

STATE OF CONNECTICUT
FREEDOM OF INFORMATION COMMISSION

In the Matter of a Complaint by

FINAL DECISION

Alyssa Peterson,

Complainant

against

Docket # FIC 2021-0192

Office of the Corporation Counsel, City of
Hartford; and City of Hartford,

Respondents

August 14, 2024

The above-captioned matter was heard as a contested case on October 2, 2023, at which time the complainant and the respondents appeared, stipulated to certain facts, and presented testimony, exhibits and argument on the complaint.

The complainant submitted a post-hearing brief dated November 6, 2023, received by the Commission on November 7, 2023. On November 6, 2023, the respondents filed a post-hearing brief. On December 4, 2023, the respondents filed a reply brief. On December 22, 2023, the complainant filed an objection to the respondents' reply brief, asking the Commission to exclude the respondents' reply brief from any decision. However, at the close of the hearing, the hearing officer specifically instructed the parties to file simultaneous initial briefs, but also stated that the parties may file reply briefs thereafter, if they so choose. Therefore, the complainant's objection to the respondents' reply brief is overruled.

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 9, 2021, the complainant requested that the respondents provide her with copies of the following records:

[a.] Any and all ... texts... either from or to the individual Janice Flemming (a.k.a. Janice Flemming-Butler)¹ and any member of City staff or any elected or appointed Hartford official, from January 1, 2020 to date.

¹ Based upon the complainant's testimony at the contested case hearing on this matter, it is found that Janice Flemming (a.k.a. Janice Flemming-Butler) ("Ms. Flemming") is the owner and/or operator of The Voices of Women of Color, LLC and Strategic Outreach Solutions, LLC and that she was a lobbyist consultant who provided services for the City of Hartford.

[b.] Any and all ... texts... either from or to an entity known as "Strategic Outreach Solutions, LLC" (see attached filing) and any member of City staff or any elected or appointed Hartford official, from January 1, 2020 to date.

[c.] Any and all ... texts... either from or to an entity known as "The Voices of Women of Color, LLC" (see SOTS filing attached) and any member of City staff or any elected or appointed Hartford official, from January 1, 2020 to date.

[d.] Any and all ... texts... either to or from the City of Hartford or any City of Hartford elected or appointed official, that *jointly* copy OR reference in any way, the following:

- Janice Flemming or Janice Flemming-Butler and LAZ Parking (see attached filing)
- Strategic Outreach Solutions, LLC and LAZ Parking
- The Voices of Women of Color, LLC and LAZ Parking.²

3. It is found that, on March 11, 2021, the respondents acknowledged the complainant's request.

4. By email dated and filed April 7, 2021,³ the complainant appealed to the Commission, alleging that the respondents violated the Freedom of Information ("FOI") Act by failing to provide the records described in paragraph 2, above.

5. 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,

² The complainant's March 9, 2021 records request originally sought thirteen categories of records. However, at the October 2, 2023 contested case hearing, the complainant initially limited her claims to the respondents' failure to provide her with any texts responsive to the requests described in paragraph 2, above, and records of certain phone calls made to or from certain City of Hartford officials' personal phones. Over the course of the hearing, the complainant further limited the scope of the hearing to her requests for text messages described in paragraph 2, above. In her post-hearing brief, the complainant stated that she limited the scope of the hearing and her brief to her requests for "text messages." As such, the Commission will only address the requests for text messages described in paragraph 2, above.

³ On March 25, 2020, the Governor issued Executive Order 7M, thereby suspending the provisions of §1-206(b)(1), G.S., 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 of this appeal.

typed, tape-recorded, printed, photostated, photographed or recorded by any other method.⁴

6. 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 (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.

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

8. It is concluded that the requested records, to the extent they exist and are maintained by the respondents, are public records within the meaning of §§1-200(5) and 1-210(a), G.S.

9. It is found that, on March 15, 2022, the complainant informed the respondents that she was limiting her requests described in paragraph 2, above, to communications to or from the then serving Mayor for the City of Hartford (“Mayor”), Treasurer of the City of Hartford (“Treasurer”) and City of Hartford Councilmembers (“Councilmembers”).

