



FREEDOM OF INFORMATION



Connecticut Freedom of Information Commission • 18-20 Trinity Street, Suite 100 • Hartford, CT 06106
Toll free (CT only): (866)374-3617 Tel: (860)566-5682 Fax: (860)566-6474 • www.state.ct.us/foi/ • email: foi@po.state.ct.us

Marissa Lowthert,
Complainant(s)
against

Notice of Meeting

Docket #FIC 2014-148

Superintendent of Schools, Wilton Public Schools; and
Wilton Public Schools,
Respondent(s)

February 3, 2015

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 the Freedom of Information Commission Hearing Room, 18-20 Trinity Street, 1st floor, Hartford, Connecticut, at **2 p.m. on Wednesday, February 25, 2015**. At that time and place you will be allowed to offer oral argument concerning this proposed finding and order. 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 February 13, 2015**. 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 February 13, 2015**. **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 **fourteen (14) copies** be filed **ON OR BEFORE February 13, 2015**, 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

W. Paradis

Acting Clerk of the Commission

Notice to: Marissa Lowthert
Anne Littlefield, Esq.

2015-02-03/FIC# 2014-148/Trans/wrbp/KKR/CAL

FREEDOM OF INFORMATION COMMISSION
OF THE STATE OF CONNECTICUT

In the Matter of a Complaint by

Report of Hearing Officer

Marissa Lowthert,

Complainant

against

Docket #FIC 2014-148

Superintendent of Schools, Wilton
Public Schools; and Winton
Public Schools,

Respondents

January 30, 2015

The above-captioned matter was heard as a contested case on November 24, 2014, and January 7, 2015, at which times the complainant and the respondents appeared and presented testimony, exhibits and argument on the complaint. For purposes of hearing, this matter was consolidated with Docket #FIC 2014-147, Marissa Lowthert v. Superintendent of Schools, Wilton Public Schools; and Wilton Public Schools and Docket #FIC 2014-160, Marissa Lowthert v. Superintendent of Schools, Wilton Public Schools; and Wilton Public Schools. By email dated January 6, 2014, Marianne Gustafson filed a petition to intervene in this matter, but failed to appear at the hearing on January 7th. Accordingly, such petition was denied by the hearing officer.

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 February 11, 2014, the complainant requested from the respondents copies of:
 - (a) “[r]ecords related to [s]chool [e]nvironmental complaints...includ[ing] all initial complaints, investigations and corresponding HR/action files...for all Wilton Public Schools,” and
 - (b) [nine] OSHA consultations and [one] OSHA investigation as well as any private ‘[n]on-OSHA’ investigations [and]...any complaints that did not result in any investigations/actions.”

3. It is found that, by email dated February 14, 2014, the respondents acknowledged receipt of the request, described in paragraph 2, above, requested that the complainant provide a time frame for the requested records, and inquired whether she was seeking a duplicate copy of 11 environmental reports that were previously provided to her.¹

4. It is further found that the district's superintendent at the time prepared a letter, also dated February 14, 2014, addressed to the complainant, with copies of some emails responsive to the request, described in paragraph 2(a), above, attached. However, it is unclear whether the respondents sent such letter to the complainant, on or around that date. It is found that the respondents provided the complainant with a copy of such letter, with attachments, in November 2014.

5. It is found that the complainant provided clarification of her request in response to the February 14th email, described in paragraph 3, above.

6. It is found that, by email dated February 21, 2014, the respondents informed the complainant that they were continuing to search for records responsive to her request for "complaints," and that they would update her the following week as to the results of such search. The respondents further informed the complainant that had they searched for, but were unable to locate, records of any "investigations and corresponding HR/action files."

7. It is found that, by email also dated February 21, 2014, the respondents provided the complainant with an update on the status of their response to her request, and further provided her with copies of certain records responsive thereto. It is found that the respondents also informed the complainant that, other than the OSHA report they had provided to her in 2013 (see footnote 1), they did not maintain any other OSHA investigations/reports.²

8. By email dated and filed March 13, 2014, the complainant appealed to this Commission, alleging that the respondents violated the Freedom of Information ("FOI") Act by failing to comply with her request for "school environmental complaints including any and all corresponding files/HR files," and [nine] OSHA reports prepared in response to staff complaints dating back to 1998."³

9. Section 1-200(5), G.S., provides:

¹ In the fall of 2013, the complainant made several requests to the respondents for records relating to air quality in the Wilton Public Schools. The respondents provided some records responsive to these requests prior to the February 11, 2014 request at issue in this case.

