STATE OF CONNECTICUT
FREEDOM OF INFORMATION COMMISSION

In the Matter of a Complaint by FINAL DECISION

Lynn Harrington,

Complainant

against Docket # FIC 2023-0276

Director, Park & Recreation Department, Town of Kent; Park & Recreation Department, Town of Kent; Chairman, Park & Recreation Commission, Town of Kent; Abigail Smith Hanby, as Commissioner, Park & Recreation Commission, Town of Kent; Park & Recreation Commission, Town of Kent; First Selectman, Town of Kent; and Town of Kent,

Respondents May 22, 2024

The above-captioned matter was heard as a contested case on October 26, 2023 and November 14, 2023, at which times the complainant and the respondents appeared, stipulated to certain facts, 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 emails dated March 3, 2023, the complainant made four separate requests for records to the following respondents:

(a) Director of Park & Recreation for any and all emails (personal or business accounts) texts or any other form of communication to any and all Park & Recreation commissioners including ex-officio members individual or as a group for the dates January 1, 2022 to the present.

(b) Commissioner Abigail Smith Hanby of the Park & Recreation Commission for any and all emails (personal or business accounts), texts or any other form of communication to any and all Park and Recreation commissioners including ex-officio members and the Director of Kent Park & Recreation whether to an individual or as a group for the dates January 1, 2022 to the present.

(c) Chairman of Park & Recreation for any and all emails (personal or business accounts), texts or any other form of communication to any and all Park and Recreation commissioners including ex-officio members and the Director of Kent Park & Recreation whether to an individual or as a group for the dates January 1, 2022 to the present.

(d) First Selectman Jean Speck for any and all emails from a business/town or personal email accounts, texts or any other form of communication to any and all Park and Recreation commissioners/ex-officio members and the Park and Recreation Director whether individual or as a group for the dates of January 1, 2022 to present.

It is also found that, in each request, the complainant requested that fees for copies be waived, and informed the respondents that responsive records could be provided to her in paper copy, electronically via email, or digitally, by allowing her access to the respondents' files.

3. It is found that, by emails dated March 5, 2023, Commissioner Hanby, the Chairman of the Park & Recreation Committee, and the First Selectman acknowledged receipt of the request that each individual received, as described in paragraph 2, above. It is also found that the Director of Park & Recreation did not acknowledge the complainant's request.

4. It is found that, by emails dated April 18, 2023, the complainant requested an update from the respondents regarding the status of each of her pending requests.

5. It is found that, by email dated April 24, 2023, the respondents notified the complainant that their search yielded over 10,000 pages of records responsive to the requests described in paragraph 2, above, and that the First Selectman had requested advice from legal counsel on how to further proceed.

6. It is found that, by email dated April 25, 2023, the respondents contacted the complainant, writing that "all documents she [*sic*] requested have been gathered and total 11,669 pages. Upon payment of the statutory copy charges in the amount of $5,834.50 to the Town of Kent she [*sic*] may pick the records up."

7. It is found that the complainant was unsure about whether she was the intended recipient of the email described in paragraph 6, above, and therefore replied on April 25, 2023, writing, "[n]ot sure if the email below was meant for me but I asked for a waiver. If you are choosing to deny that request, please list the reason why. I can drop off a thumb drive to download all the communications for each request. Alternatively, I can also come to the Town Hall to review them during business hours."

8. It is found that the respondents did not respond to the complainant's email, described in paragraph 7, above. It is found that on or about May 1, 2023, the complainant hand delivered a thumb drive to the respondents' offices and sent a follow-up email confirming that she had done so. It is found that the complainant did not receive a response to her May 1, 2023, email to the respondents.

9. It is found that, by email dated May 22, 2023, the complainant contacted the respondents a third time, and asked that the respondents email her a copy of the responsive records. It is also found that the complainant did not receive a response to her May 22, 2023 email.

10. Absent any response from the respondents following the complainant's communications described in paragraphs 7 through 9, above, by complaint filed June 2, 2023, the complainant appealed to the Commission, alleging that the respondents violated the Freedom of Information ("FOI") Act by denying her request for the records described in paragraph 2, above. In her complaint, the complainant requested that the respondents provide her with a copy of the responsive records on a thumb drive, free of charge.