10. It is found that the respondent City of Hartford (“City”) issued cell phones to the Mayor, the Treasurer and the Councilmembers, and that Verizon Wireless (“Verizon”) is the wireless service provider for such City-issued cell phones.

11. It is found that, on May 24, 2022, the respondents informed the complainant through the GovQA public records request management system and online portal (“GovQA”), of the following:

[Metro Hartford Innovation Services (“MHIS”)]⁵ completed an exhaustive review of the Verizon invoices from 1/2020 to April 2022 and after searching the requested phone number (860) 555-8364, there were 0 (zero) results. We trust this will resolve all outstanding issues in your FOI request. Should you have any additional questions or concerns, please reply to this email.

12. At the hearing on this matter and in her post-hearing brief, the complainant contended that the respondents failed to provide her with any texts responsive to the requests

⁴ The Commission notes that §1-200(5), G.S., was subsequently amended to include the term “videotaped.” See June Sp. Sess. Public Act 21-2, §147.

⁵ MHIS provides information technology services to the respondents.

described in paragraph 2, above. She claimed that the respondents' failure to properly and promptly search for, maintain and provide her with the requested records violates the FOI Act. In her post-hearing brief, the complainant argued that this case should be treated as a "destruction of records' case[,]” and requested that the Commission impose a "serious penalty" upon the respondents.

13. At the hearing and in their post-hearing brief, the respondents argued that they were not aware that the complainant was seeking texts since she had not indicated that she was still seeking texts after the respondents' May 24, 2022 email described in paragraph 11, above, until she raised that issue in an Objection to Motion for Continuance filed on September 22, 2023. The respondents further argued that they did not violate the FOI Act since they could not retrieve text messages on City-issued phones from Verizon without a subpoena from the complainant and they asked certain City officials to search their personal and City-issued phones for responsive texts but no responsive texts were located.

14. The respondents' contention that they were not aware that the complainant was seeking texts is unavailing.

15. First, it is found that the complainant's March 9, 2021 request specifically requested texts, among other types of communications, and that the complainant never withdrew her request for texts.

16. Next, it is found that, in her complaint to the Commission, described in paragraph 4, above, the complainant stated the following: "I do know [the respondents] are short-staffed in that office and in Human Relations, however, I do expect a 'battle' on some of the items and that the attached request will have to go through a hearing officer to obtain all communicated information, especially texts." [Emphasis added.]

17. Additionally, despite the respondents' statement in their May 24, 2022 email, described in paragraph 11, above, that they believed they had resolved all outstanding issues with respect to the complainant's March 9, 2021 request, it is found that the complainant was not required to send a follow up email to the respondents specifically requesting texts, since her initial request already specified that she was seeking texts.

18. Accordingly, based on a reasonable reading of the request described in paragraph 2, above, it is found that the request clearly sought texts between specifically identified individuals for a specific time period. It is found that the request was not vague or unclear and specifically identified the records sought.

19. With respect to the respondents' search for texts responsive to the requests described in paragraph 2, above, the FOI Act requires public agencies to conduct a diligent search for records responsive to requests made pursuant to the FOI Act.

20. "The sponsors of [the FOI Act] understood the legislation to express the people's sovereignty over the agencies [that] serve them ... and [the Connecticut Supreme Court] consistently has interpreted that expression to require diligent protection of the public's right of

access to agency proceedings....” (Emphasis added.) Comm'r of Mental Health & Addiction Servs. v. Freedom of Info. Comm'n, 347 Conn. 675, 705 (2023).

21. Black’s Law Dictionary, Seventh Edition, defines “diligence” as “1. A continual effort to accomplish something. 2. Care; caution; the attention and care required from a person in a given situation.” Black’s Law Dictionary (7th Ed.). Black’s Law Dictionary defines “due diligence” as “[t]he diligence reasonably expected from, and ordinarily exercised by, a person who seeks to satisfy a legal requirement or to discharge an obligation.” Id. “Reasonable diligence” is defined as “[a] fair degree of diligence expected from someone of ordinary prudence under circumstances like those at issue.” Id.

