FREEDOM OF INFORMATION COMMISSION
OF THE STATE OF CONNECTICUT

In the Matter of a Complaint by FINAL DECISION

Matthew Hennessy,

Complainant

against Docket # FIC 2020-0281

Donald Stein, Chairman, Board of Directors, Materials Innovation and Recycling Authority; Board of Directors, Materials Innovation and Recycling Authority; Tom Kirk, President, Materials Innovation and Recycling Authority; Laurie Hunt, Director of Legal Services, Materials Innovation and Recycling Authority; and Materials Innovation and Recycling Authority,

Respondents June 22, 2022

The above-captioned matter was heard as a contested case on January 18, 2022, and March 28, 2022, at which times the complainant and the respondents appeared and presented testimony, exhibits and argument on the complaint. Due to the COVID-19 pandemic and the state's response to it, the hearing was conducted remotely pursuant to §149 of Public Act 21-2 (June Special Session). For hearing purposes, this matter was consolidated with Docket #FIC 2020-0351, Matthew Hennessy v. Laurie Hunt, Director of Legal Services, Materials Innovation and Recycling Authority; Tom Kirk, President, Materials Innovation and Recycling Authority; Donald Stein, Chair, Materials Innovation and Recycling Authority; and Materials Innovation and Recycling Authority ("Docket #FIC 2020-0351"). The Commission takes administrative notice herein of the testimony and exhibits in Docket #FIC 2020-0351.

The case caption has been amended to accurately reflect the names and titles of the parties.

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.[1]

[1] Section 1-200(1), G.S., defines "public agency", in relevant part, as: ...[a]ny executive, administrative or legislative office of the state or any political subdivision of the state and any state or town agency, any department, institution, bureau, board, commission, authority or official of the state or of any city, town, borough, municipal

2. It is found that, by letter dated May 27, 2020, the complainant requested from the respondent President Kirk ("Kirk") a copy of certain emails pertaining to jet engine contracts. It is found that 191 pages of responsive records were located, and by email dated June 9, 2020, the respondent Attorney Hunt ("Hunt"), on behalf of Kirk, informed the complainant that, upon payment of the copying fee of $.50 per page, the copies would be provided. The complainant protested and maintained that the statutorily permitted copying fee is $.25 per page. Nonetheless, the complainant paid the $.50 per page copying fee, and a copy of the requested records was provided to the complainant on or about June 26, 2020.

3. By letter of complaint filed July 26, 2020,[2] the complainant appealed to this Commission, alleging that the respondents violated the Freedom of Information ("FOI") Act G.S., by charging him $.50 per page for copies of the records he requested, as described in paragraph 2, above.

4. In addition, the complainant alleged in the July 26th complaint that the respondent board ("board") violated the FOI Act when it held meetings on May 6, 2020, May 13, 2020, and May 28, 2020, and entered into executive session during those meetings without stating the purpose of such executive sessions. Finally, the complainant alleged that during a meeting held on June 10, 2020, the board improperly discussed in executive session a matter which should have been discussed in public. The complainant requested the imposition of a civil penalty against the respondent Chairman Stein ("Stein"), and Kirk and Hunt.[3]

5. With regard to the allegation that the respondents violated the FOI Act by charging him $.50 per page for copies, §1-212(a) 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....The fee for any copy provided in accordance with the Freedom of Information Act:
>
> (A) By an executive, administrative or legislative office of the state, a state agency or a department, institution, bureau, board, commission, authority or official of the state,

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corporation, school district, regional district or other district or other political subdivision of the state, including any committee of, or created by, any such office, subdivision, agency, department, institution, bureau, board, commission, authority or official...."

[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 any appeal filed through June 30, 2021. Consequently, the Commission retains jurisdiction over this matter. In addition, although §1-206(b)(1), G.S., requires that an appeal be filed with the Commission within 30 days of an alleged violation, Executive Order 7M (§2(2)) suspended such requirement for appeals filed between March 25, 2020, and April 19, 2021.

[3] Due to a clerical error, the Commission did not name Attorney Hunt as a respondent in this matter. Upon inquiry by the hearing officer during the hearing, Attorney Hunt stated that she did not contest that she had been provided notice and an opportunity to be heard with regard to any civil penalty that may be imposed, in accordance with §1-206(b)(2), G.S.