² It is found that the respondents contacted OSHA and requested copies of all reports of OSHA investigations related to the Wilton Public Schools, but were informed that OSHA does not maintain any such reports beyond five years.

³ Although the February 11, 2014 request, described in paragraph 2(b), above, included a request for both OSHA and "non-OSHA" investigations/consultations, the alleged denial of her request for "non-OSHA" investigations, is the subject of Docket #FIC 2014-160, Marissa Lowthert v. Superintendent of Schools, Wilton Public Schools, et al., and not at issue in this case.

“Public 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, printed, photostated, photographed or recorded by any other method.

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

Except 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.

11. 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.”

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

13. It is found that, despite the respondents’ representation that all OSHA reports had been provided to her (see paragraph 7, above), the complainant continued to dispute that claim. It is found that the respondents conducted another search, and on March 19, 2014, provided the complainant with a copy of one additional OSHA report discovered after such search. At this time, the respondents again represented that they “ha[d] searched for and provided all reports in our possession...from OSHA.”

14. It is found that, thereafter, the complainant contacted OSHA and discovered that, although OSHA does not maintain copies of the reports she was seeking, it does maintain an index card file indicating the dates and locations of the consultations and inspections it had conducted with regard to the Wilton Public Schools. It is found that OSHA provided this information to the complainant in June of 2014, but that the complainant did not share this information with the respondents until the hearing in this matter on November 24th.

15. In their pre-hearing brief, dated November 19, 2014, the respondents, through counsel, stated, with respect to the request at issue in this case, that “Wilton has provided [the complainant] with all non-exempt public records maintained by the district that are responsive to [such] request[.]. Upon receipt of ... [this] request, Wilton promptly undertook a diligent search for the requested records and promptly provided a response.”

16. At the November 24th hearing in this matter, the complainant claimed that the respondents were deliberately withholding responsive records from her, pointing out that additional responsive records were located by the respondents after they had represented, on several different occasions, that all responsive records they maintain had been provided to her. The complainant further pointed to the information provided to her from OSHA (see paragraph 14, above) as proof that other OSHA reports exist.

17. It is found that, after the November 24th hearing in this matter, the current superintendent of schools, Dr. Kevin Smith, directed additional personnel, including the principals of all schools in the district, head custodians, and library/media specialists, to conduct another search of all files in each school for any additional OSHA reports. It is found that, as a result of such search, the respondents located three additional OSHA reports. Dr. Smith testified that the reports were found in files in the following locations, which he characterized as “unusual”: the nurse’s office, the library, and in a filing cabinet of the assistant to one of the principals.⁴ It is found that such reports were provided to the complainant immediately after they were located, in December of 2014.

18. At the January 7th hearing in this matter, the respondents again represented that they had conducted a thorough and diligent search for responsive records, but acknowledged that there may be an “additional responsive email” that exists that still has not been located and turned over to the complainant. The complainant asserted that the respondents had deliberately withheld the OSHA reports, described in paragraphs 13 and 17, above, as well as other responsive records, were continuing to withhold, or had destroyed records, and that the records that were provided to her were not provided to her promptly.

19. With regard to the allegation that the respondents deliberately withheld or destroyed records, it is found that there is no credible evidence in the record to support such allegation.

20. With regard to the claim that the respondents, even as of the January 7th hearing, continued to maintain additional responsive records that were not provided to her, it is found that the respondents did, in fact, at the time of the January 7th hearing, maintain additional responsive records they had not provided to the complainant. It is found that, by email dated January 22, 2014, approximately two weeks after the close of the hearing in this matter, the respondents provided to the complainant an additional 86 pages of records responsive to her request. Such records also were provided to the hearing officer and have been marked as Respondents’ Exhibit 13, (after-filed).⁵ It is found that such records consist of more than just “an email.”