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

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

13. Section 1-211(a), G.S., provides, in relevant part:

> [a]ny public agency which maintains public records in a computer storage system shall provide, to any person making a request pursuant to the [FOI] Act, a copy of any nonexempt data contained in such records, properly identified, on paper, disk, tape <u>or any other electronic storage device or medium requested by the person, including an electronic copy sent to the electronic mail address of the person making such request, if the agency can reasonably make any such copy or have any such copy made</u>. (Emphasis added).

14. Section 1-212(b), G.S., provides, in relevant part, that "[t]he fee for any copy provided in accordance with subsection (a) of section 1-211 shall not exceed the cost thereof to

the public agency. In determining such costs for a copy, other than for a printout which exists at the time that the agency responds to the request for such copy, an agency may include only:

> (1) An amount equal to the hourly salary attributed to all agency employees engaged in providing the requested computer-stored public record, including their time performing the formatting or programming functions necessary to provide the copy as requested, but not including search or retrieval costs except as provided in subdivision (4) of this subsection;
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> (2) An amount equal to the cost to the agency of engaging an outside professional electronic copying service to provide such copying services, if such service is necessary to provide the copying as requested;
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> (3) The actual cost of the storage devices or media provided to the person making the request in complying with such request; and
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> (4) The computer time charges incurred by the agency in providing the requested computer-stored public record where another agency or contractor provides the agency with computer storage and retrieval services....

15. It is concluded that the records described in paragraph 2, above, are public records within the meaning of §§1-200(5) and 1-210(a), G.S.

16. At the hearing, the complainant contended that the respondents violated the FOI Act by failing to provide her with access to the records described in paragraph 2, above. The respondents disputed this contention.

17. It is found that, following receipt of the complainant's request, the First Selectman requested that the respondents' IT consultant conduct a search of the town's server for responsive email records. It is also found that, because the town never issued Commissioner Hanby and the Chairman of the Park & Recreation Commission a town email account, the First Selectman directed Commissioner Hanby and the Chairman to conduct a search of their personal email accounts for responsive records.

18. As already found in paragraph 6, above, as of April 25, 2023, the respondents had compiled all responsive email communications. It is found that such email communications are public records maintained "in a computer storage system," within the meaning of §1-211(a), G.S.

19. It is found that the fee of $5,834.50, described in paragraph 6, above, was calculated using §1-212(a)(1)(B), which permits public agencies, with the exception of state-level agencies, to charge a requester up to fifty cents per page for hard copies of public records.

20. However, §1-212(b), G.S., governs the fee for copies of computer stored public records, and §1-211(a), G.S., expressly provides that a requester may request the method of

delivery of such records, and that the public agency is required to use the method of delivery requested if it can reasonably do so.

21. As already found in paragraphs 2 and 7, above, the complainant requested that the respondents provide her with the email communications described in paragraph 6, above, either via email or on an electronic storage device or medium, and specifically provided the respondents with a thumb drive in order to do so.

22. At the hearing, the respondents contended that they could not provide the complainant with any of the email communications described in paragraph 6, above, because the respondents believed that such records contained information identifying children that is exempt from disclosure pursuant to §1-210(b)(23), G.S., and that such records required redaction.

23. Section 1-210(b)(23), G.S., provides, that nothing in the FOI Act requires the disclosure of "[t]he name or address of any minor enrolled in any parks and recreation program administered or sponsored by any public agency...."

24. Although the complainant did not dispute that the records described in paragraph 6, above, may contain such information, and consented to such redaction, the respondents' witness testified, and it is found, that at the time of the hearing, the respondents had not engaged in any review and redaction of such records, and therefore could not quantify how many responsive records required redaction, and how that redaction would occur. It is also found that, from the time that the records were compiled on or about April 25, 2023, the respondents had been waiting for their counsel to advise them regarding how to next proceed with respect to complying with the complainant's request.[1]

25. Based on the foregoing, it is found that the respondents failed to prove that they could not reasonably make a copy of the records described in paragraph 6, above, available on an "electronic storage device or medium," or by providing an electronic copy of the records via email, as requested by the complainant.

26. The respondents also contended that they did not violate the FOI Act, as alleged in the complaint, because in or about September 2023, six months after the date of the request, the respondents offered the complainant the opportunity to inspect the records. It is found that the complainant declined this offer because her work schedule at such time would not allow her to inspect the records during the regular business hours of the respondents.

