

FREEDOM OF INFORMATION COMMISSION  
OF THE STATE OF CONNECTICUT

In the Matter of a Complaint by

FINAL DECISION

Martin Rutt,

Complainant

against

Docket # FIC 2023-0349

Land Use Inspector,  
Town of Prospect; and  
Town of Prospect,

Respondents

June 26, 2024

The above-captioned matter was heard as a contested case on March 28, 2024, and April 30, 2024, at which times 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 sent on April 7, 2023, the complainant requested that the respondents provide “everything related to the cease and desist order, the remediation plan, the peer review process and all results of the soil testing regarding the contaminated fill dumped at 111 Waterbury [Road in Prospect, Connecticut (hereinafter, “the property”)] long before the cease and desist order back in November of 2020.” It is found that attached to such email was a pdf file containing a handwritten records request on the Town of Prospect’s “Freedom of Information Act Request Form,” requesting the same records.<sup>1</sup> It is found that such handwritten request also noted that:

(a) the request was being made to the “Land Use/Inland Wetlands” town department,

(b) the records were being requested on behalf of Patricia Dyer,

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<sup>1</sup> The Commission notes that the pdf attachment appears to be a standardized Town of Prospect form. Part I of the form provides space for the requester to write or type requester contact information. Part II of the form provides space for the requester to describe the records being requested. At the foot of the form is a series of prompts inviting the town office receiving the request to note the following: acknowledgement date, anticipated response time, date completed/initials, number of pages, copy fee amount, and fee paid.

- (c) the documents being requested consist of “everything related to cease + desist order 11/16/20 + everything related to remediation plan and peer review including soil testing” at the property, and
- (d) the date range of the records being requested spanned October 2020 through March 2021.

3. It is found that by email sent on June 21, 2023, at 2:03 p.m., the complainant followed up on the status of his request and again attached a copy of the handwritten request described in paragraph 2, above.

4. It is found that by email sent on June 21, 2023, at 2:17 p.m., the respondents acknowledged receipt of the complainant’s requests described in paragraphs 2 and 3, above, and stated that they would work on preparing the requested records and notify the complainant about the cost and when the records would be available.

5. It is found that by email sent on June 21, 2023, approximately one hour later, the complainant replied to the respondents’ email described in paragraph 4, above, stating in relevant part, “I am certain that you can simply give me the entire file and a secure place where I can bring my scanner and scan what I need. I just need a table and an electrical outlet.”

6. It is found that two days later, on June 23, 2023, the complainant arrived at the respondents’ land use office, sometime prior to 9:52 a.m., with a plug-in scanner. It is also found that, upon the complainant’s arrival, the land use office tech (i.e., assistant clerk) handed him an envelope containing copies of records compiled by the respondents without giving him an opportunity to inspect or scan any records in the respondents’ possession.<sup>2</sup> In addition, it is found that the complainant paid \$44 to the respondents prior to receiving the envelope of records.<sup>3</sup>

7. It is found that on June 23, 2023, after the office tech handed the complainant the envelope of records described in paragraph 6, above, the respondent land use inspector emailed him, stating that “[t]he Town would only permit scanning as described in the Ct General Statutes.” Such email also stated that “[t]he Land Use Office does not have the staff to sit with you while you review a file and scan” and concluded by stating, “[a]s you have received your copies[,] your FOIC [sic] request is fulfilled.”

8. By email dated June 30, 2023, the complainant appealed to the Commission, alleging that the respondents violated the Freedom of Information (“FOI”) Act for failing to comply with his records requests.

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<sup>2</sup> The Commission notes that it is unclear from the administrative record as to how many pages of records were provided to the complainant in the envelope.

<sup>3</sup> The Commission notes that although the complaint alleges that the complainant was charged \$46, in testimony at the hearings the complainant did not dispute that the charge was \$44.

9. At the two hearings on this matter, the complainant repeatedly contended that the scope of his complaint extended beyond the requests described in paragraphs 2 and 3, above.