21. With regard to the claim that the respondents failed to promptly provide her with copies of the records she requested, the Commission has held that the meaning of the word

⁴ In their post-hearing brief, the respondents represented that all three additional reports were located in the library/media center, and that Dr. Smith’s testimony regarding where the reports were located was inaccurate.

⁵ At the request of the hearing officer, the respondent superintendent also submitted an affidavit detailing the scope and nature of the search conducted in response to the request, described in paragraph 2, above. Such affidavit, dated January 21, 2015, has been marked by the hearing officer as Respondents’ Exhibit 14 (after-filed).

“promptly” is a particularly fact-based question. In 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), the Commission advised that the word “promptly,” as used in §1-210(a), G.S., means quickly and without undue delay, taking into consideration all of the factors presented by a particular request.

22. The advisory opinion 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 time and personnel required to comply with a request; the time by which the person requesting records needs them; 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 the loss of the personnel time involved in complying with the request.

23. In this case, it is found that: the complainant made 26 voluminous requests for records to the respondents between February and September 2014. It is also found that the month of February, in which the request at issue in this case was filed, is an extremely busy time for the respondents in that, during this time, they are preparing and finalizing their budget, engaging in strategic planning and dealing with issues arising in the state legislature. However, it is also found that the complainant made the respondents very aware of the importance to her of obtaining the records, as she believed the air quality at her childrens’ school may have adversely affected their health.

24. Even taking into consideration that the complainant made many voluminous records requests, and that the respondents were very busy with the press of business during the month of February, it is found that the records provided to the complainant in November and December 2014, and in January 2015, were not provided to her promptly. It is further found that the undue delay in providing these records to the complainant resulted from the respondents’ failure initially, and thereafter, to conduct a thorough and diligent search for such records.

25. The respondents claim they did not locate the records earlier because, initially, they searched for such records only in locations where they expected them to be maintained, such as in the office of the facilities director. However, under the facts and circumstances of this case, in which the complainant was so persistent in her claim that such records existed, it is found that having not found them in the office of the facilities director, the respondents should have taken some further action—such as searching in other locations for them sooner, inquiring of the complainant as to the basis for her belief that additional records existed, or contacting OSHA, as the complainant did, and obtaining from it the dates and locations of the investigations conducted in the school district—rather than erroneously informing the complainant that they did not maintain any additional records. The fact that the respondents’ method of filing and/or maintaining public records apparently lacked organization at the time of the request at issue, does not excuse undue delay in locating such records, and is not a defense to the claim that records were not provided promptly.

26. The respondents further claim that any delay on their part was caused by the complainant, because she failed to provide them with the information she obtained from OSHA

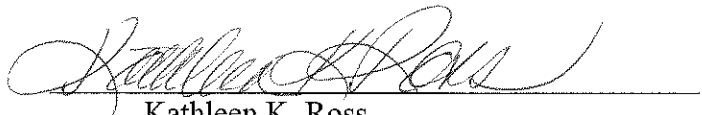
regarding the dates and locations of the OSHA investigations (see paragraph 14, above). However, although it is curious that the complainant chose not to provide the respondents with this information, it is found, first, that the respondents could have obtained this same information from OSHA, and second, that even without this information, the respondents could have more efficiently and quickly located and provided the requested records to the complainant had they conducted a more thorough and diligent search initially, and had their records been filed and maintained in a more organized manner.

27. The respondents further argue that they should not be found to have violated the promptness requirements of the FOI Act because they provided records to the complainant "on a rolling basis." However, it is found that the respondents never informed the complainant that they were continuing to search for records and would provide copies to her as they located them; rather, they repeatedly represented to the complainant that they had provided all responsive records to her, when in fact, they had not. It is found that, if not for the complainant's insistence that the respondents maintained additional records responsive to her request, such records might never have been located.

28. Accordingly, it is found that the respondents violated 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. Forthwith, the respondents shall strictly comply with the promptness provisions of the FOI Act.



Kathleen K. Ross
as Hearing Officer