> including a committee of, or created by, such an office, agency, department, institution, bureau, board, commission, authority or official…shall not exceed twenty-five cents per page; and
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> (B) By all other public agencies, as defined in section 1-200, shall not exceed fifty cents per page….

6. The respondents argued that the respondent Materials Innovation and Recycling Authority ("MIRA") falls within the definition of "public agency" in §1-200(1), G.S., because it is a "political subdivision of the state", and that because the phrase "political subdivision of the state" does not appear in §1-212(a)(A), G.S., MIRA falls under the category of "all other public agencies" in §1-212(a)(B), G.S.

7. The Commission notes that the definition of "public agency" under §1-200(1), G.S., also includes any "authority…of the state". (See footnote 1, above). The phrase "authority…of the state" is not defined in the FOI Act, and the Commission has not previously had occasion to determine whether MIRA is an authority of the state for purposes of the definition of "public agency" under §1-200(1), G.S., or for purposes of the allowable fees for copies under §1-212(a), G.S.

8. However, a review of the statutory scheme by which MIRA and its predecessor authority, the Connecticut Resources Recovery Authority ("CRRA"), were created sheds light on whether MIRA is an "authority…of the state" for purposes of §1-212(a)(A), G.S.

9. It is found that CRRA, now MIRA, was created by the General Assembly in 1973 "as part of a comprehensive program whose purpose was to address the growing statewide problems of solid waste disposal." City of Shelton v. Commissioner, Department of Environmental Protection, et al., 193 Conn. 506 (1984). See Solid Waste Services Act §§22a-258, G.S., et seq. When the legislation creating CRRA, now MIRA, was enacted, §22a-261(a), G.S., provided:

> [t]here is hereby established and created a body politic and corporate, constituting a public instrumentality and political subdivision of the state of Connecticut established and created for the performance of an essential public and governmental function, to be known as the Connecticut Resources Recovery Authority.

10. In 1984, §22a-261(a), G.S., was amended to also include that CRRA, now MIRA, "shall not be construed to be a department, institution, or agency of the state." See Public Act 84-331, §1.

11. As the Court noted in City of Shelton, that amendment was in direct response to a then pending legal dispute over whether local zoning ordinances overrode the statewide planning decisions of CRRA and the Department of Environmental Protection ("DEP"). Id. at 514. At issue in that dispute was whether CRRA was a state agency for purposes of §22a-1b, G.S., which required state agencies to file an environmental impact statement prior to obtaining a solid waste

disposal permit from DEP. It is found that the amendment to §22a-261(a), G.S., does not resolve the issue of whether MIRA is an "authority of the state" for purposes of §1-212(a)(A), G.S.

12. According to the legislative findings set forth in §22a-258, G.S., CRRA, now MIRA, was created after the General Assembly determined that local governments did not have sufficient resources to provide solid waste disposal services without creating damage to the environment, and that state sponsored large-scale processing of solid waste was necessary. The General Assembly further found:

> that the development of systems and facilities and the use of the technology necessary to initiate large-scale processing of solid wastes have become logical and necessary functions to be assumed by state government; that the provision of solid waste disposal services to local governments at reasonable cost, through the use of state governmental powers and capabilities, would supply valuable assistance to such local governments; and, that, because of the foregoing, the provision of statutory authorization for the necessary state structure, which can take initiative and appropriate action to provide the necessary systems, facilities, technology and services for solid waste management and resources recovery is a matter of important public interest and that it is the purpose and intent of the General Assembly to be and remain cognizant not only of its responsibility to authorize and establish the necessary state and local structure and powers for the effective accomplishment of solid waste management and resources recovery, but also of its responsibility to monitor and supervise the activities and operations of the state authority created by this chapter, and the exercise of the powers conferred upon such authority by virtue of this chapter. (Emphasis added).

13. After careful consideration of all of the foregoing, it is found that MIRA is a state authority, and therefore is an "authority…of the state" for purposes of §1-212(a)(A), G.S. Therefore, MIRA may charge a copying fee of up to $.25 per page for public records under that statute.

