Stanley representative contacted Ms. Pitt and provided her with access to a secure website to download the responsive records retrieved in the first search.⁴

19. It is found that Morgan Stanley ran the additional search on or about September 12, 2019 and provided Ms. Pitt with access to the responsive records in the same way it had on September 5, 2019 (the "second search").

20. It is found that, in total, Morgan Stanley provided Ms. Pitt with 1,308 emails.

³ The Commission notes that Mr. Goodwin has more than one email account with Morgan Stanley and Morgan Stanley agreed that the search for responsive records would include a search of all of Mr. Goodwin's business email accounts.

⁴ It is worth noting that Mr. Goodwin had no role in the search of his Morgan Stanley email accounts for responsive records.

21. It is found that the respondents reviewed the 1,308 emails and determined that 100 of those emails contained privileged attorney-client communications and that 34 emails were non-responsive.

22. With the exception of the 100 emails for which the attorney-client privilege was initially claimed, the 34 emails that were claimed to be non-responsive, and 19 emails that could not be opened or otherwise transferred onto a flash drive⁵, it is found that, on September 18, 2019, Ms. Pitt notified the complainants that the emails had been placed on a flash drive, which the complainants could retrieve from the town hall.

23. Subsequently, it is found that, on or about January 10, 2020, when the litigation to which the 100 emails pertained was resolved, the respondents waived their claim of privilege and disclosed the 100 emails to the complainants. It is found that, at or around this same time, and at the request of the complainants, the respondents also disclosed the 34 non-responsive emails to the complainants.

24. It is found that, after receiving all of the Morgan Stanley emails (with the exception of the 19 emails), the complainants informed the respondents that they believed there should be more responsive records.

25. It is found that, in December 2020, Attorney Bloom again contacted Morgan Stanley, provided Morgan Stanley with a copy of the March 27, 2019 request issued to Ms. Brooks Avni, and requested that Morgan Stanley conduct another search of Mr. Goodwin's Morgan Stanley email accounts. It is found that Morgan Stanley complied with such request (the "third search").

26. It is found that, by letter dated February 5, 2021, a Morgan Stanley representative informed Ms. Pitt that he had performed the third search of Mr. Goodwin's email and provided Ms. Pitt with access to a secure website to download the responsive records. It is found that this search also resulted in 1,308 responsive emails. See ¶ 20, above. It is found that, on this occasion, the respondents were able to transfer all 1308 emails onto a flash drive. It is found that, on February 16, 2021, the respondents notified the complainants that they could pick up the flash drive at town hall. It is found that, on February 25, 2021, Complainant Markatos picked up the flash drive.

27. Finally, with regard to hardcopy records responsive to the request, the respondents informed the complainants that there was a file in the office of the Planning and Zoning Commission and that they could review the file by contacting the commission's administrative assistant.

28. At the second contested case hearing, the complainants contended that the third search performed by Morgan Stanley may not have captured all of Mr. Goodwin's responsive emails from his Morgan Stanley email accounts. In support of this contention, the complainants relied on a February 5, 2021 letter from a Morgan Stanley representative to

⁵ It is found that Ms. Pitt contacted the respondents' IT professional to assist her with transferring the 19 emails onto a flash drive. The IT professional was also not able to open, read, print, or transfer these 19 emails onto a flash drive.

Attorney Ira Bloom, in which the representative confirms that a third search of Mr. Goodwin's email accounts at Morgan Stanley had been conducted in accordance with the following parameters:

Morgan Stanley custodian: All emails sent to or received by any Morgan Stanley email address used by John Goodwin (which includes, *inter alia*, John.Goodwin@morganstanleypwm.com and jgood@ms.com);

Time period: June 1, 2015 through March 27, 2019;