10. On April 5, 2024, the hearing officer issued a Notice and Order that, in relevant part, ordered the complainant to (1) provide the Commission with documentation, if any, showing that the summary of the complaint typed by the complainant on the Commission's online records complaint form did not capture the entirety of his complaint and (2) identify whether a two-page request form, entered into evidence as part of complainant's Exhibit A, constituted the records request at issue. The complainant and respondents filed their responses to such Notice and Order on April 12, 2024, and April 19, 2024, respectively.

11. Based upon a careful review of the complaint and the parties' responses to the Notice and Order, and absent any additional documentation, the hearing officer determined that the scope of the complaint is as follows:

“My original FOI request from 4/7/2023 was ignored. I filed a formal complaint. FOI contacted me and requested that I reach out again to the Land Use Office. On 6/23/2023, the land use office refused to let me see the file I requested. I brought a scanner to scan the file in front of them at the town hall. They refused to let that happen. In fact unless I paid them \$46 they would not let me see any of the file. They decided what I could see and waht [sic] I could not see. What they did give me for \$46 was not what I requested. I requested all and everything related to the environmental remediation plan especially the independant [sic] contractor records and the soil test results along with the final inspection report a[s] outline[d] in the attached “Sequence for Implimitaion [sic] of the Remediation Plan for 111 Waterbury Rd”

12. Accordingly, it is found that the complaint encompasses only the complainant's April 7, 2023 and June 21, 2023 records requests, as described in paragraphs 2 and 3, above.<sup>4</sup>

13. Section 1-200(5), G.S., provides the following:

“[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.

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<sup>4</sup> The Commission notes that any remaining allegations raised by the complainant at the hearings and on brief are outside the scope of the complaint and, accordingly, will not be addressed herein.

14. Section 1-210(a), G.S., provides the following 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.

15. 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.”

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

17. At the hearings, the complainant contended that the respondents failed to provide him with all records responsive to his requests. The complainant also contended that they failed to provide him with the opportunity to inspect the requested records prior to paying copying fees. In addition, he contended that the respondents failed to provide responsive records promptly.<sup>5</sup>

18. With respect to the complainant’s contention that the respondents failed to provide him with an opportunity to inspect the requested records prior to being charged for copies, it is found that the complainant did not explicitly request an opportunity to inspect records.

19. It is found, however, that the complainant’s requests to access the requested records, as described in paragraphs 5 and 6, above, are tantamount to a request to inspect, within the meaning of §1-210(a), G.S.

20. At the hearing, the respondents testified that they denied the complainant’s request to inspect the requested records because they require an appointment to do so for the following reasons: the land use office is too small to allow requesters to come in; the respondents must find a place outside the land use office where the requester can inspect the records in the presence of a supervising party; and the respondents have a limited number of staff to supervise the requester.

21. It is found however that the respondents did not provide any evidence demonstrating that they had explained to the complainant, either prior to or at the time he arrived in the office, the reasons why his request to inspect was being denied; nor did they provide any evidence

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<sup>5</sup> In his complaint, the complainant also alleged that the respondents did not allow him to scan the requested records. However, at the hearings, the complainant testified that he was no longer pursuing this allegation. Accordingly, such allegation will not further be addressed herein.

demonstrating that they had offered the complainant an alternative time to make an appointment and return to inspect the records.

22. It is therefore concluded, under the facts and circumstances of this matter, that the respondents violated §1-210(a), G.S., when they denied the complainant the right to inspect the requested records.

23. With respect to the complainant's allegations that the respondents failed to provide all responsive records, at the hearing the complainant testified that the following records were withheld:<sup>6</sup>

I. November 2020 records:

- (a) the cease and desist order from the Prospect Inland Wetlands Commission pertaining to the property (i.e., 111 Waterbury Road);
- (b) the public notice of the environmental clean-up of the property required by said cease and desist order; and
- (c) an iteration of the remediation plans for the property.

II. February 2021 records:

- (a) subsequent iterations of remediation plans concerning the property;
- (b) the selection of the independent contractor for the property by the town;
- (c) the records of the quantity, types, and destination of the materials removed from the property as outlined in the remediation plan; and
- (d) the results of the soil testing of the materials.

III. March 2021 records:

- (a) correspondence between the respondents and the property owners regarding burial of asphalt and concrete on the property.