14. Accordingly, it is concluded that Kirk and MIRA violated §1-212(a), G.S., by charging the complainant $.50 per page for copies of the records, described in paragraph 2, above.

15. With regard to the alleged meetings violations, it is found that the board held regular meetings on the dates identified in paragraph 4, above. It is found that the agenda for the meetings indicated that the board may enter into executive session to discuss "pending litigation and pending RFP responses, potential lease of MIRA real estate, trade secrets, personnel matters, security matters, and feasibility estimates and evaluations."

16. It is found that, at each of the meetings identified in paragraph 4, above, Stein made a motion to go into executive session for "the reasons stated on the agenda". It is found that the motion was seconded and passed and that the board thereafter entered into executive session at each of these meetings.

17. Section 1-225(a), G.S., provides, in relevant part, that the meetings of all public agencies, except executive sessions, as defined in subdivision (6) of section 1-200, shall be open to the public.

18. Section 1-225(f), G.S., provides that: "[a] public agency may hold an executive session as defined in subdivision (6) of section 1-200, upon an affirmative vote of two-thirds of the members of such body present and voting, taken at a public meeting and stating the reasons for such executive session, as defined in section 1-200." (Emphasis added).

19. The board conceded, and it is found, that it did not state the reason or reasons for the executive session at each of the meetings identified in paragraph 4, above, prior to entering into executive session.

20. It is therefore concluded that Stein and the board violated §1-225(f), G.S., as alleged, with respect to those meetings.

21. With regard to the allegation that the board discussed a matter in executive session during the June 10, 2020 meeting, which matter should have been discussed in public, it is found that the amended minutes of such meeting state that the board discussed in executive session a response to a request for proposal ("RFP"). The board argued that such discussion was permitted in executive session pursuant to §1-200(6)(E), G.S., because, at the time of the executive session, the RFP was pending and therefore exempt from disclosure pursuant to §1-210(b)(24), G.S.

22. Section 1-200(6), G.S., provides:

> "[e]xecutive sessions" means a meeting of a public agency at which the public is excluded for one or more of the following purposes: (A) Discussion concerning the appointment, employment, performance, evaluation, health or dismissal of a public officer or employee, provided that such individual may require that discussion be held at an open meeting; (B) strategy and negotiations with respect to pending claims or pending litigation to which the public agency or a member thereof, because of the member's conduct as a member of such agency, is a party until such litigation or claim has been finally adjudicated or otherwise settled; (C) matters concerning security strategy or the deployment of security personnel, or devices affecting public security; (D) discussion of the selection of a site or the lease, sale or purchase of real estate by the state or a political subdivision of the state when publicity regarding such site, lease, sale, purchase or construction would

> adversely impact the price of such site, lease, sale, purchase or construction until such time as all of the property has been acquired or all proceedings or transactions concerning same have been terminated or abandoned; and (E) discussion of any matter which would result in the disclosure of public records or the information contained therein described in subsection (b) of section 1-210. (Emphasis added).

23. Section 1-210(b)(24), G.S., provides that disclosure is not required of:

> [r]esponses to any request for proposals or bid solicitation issued by a public agency…or any record or file made by a public agency in connection with the contract award process, until such contract is executed or negotiations for the award of such contract have ended, whichever occurs earlier, provided the chief executive officer of such public agency certifies that the public interest in the disclosure of such responses, record or file is outweighed by the public interest in the confidentiality of such responses, record or file. (Emphasis added).

24. It is found that, during the June 10th executive session, the board discussed a response to a RFP issued by the state Department of Energy and Environmental Protection ("DEEP"). It is found that, at the time of the executive session, DEEP had selected the proposal submitted by Sacyr Rooney Recovery Team ("SRRT"), and that the RFP was closed. However, it is also found that, upon selecting SRRT, DEEP directed MIRA to enter into a contract with SRRT, and that at the time of the June 10th executive session, negotiations between MIRA and SRRT were ongoing, and no contract had been executed.

25. It is further found, however, that the board did not offer evidence that the MIRA's chief executive officer certified, prior to or at the time of the executive session, that the public interest in the disclosure of the response to the RFP was outweighed by the public interest in the confidentiality of such response.