Email to/from the following addresses: sprince@gracefarmsfoundation.org OR michael@chen-associates.com OR rkhattabi@gracefarmsfoundation.org OR kpatel@gracefarmsfoundation.org OR Robert.mallozzi@newcanaanct.gov OR kevin.j.moynihan@gmail.com OR steven.kleppin@newcanaanct.gov OR steve.palmer@newcanaanct.gov OR keisha.fink@newcanaanct.gov OR lola.sweeney@newcanaanct.gov OR tohanlan@rc.com OR ibloom@bmdlaw.com OR stecomm@optimum.net OR gpflederer@gracefarmsfoundation.org OR bgould@gracefarmsfoundation.org OR lynn.brooksavni@newcanaanct.gov OR daniel.stepanek@newcanaanct.gov OR Kathleen.holland@newcanaanct.gov OR DNeives@rc.com OR dewaele2@aol.com; and

Search terms: "Grace Farms" OR "Grace Farms Foundation" OR "Grace Community Church" OR "Grace" or "GFF" or "GCC".

29. Specifically, the complainants contend that the "Email to/from the following addresses" section may have limited the search because it did not include all of the email addresses (that is, both business and personal) for each individual listed in the request. See ¶ 2, above.

30. Based on a review of the records produced to the complainants as a result of Morgan Stanley's second search, see ¶¶ 19-20, above, it is found that the "Email to/from the following addresses" criteria referenced in paragraph 28, above, did not limit the results of the third search.⁶ For example, it is found that the responsive records produced to the complainants as a result of the second search contained emails sent to and from two distinct email addresses for Attorney Bloom (that is, the email address for Attorney Bloom listed in paragraph 28, above, as well as a distinct email address not listed in said paragraph). It is further found that the responsive records produced to the complainants as a result of the second search contained emails sent to and from two distinct email addresses for Mr. Mazzolli (that is, the email address for Mr. Mazzolli listed in paragraph 28, above, as well as a distinct email address not listed in said paragraph). It is also found that responsive records were produced as a result of the second search containing emails addresses that were not listed in paragraph 28, above. Finally, it is found that, because the results of the second and third Morgan Stanley searches yielded the exact same number of responsive records (that is, 1308 emails, see ¶¶ 20, 26), the second and third searches performed by the Morgan Stanley

⁶ At the request of the hearing officer, the respondents submitted to the Commission the responsive emails gathered by Morgan Stanley as a result of its second search and such records were marked as respondents' Post-Hearing Ex. 11.

representative were thorough and complete searches.

31. It is found that the third search included all email addresses used by Mr. Goodwin. Accordingly, it is found that all responsive records related to Mr. Goodwin have been provided to the complainants.

32. Based on all of the evidence in this case, it is found that the respondents conducted multiple, complicated searches for responsive records and that all responsive records have been disclosed to the complainants.

33. Finally, with regard to whether the respondents have disclosed the responsive records promptly, this 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 records requested; the amount of personnel time necessary to comply with the request; the time by which the requester needs the information contained in the records; 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.

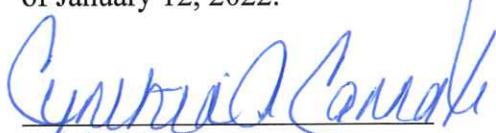
34. It is found that, at the time the respondents received the request referenced in paragraph 2, above, they had at least five pending FOI requests. It is found that some of the pending FOI requests were quite large. Moreover, it is found that request at issue in this case was extremely broad, complicated, and difficult to process. Based on the facts and circumstances of this case, the Commission believes that the respondents have worked diligently in this case and in accordance with the promptness criteria set forth in Advisory Opinion #51.

35. Accordingly, it is concluded that the respondents did not violate the provisions of §§1-210(a) and 1-212(a), G.S., as alleged in the complaint.

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.

Approved by Order of the Freedom of Information Commission at its regular meeting of January 12, 2022.



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:

JENNIFER HOLME, AND DAVID MARKATOS, c/o Attorney Amy Souchuns, Hurwitz Sagarin Slossberg & Knuff LLC, 147 North Broad Street, Milford, CT 06460

TOWN PLANNER, TOWN OF NEW CANAAN; AND TOWN OF NEW CANAAN, c/o Attorney Ira W. Bloom, Berchem Moses PC, 1221 Post Road East, Westport, CT 06880 and Attorney Nicholas R. Bamonte, Berchem Moses PC, 1221 Post Road East, Westport, CT 06880



Cynthia A. Cannata
Acting Clerk of the Commission