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<sup>6</sup> At the hearing, the complainant offered a document that lists and describes the records that he alleges were withheld (Complainant's Exhibit D). Such list organizes the records chronologically by their presumed date of origin, ranging from November 2020 through June 2023.

IV. May 2012 [sic] records:<sup>7</sup>

- (a) results of contaminant testing of the materials during remediation;
- (b) records of erosion control measures; and
- (c) records of a draft stormwater plan and stormwater approval documents.

V. June 2021 records:

- (a) records supporting the property's alleged compliance with the remediation plan;
- (b) a written report with pictures as ordered by the Inland Wetland Commission's Notice of Granting Permit;
- (c) an annual written inspection report of the property's underground detention systems, with pictures, prepared by a licensed professional engineer;
- (d) an "as built drawing" prepared by the surveyor to indicate that the property site was constructed in accordance with the commission's approval; and
- (e) written reports from a contractor informing the land use office about the location of any excess material (i.e., asphalt) disposal.

VI. July 2021 records:

- (a) an environmental impact statement from the applicants about the submitted plan for the property.

VII. August 2021 records:

- (a) an environmental impact study to assess whether trucks on the property are leaking oil and other pollutants.

VIII. March 2023 records:

- (a) correspondence with the property owners about construction of storm drain structures; and
- (b) land use enforcement orders instructing the property owners to remove items from the front of the property to the street.

IX. April 2023 records:

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<sup>7</sup> Presumably, the complainant made a typographical error and intended to list "May 2021", and not "May 2012."

- (a) an “as built” wall survey as required in the SLR Peer Review reports; and
- (b) a tape recording of alleged cursing, name calling, and demeaning public remarks at the town’s Planning and Zoning Commission meetings.

X. June 2023 records:

- (a) photos or evidence of a solid green vinyl fence on the property.

24. With respect to the records described in paragraph 23(IV.) through (X.), above, it is found that such records are outside the scope of the complaint, as described in paragraph 11, above. Accordingly, such records shall not be further addressed herein.

25. With respect to the records described in paragraph 23(I.)(a) and (II.)(a), above, it is found that such records were provided by the respondents to the complainant on June 23, 2023, as described in paragraph 6, above. Accordingly, it is concluded that the respondents did not violate the disclosure provisions of §§1-210(a) and 1-212(a), G.S., with respect to the records described in paragraph 23(I.)(a) and (II.)(a), above.

26. With respect to the records described in paragraph 23(I.)(b) and (II.)(b)-(d), above, it is well established that the FOI Act does not require a public agency to create records that do not exist in response to a FOI request. See, e.g. Albright-Lazzari v. Murphy, 2011 WL 1886878, at \*3 (Super. Ct. April 21, 2011); Montoya v. Superintendent of Schools, Westport Public Schools, et al., Docket #FIC 2019-0606, ¶10 (June 23, 2021). It is found that the records described in paragraph 23(I.)(b) and (II.)(b)-(d), above, did not exist at the time of the complainant’s requests, described in paragraphs 2 and 3, above. It is therefore concluded that the respondents did not violate the disclosure provisions of §§1-210(a) and 1-212(a), G.S., with respect to such records.

27. With respect to the records described in paragraph 23(I.)(c) and (III.)(a), above, it is unclear from the administrative record whether such records existed at the time of the complainant’s requests. It is therefore concluded that, to the extent the respondents maintain records responsive to such requests and have not provided the complainant with a copy of such records, the respondents violated the disclosure provisions of §§1-210(a) and 1-212(a), G.S. However, to the extent that no records exist that are responsive to the complainant’s requests, the respondents did not violate the disclosure provisions of §§1-210(a) and 1-212(a), G.S.

28. With respect to the complainant’s contention that the respondents failed to provide responsive records promptly, the Commission has defined the word “promptly,” as used in §§1-210(a) and 1-212(a), G.S., to mean “quickly and without undue delay, taking into account all of the factors presented by a particular request.” See FOI Commission Advisory Opinion #51, In the Matter of a Request for Declaratory Ruling, Third Taxing District of the City of Norwalk, Applicant (Notice of Final Decision dated January 11, 1982) (hereinafter “Advisory Opinion #51”).