22. Based upon the testimony of the Chief Innovation Officer for the City at the hearing in this matter, it is found that MHIS does not maintain records of texts messages from City-issued cellphones in their offices or on their system and that Verizon informed them that it required a subpoena to provide texts to the respondents.⁶

23. It is found that, not until September 28, 2023, four days before the hearing in this matter and more than two and half years after the complainant’s March 9, 2021 request, did the respondents ask the Mayor and Councilmembers who were still serving as Councilmembers to search their cell phones for any texts to and/or from Ms. Flemming at 860-555-8364 between January 1, 2020 to March 9, 2021.

24. It is found that the Mayor and each Councilmember, who the respondents contacted, responded that he or she had searched both their personal and City-issued cell phones for the requested texts and found no text messages between themselves and Ms. Flemming. It is found that no evidence was presented, at the contested case hearing, as to whether such messages had existed but were deleted.

25. It is found that two of the individuals who were serving as Councilmembers at the time of the complainant’s March 9, 2021 request were no longer serving in such roles on September 28, 2023 and, therefore, the respondents never requested that such former Councilmembers search their phones for responsive texts.

26. It is further found that the respondents failed to provide any evidence that they asked the Treasurer to search for texts responsive to the complainant’s requests described in paragraph 2, above.

27. Putting aside whether the respondents should have made additional efforts to obtain text messages from Verizon without a subpoena or whether the respondents should have informed the complainant close in time to the date of the request that she was required to provide a subpoena in order obtain such texts, it is found that the respondents failed to conduct any

⁶ Additionally, the Commission takes administrative notice of the evidence in John Smith v. Town Administrator, Town of Putnam, et al., Docket #FIC 2012-564 (August 14, 2013), which specifically found that Verizon maintains text messages on its servers for only a limited amount of time after they are created and that, thereafter, such messages are deleted from its servers. It is found, therefore, that by the time of the hearing in this matter, it is more than likely that the respondents could no longer obtain text messages from the City-issued cellphones through Verizon, even with a subpoena.

search for responsive texts until over two years after the date of the request. At the very least, the respondents should have requested that the Mayor, the Treasurer and the City Councilmembers conduct a search for responsive texts on their City-issued phones upon receipt of the complainant's March 9, 2021 request, or shortly thereafter.⁷

28. It is found that the respondents failed to prove that their searches for texts responsive to the complainant's March 9, 2021 request were conducted with due or reasonable diligence under the circumstances.

29. Accordingly, it is concluded that the respondents violated §§1-210(a) and 1-212(a), G.S.

30. With respect to the complainant's contention that the respondents violated the promptness provisions of §1-212(a), G.S., such provision 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.”

31. It is well settled that the respondents are only obligated to provide prompt access to records that exist at the time of the complainant's request. See §1-210(a), G.S.; Robert J. Symmes v. Charles Marino, Democratic Registrar of Voters, City of West Haven, Docket #FIC 2008-564 (March 25, 2009)(record that did not exist at the time of request was not maintained or kept on file by respondent); Lorraine Wilmot and Jim Coll v. H. Wayne Carver, II, Chief Medical Examiner, State of Connecticut, Office of the Chief Medical Examiner, Docket #FIC 1999-507 (April 26, 2000)(“respondent was not required to comply with a request for records that did not exist at the time of the request”).

32. Although it is found that the respondents failed to commence their search for any texts responsive to the complainant's March 9, 2021 until more than two years after the date of the complainant's request and that their search for such texts was not diligent, it is found that the administrative record contains no evidence that any texts responsive to the complainant's request, in fact, existed at the time of her request.⁸

33. Accordingly, the Commission cannot find that the respondents failed to provide prompt access to texts that, based upon the record in this case, might never have existed.

