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FREEDOM OF INFORMATION

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Marc Lemcke

Complainant(s)

Notice of Meeting

against

Docket #FIC 2022-0229

Building Official, Town of Westport; Town Planner, Town of Westport; and Town of Westport

Respondent(s)

April 19, 2023

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.

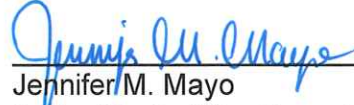
This will notify you that the Commission will consider this matter for disposition at its meeting which will be held **in person** at the Freedom of Information Commission's Hearing Room, Conference Room H, located on the ground floor at 165 Capitol Avenue, Hartford, Connecticut, at **2:00 p.m. on Wednesday, May 10, 2023.**

At that time and place, you will be allowed to offer oral argument concerning this proposed finding and order in person. 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 28, 2023.** 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 28, 2023.** **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 28, 2023** 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



Jennifer M. Mayo
Acting Clerk of the Commission

Notice to: Marc Lemcke
Attorney Eileen Lavigne Flug

FIC# 2022-0229/ITRA/VDH/CZH/JMM/2023-04-19

FREEDOM OF INFORMATION COMMISSION
OF THE STATE OF CONNECTICUT

In the Matter of a Complaint by

Report of Hearing Officer

Mark Lemcke,

Complainant

against

Docket #FIC 2022-0229

Building Official, Town of
Westport; and Planning and
Zoning Department,
Town of Westport,

Respondents

April 12, 2023

The above-captioned matter was heard as a contested case on October 26, 2022, at which time the complainant 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 March 17, 2022, the complainant requested that the Planning and Zoning Department (the “P&Z Department”) for the Town of Westport¹, provide him with “all information regarding Aquarion construction on North Avenue. . . .”
3. It is found that, by email dated March 18, 2022, the complainant requested that John Broadbin, the Deputy Director of Public Works for the Town of Westport, provide him with “all information regarding Aquarion construction on North Avenue. . . .”
4. It is found that, by letter dated March 21, 2022, the Planning and Zoning Director informed the complainant that he was welcome to come into the P&Z Department’s office during normal business hours and review the relevant zoning permit and the public hearing files pertaining to Aquarion construction. The Planning and Zoning Director further informed the complainant that he could take pictures of the records, or request that certain records be scanned or that copies be made for him.

¹ It is found that the Town of Westport does not have a “Town Planner”; however, the Town does have a Planning and Zoning Director, which position is equivalent to a Town Planner. Because the March 17, 2022 request was directed to the P&Z Department and because the Planning and Zoning Director appeared and testified at the contested case hearing, the case caption has been amended to reflect the Planning and Zoning Department as a party respondent in this matter in lieu of the “Town Planner.”

5. It is found that, by letter dated April 6, 2022, counsel for the Town of Westport informed the complainant that the Deputy Director of Public Works did not maintain any records responsive to March 18, 2022 request.

6. It is found that, on or around April 6, 2022, the complainant clarified that he wanted copies of all of the Deputy Director of Planning and Zoning's emails for the previous two years that pertained to "Aquarian."

7. It is found that, by email dated April 8, 2022, the complainant requested that the P&Z Department forward any responsive records to him via email.

8. It is found that, by email dated April 12, 2022, the Deputy Planning and Zoning Director informed the complainant that the records had been copied for him and that they were available for pick up in the P&Z Department's office.

9. It is found that, on or about April 28, 2022, the complainant picked up approximately 600 pages of responsive records.

10. It is found that, by email dated April 29, 2022, the P&Z Department informed the complainant that some of the Deputy Director of Planning and Zoning's emails were being reviewed to determine if they were exempt from disclosure as protected attorney-client communications.

11. It is found that, by email dated May 23, 2022, the complainant informed the P&Z Department that he believed there were gaps in the records that he received and that he did not receive any emails from the Planning and Zoning Director.

12. It is found that, by email dated May 23, 2022, the P&Z Department forwarded the complainant additional responsive emails from the Deputy Director of the Planning and Zoning and informed the complainant that the remainder of the Deputy Director's emails were exempt from disclosure as privileged attorney-client communications. It is found that the P&Z Department further informed the complainant that it had instructed the Planning and Zoning Director to search all her emails for the previous two years and provide the complainant any email containing the word "Aquarian."

13. It is found that, by email dated May 24, 2022, the P&Z Department reminded the complainant that he was still welcome to come into the office to review the zoning permit file and the public hearing file pertaining to Aquarian construction.

14. By letter of complaint, dated and filed May 25, 2022, the complainant appealed to this Commission, alleging that the P&Z Department and the Building Official violated the Freedom of Information ("FOI") Act by failing to provide him with copies of all of the records referenced in paragraph 2, above.

15. 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 1-218, whether such data or information be handwritten, typed, tape-recorded, videotaped, printed, photostated, photographed or recorded by any other method.

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

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

17. Section 1-212(a), G.S., provides, in relevant part: “[a]ny person applying in writing shall receive, promptly upon request, a plain, facsimile, electronic or certified copy of any public record.”

18. It is found that the requested records are public records within the meaning of §§1-200(5) and 1-210(a), G.S.

19. It is found that the complainant did not make a request for public records from the Building Official for the Town of Westport.

20. Accordingly, the Building Official did not violate the FOI Act as alleged and the complaint is dismissed as to such respondent.

21. It is found that, on October 14, 2022, the P&Z Department provided the complainant with copies of all of the Deputy Director of Planning and Zoning’s emails that it had previously claimed were exempt from disclosure as privileged attorney-client privilege communications. See ¶ 12, above. It is found that, rather than search the previous two years as requested by the complainant, the Deputy Director of Planning and Zoning searched her emails from 2017 to the date of the request in this case. Accordingly, it is found that all of the Deputy Director’s responsive emails have been provided to the complainant.

22. It is further found that, on October 14, 2022, the P&Z Department provided the complainant with all of the Planning and Zoning Director’s emails for the two year period preceding the request, which contained the word “Aquarian,” including those emails that the department determined were privileged attorney-client communications.

23. It is concluded that the P&Z Department did not violate the disclosure provisions of §§1-210(a) or 1-212(a), G.S., as alleged in the complaint.

24. Finally, the complainant contended that the respondents failed to disclose the records to him promptly.

25. 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.

26. In this case, it is found that the P&Z Department did not initially construe the request as seeking copies of emails; rather, the P&Z Department believed that the complainant was requesting access to and copies of the zoning permit file and the public hearing file pertaining to Aquarian construction.

27. It is found that the complainant never visited the P&Z Department's office to review the files pertaining to Aquarian construction.

28. It is found that, when the complainant clarified that he was seeking copies of certain emails, the P&Z Department acted promptly in gathering, reviewing, and disclosing such emails to the complainant.

29. It is found that the P&Z Department prioritized the complainant's request in this matter, along with many other projects that were significant to the department and subject to strict deadlines, including developing plans to allow restaurants to remain open during the Covid-19 pandemic. It is further found that, at the time the P&Z Department received the complainant's request, it was working to satisfy approximately five FOI requests.

30. Under the facts and circumstances of this case, it is found that the P&Z Department provided the complainant with the requested records promptly.

31. Accordingly, it is concluded that the P&Z Department did not violate the promptness provisions of §§1-210(a) and 1-212(a), G.S.

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.



Valicia Dee Harmon
as Hearing Officer