29. Advisory Opinion #51 goes on to describe some of the factors that should be

considered in weighing a request for records against other priorities: the volume of records requested; the amount of personnel time necessary to comply with the request; the time by which the requestor 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 other agency business without the loss of personnel time involved in complying with the request.

30. Additionally, as the court recognized in Commissioner of Department of Emergency Services and Public Protection v. Freedom of Information Commission, 70 Conn. L. Rptr. 203 (July 2, 2020) \*3, a public agency should consider its obligations under the FOI Act as a “primary duty” of that agency, “on par with the [agency’s] other significant duties, or said another way, that the agency’s FOIA duty is not a second class duty.”

31. It is also well settled that the law does not require “immediate” access to records upon demand, but rather permits a person the right to inspect records “promptly.” See Egan v. Comptroller, Office of the Comptroller, City of Ansonia, et al., Docket #FIC 2023-0277 (April 25, 2024); Deanna Bouchard v. Andreas Bisbikos, Docket #FIC 2022-0199 (March 22, 2023); Anne Manusky v. Commissioner, State of Connecticut, Department of Education, et al., Docket #FIC 2016-0224 (November 16, 2016); see also Bradshaw Smith v. Stephen Mitchell, Chairman, Greater Hartford Transit District, et al., Docket #FIC 2014-184 (October 8, 2014); Suzanne Carlson and the Journal Inquirer v. Mayor, Town of Vernon, et al., Docket #FIC 2011-542 (May 23, 2012) (“nothing in the FOI Act requires employees of a public agency, or public officials, necessarily, to interrupt their work in order to immediately fulfill a request to inspect or copy records”).

32. At the April 30, 2024 hearing, the respondent land use inspector testified that she had received the complainant’s records request, described in paragraph 2, above, on April 7, 2023, but did not acknowledge receipt of such request at that time. She testified that she had “started working on it”; however, the respondents did not offer any evidence as to when they in fact began their search for records, nor as to how much time was dedicated to conducting the search.

33. The respondent land use inspector testified that she and the office tech worked together to gather responsive records. She also testified that the requested records were not all stored in a single file, and that the scope of the search “could be three to four boxes, depending on the projects” and included “filing cabinets” and “other locations.”

34. It is found that although the respondents were aware of the request since April 7, 2023, they did not make any records available to the complainant until June 23, 2023.

35. It is found that although the respondents were not required to provide immediate access to the requested records, they were nonetheless required to provide records promptly.

36. Based on the foregoing, it is found that the respondents failed to provide the requested records to the complainant promptly. Accordingly, it is concluded that the respondents violated the promptness provisions in §§1-210(a) and 1-212(a), G.S.

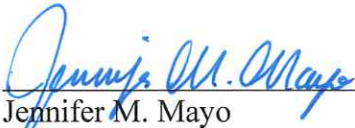


The following order by the Commission is hereby recommended on the basis of the record concerning the above-captioned complaint:

1. Forthwith and within 45 days of the date of the notice of final decision, the respondents shall conduct a search for, and provide copies of, the records described in paragraph 23(I)(c) and (III)(a) of the findings, above. If no records are found, the respondents shall provide the complainant with an affidavit indicating that, after a complete and thorough search of their records, no records responsive were found; such affidavit shall include the nature and extent of the respondents' search.

2. 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 June 26, 2024.

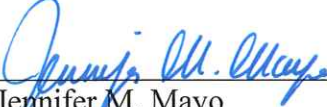
  
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Jennifer M. Mayo  
Acting Clerk of the Commission

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:

**MARTIN RUTT**, 108 Cook Road, Prospect, CT 06712

**LAND USE INSPECTOR, TOWN OF PROSPECT; AND TOWN OF PROSPECT**, c/o Attorney David S. Hardy, Carmody Torrance Sandak & Hennessey LLP, 195 Church Street, PO Box 1950, New Haven, CT 06509-1950

  
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Jennifer M. Mayo  
Acting Clerk of the Commission