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[1] The Commission notes, however, that even if the respondents believed that they needed to redact the records described in paragraph 6, above, because such records contained the names or addresses of minors enrolled in the respondents' parks and recreation program, §1-210(b)(23), G.S., is a permissive exemption that the respondents may invoke, but are not required to invoke. The respondents presented no evidence that disclosure of such information is prohibited by federal law or state statute. Consequently, nothing in the FOI Act would have afforded the respondents the right to pass the cost of redacting such records onto the complainant. See Kozlowski v. FOI Comm'n, No. CV 960556965, 1997 WL 435860 (July 29, 1997) (concluding that, because state statute specifically prohibited the agency from disclosing certain information contained in the requested record, which therefore necessitated redaction of the requested record, the agency could charge the requester the per-page fee for having to print and redact each page prior to allowing inspection.)

27. As already found in paragraphs 2 and 7, above, the complainant initially informed the respondents that she could make herself available to inspect the respondents' records. However, it is found that the respondents waited six months to respond to the complainant's request to do so, and by such time the complainant was no longer available to inspect the records. Because the FOI Act entitles the public to *prompt* access to public records, the respondents belated offer to inspect the records, in lieu of paying $5,834.50 for physical copies, does not remedy their noncompliance with the FOI Act for the preceding period of six months.[2]

28. With respect to the request for text messages, described in paragraph 2, above, at the hearing, the respondents' witness testified, and it is found, that the respondents did not have town issued cell phones. However, the First Selectman testified, and it is found, that at times, she used her personal cell phone to engage in town business. Notwithstanding, it is found that the First Selectman did not search her personal cell phone for any records responsive to the request. The First Selectman also testified, and it is found, that the respondents were not asked to search their personal cell phones for responsive records but were instead advised by counsel to focus their efforts on locating responsive email communications.

29. It is therefore found that the respondents failed to prove that they conducted a reasonable and diligent search. It is therefore found that the respondents also failed to prove that they do not maintain any text messages responsive to the complainant's request.

30. Accordingly, it is concluded that the respondents violated the disclosure provisions of the FOI Act when they failed to provide the complainant with a copy of the records described in paragraph 2, above.

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

1. Within 30 days of the date of the Notice of Final Decision, the respondents shall provide the complainant with a copy of the email communications described in paragraph 2, above, free of charge. The respondents may do so by providing such records on an electronic medium, such as a thumb drive, or via email. The respondents may redact such records pursuant to §1-210(b)(23), G.S., before providing them to the complainant.

2. Within 30 days of the date of the Notice of Final Decision in this matter, the respondents shall each conduct a search of their records for text messages that are responsive to the complainant's request, and if responsive records are located, the respondents shall provide copies of such records to the complainant, free of charge. The respondents may redact such records pursuant to §1-210(b)(23), G.S., before providing them to the complainant.

[2] The Commission also notes that the communications regarding the respondents' offer to the complainant to inspect records arose through the ombudsman assigned to this matter. Ordinarily, correspondence between the parties and the ombudsman are not entered into evidence. See §1-21j-29(d) of the Regulations of Connecticut State Agencies. However, in this matter, both parties requested to introduce evidence of such communications and therefore such evidence was permitted.

3. Within 30 days of the date of the Notice of Final Decision in this matter, each respondent shall provide the complainant with an affidavit setting forth their efforts to comply with the Order set forth in paragraph 2, above.

4. Henceforth, the respondents shall comply with the disclosure provisions of the FOI Act.

Approved by Order of the Freedom of Information Commission at its regular meeting of May 22, 2024.

Molly E. Steffes
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:

LYNN HARRINGTON, 284 Kent Road, Kent, CT 06757

DIRECTOR, PARK & RECREATION DEPARTMENT, TOWN OF KENT; **PARK & RECREATION DEPARTMENT, TOWN OF KENT**; **CHAIRMAN, PARK & RECREATION COMMISSION, TOWN OF KENT**; **ABIGAIL SMITH HANBY, AS COMMISSIONER, PARK & RECREATION COMMISSION, TOWN OF KENT**; **PARK & RECREATION COMMISSION, TOWN OF KENT**; **FIRST SELECTMAN, TOWN OF KENT; AND TOWN OF KENT**, c/o Attorney Joseph P Mortelliti, Cramer & Anderson LLP, 30 Main Street, Suite 204, Danbury, CT 06810

Molly E. Steffes

Molly E. Steffes
Acting Clerk of the Commission

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