⁷ With respect to texts that might have been stored on the personal cell phones of the Mayor, the Treasurer or the Councilmembers, there was no specific evidence that such officials, in fact, conducted agency business on their personal cell phones, especially given that the City provided them with City-issued phones to conduct agency business. See e.g., Commissioner of Dept. of Correction v. Freedom of Info. Comm'n, 2020 WL 5606842 *5 (Conn. Super. Ct. July 30, 2020)(finding that, under the facts and circumstances of that case, the public agency employees had a reasonable expectation of privacy in text messages contained on their personal cell phones given the lack of evidence that such employees were conducting department business on their personal cell phones). In any event, it is found that many of the respective individuals did search their personal phones and that no texts were located. In addition, given the passage of time, any search at this juncture likely will not yield any results. Therefore, the Commission declines, under the facts and circumstances of this case, to determine that the FOI Act required the respondents to order the employees to search their personal cell phones.

⁸ The complainant testified that she could not believe that no texts existed that were responsive to her March 9, 2021 request. However, the complainant's belief does not constitute credible evidence.

34. Although the complainant decried the potential destruction of public records at the hearing and in her post-hearing brief,⁹ the retention and destruction of public records falls under the jurisdiction of the Public Records Administrator, not the Commission.

35. In her post-hearing brief, the complainant requested that the Commission impose a penalty on the respondents. However, the complainant failed to seek any penalty in the complaint or prior to the filing of her post-hearing brief. Based upon the facts and circumstances of this case, the Commission declines to consider the imposition of a civil penalty.

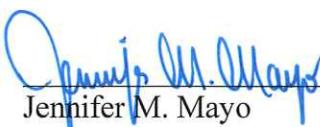
The following order by the Commission is hereby recommended on the basis of the record concerning the above-captioned complaint:

1. The Commission notes that the individual who served as Treasurer at the time of the complainant's March 9, 2021 request is no longer serving in that role and, therefore, it is more likely than not that a search of the former treasurer's texts is no longer possible and, even if such a search were possible, it likely would be futile at this juncture. Similarly, the Commission also notes that a search of the cell phones of the former Councilmembers described in paragraph 25, in the findings above, is likely no longer possible and, even if such a search were possible, it likely would be futile at this juncture. Under such facts and circumstances, the Commission is not ordering the respondents to conduct any further searches.

2. Notwithstanding paragraph 1, above, the Commission reminds the respondents that they should commence their searches for records with due and reasonable diligence and that text messages pertaining to the conduct of the public's business are public records that must be preserved in accordance with the applicable records retention schedules.

3. Henceforth, the respondents shall strictly comply with §§1-210(a) and 1-212(a), G.S.

Approved by Order of the Freedom of Information Commission at its regular meeting of August 14, 2024.



Jennifer M. Mayo
Acting Clerk of the Commission

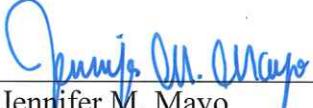
⁹ At the hearing, the complainant also testified that a City Councilwoman informed the complainant that the Councilmembers were told to delete their texts on their cell phones approximately one year earlier. However, it is found that there was no credible evidence regarding the identity of the individual(s) who instructed the Councilwoman to delete texts, the specific date of such instruction or any facts demonstrating that the respondents deleted texts responsive to the complainant's request described in paragraph 2, above. At the hearing on this matter, the complainant requested that the hearing remain open so that she may call this witness, which request the hearing officer denied. The complainant did not subsequently file a motion to reopen the hearing to admit further evidence or a motion to file an affidavit. In her post-hearing brief, the complainant stated: "Complainant is a non-attorney and is unclear if requesting an affidavit of these officials is appropriate at this very late date." This statement does not suffice as a motion to present additional evidence or to open the hearing. To the extent that the complainant intended it to be such a motion, it is denied.

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:

ALYSSA PETERSON, 297 Grandview Terrace, Hartford, CT 06114

OFFICE OF THE CORPORATION COUNSEL, CITY OF HARTFORD; AND CITY OF HARTFORD, c/o Attorney Nathalie Feola-Guerrieri, Office of the Corporation Counsel, 550 Main Street, Hartford, CT 06103



Jennifer M. Mayo
Acting Clerk of the Commission