26. Accordingly, it is found that the board failed to prove that the SRRT response was exempt from disclosure pursuant to §1-210(b)(24), G.S., at the time of the executive session. It is therefore further found that the board failed to prove that there was a proper basis for the executive session pursuant to §1-200(6)(E), G.S.

27. It is therefore concluded that Stein and the board violated §1-225(a), G.S., by conducting such discussion in executive session.

28. At the hearing in this matter, the complainant argued that the Commission should impose a civil penalty against Stein, Kirk, and Hunt for violating the FOI Act.

29. Section 1-206(b)(2), G.S., provides, in relevant part:

> ...upon the finding that a denial of any right created by the Freedom of Information Act was without reasonable grounds and after the custodian or other official directly responsible for the denial has been given an opportunity to be heard at a hearing conducted in accordance with sections 4-176e to 4-184, inclusive, the commission may, in its discretion, impose against the custodian or other official a civil penalty of not less than twenty dollars nor more than one thousand dollars.

30. It is found that Kirk is the individual directly responsible for the violation, described in paragraph 14, above, and that Stein is the individual directly responsible for the violations described in paragraphs 20 and 27, above.

31. Regarding whether such violations were "without reasonable grounds", it is found that Hunt has served as in-house legal counsel to MIRA and its predecessor agency CRRA for approximately 17 years. It is found that, in that capacity, she advises the agency, its board, and officers on legal matters, including the requirements of the FOI Act.

32. It is found that Hunt had, at the time of the hearing in this matter, attended at least two FOI training sessions conducted by the Commission's public information officer. However, it is also found that Hunt was unfamiliar with the law as it relates to a public record serving as the basis for an executive session under §1-200(6)(E), G.S., and the requirement in §1-225(f), G.S., that a public agency state the reasons for an executive session prior to entering into an executive session. In addition, it is found that even after the complainant questioned the appropriate fee that may be charged for copies under the FOI Act, Hunt did not conduct research to determine whether the $.50 per page copying fee was appropriate, but testified only that she believed the $.50 per page fee was appropriate because "the agency had always charged" such fee.

33. It is found that Kirk and Stein relied on Hunt to provide them with legal advice and guidance with regard to the requirements of the FOI Act, and that it was reasonable for them to have done so.

34. It therefore cannot be found that the violations were "without reasonable grounds".

35. It is concluded that, absent a finding that the violations were "without reasonable grounds," the Commission may not impose a civil penalty.

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

1. Forthwith, Kirk and MIRA shall refund to the complainant the amount charged for the copies, identified in paragraph 2 of the findings, above, in excess of the statutorily permitted fee of $.25 per page.

2. Henceforth, Stein and the board shall strictly comply with §§1-212(a), 1-225(a) and 1-225 (f), G.S.

3. The complaint against Hunt is dismissed.

Approved by Order of the Freedom of Information Commission at its regular meeting of June 22, 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:

**MATTHEW HENNESSY**, c/o Attorney Michael C. Harrington, FordHarrison, LLP, 185 Asylum Street, Suite 610, Hartford, CT 06103

**DONALD STEIN, CHAIRMAN, BOARD OF DIRECTORS, MATERIALS INNOVATION AND RECYCLING AUTHORITY; BOARD OF DIRECTORS, MATERIALS INNOVATION AND RECYCLING AUTHORITY; TOM KIRK, PRESIDENT, MATERIALS INNOVATION AND RECYCLING AUTHORITY; LAURIE HUNT, DIRECTOR OF LEGAL SERVICES, MATERIALS INNOVATON AND RECYCLING AUTHORITY** c/o Attorney Duncan J. Forsyth, Halloran & Sage LLP, 225 Asylum Street, Hartford CT 06103 and Attorney Michael C. Collins, Esq., Halloran & Sage LLP, 225 Asylum Street, Hartford, CT 06103; **AND MATERIALS INNOVATION AND RECYCLING AUTHORITY,** 200 Corporate Place, Suite 202, Rocky Hill, CT 06067

Cynthia A. Cannata
Acting Clerk of the Commission

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