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FREEDOM OF INFORMATION



Connecticut Freedom of Information Commission • 18-20 Trinity Street, Suite 100 • Hartford, CT 06106
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Eric Simonson,
Complainant(s)
against

Notice of Meeting

Docket #FIC 2012-420

Zoning Enforcement Officer, Town of Darien;
and Town of Darien,
Respondent(s)

December 21, 2012

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, January 23, 2013**. 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 January 11, 2013**. 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, the Commission requests that an **original and fourteen (14) copies** be filed **ON OR BEFORE January 11, 2013**. **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 January 11, 2013**, 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: Eric Simonson
John Wayne Fox, Esq.

2012-12-21/FIC# 2012-420/Trans/wrbp/CAL//TAH

FREEDOM OF INFORMATION COMMISSION
OF THE STATE OF CONNECTICUT

In the Matter of a Complaint by

Report of Hearing Officer

Eric Simonson,

Complainant

against

Docket # FIC 2012-420

Zoning Enforcement Officer,
Town of Darien; and Town of Darien,

Respondents

December 19, 2012

The above captioned matter was heard as a contested case on December 11, 2012, at which time 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)(A), G.S.
2. It is found that by three emails dated June 29, 2012, July 13, 2012, and July 16, 2012, the complainant made requests to the respondents for records related to his land use dispute with his neighbor. The June 29, 2012 email requested "a letter or legal opinion in support of" the position of attorney Fox concerning an action by the respondent Zoning Enforcement Officer which the complainant considered "directly and unambiguously contrary to the state law". The July 13, 2012 email requested copies of "all communications between anyone at P&Z and ZBA, as well as Town Counsel that relate to this [jurisdictional] issue." The July 13, 2012 email also restated the complainant's request for "all written advice and legal opinions provided to P&Z or ZBA" concerning the automatic stay issue and "any other matters related to my appeal". Finally, the July 16, 2012 email reiterated the request for "the written advice (or summaries of oral advice) provided to" the respondent Zoning Enforcement Officer, and requested "all relevant and requested materials relating to communications with town counsel." The July 13, 2012 request is the broadest, but all three requests together constitute the "requested records".
3. It is found that on July 17, 2012, the respondents provided the complainant with numerous records consisting primarily of emails and copies of photographs, which in the aggregate comprised a stack of records with a thickness of approximately one and a half inches.

4. It is found that, by letter dated and filed with the Commission on July 27, 2012, the complainant appealed to the Commission, citing the three requests set forth in paragraph 2, above, and alleging that the failure of the respondents "to provide access to or copies of the Advice of Counsel" constituted a violation of the Freedom of Information Act ("FOIA").

5. It is found that by email dated September 25, 2012, the complainant made a fourth records request to the respondents, this time for "all documents, appeal papers and other communications between the Ropps and their legal counsel and the Zoning Enforcement Officer, the zoning staff, and ZBA relating to the public hearing identified in the attachment and all issues relating thereto...." The attachment was the agenda of the May 16, 2012 meeting of the Town of Darien Zoning Board of Appeals, which included an item relating to a request to amend a stipulation in a decision concerning J. Willson Ropp and Adrienne Dreiss. It is further found that the complainant forwarded a copy of the September 25, 2012 email to the Commission in response to the Commission's docketing letter and that this email was included with the order to show cause issued by the Commission on November 14, 2012.

6. It is also found that on September 27, 2012, the respondents hand delivered to the complainant's home approximately thirty five to forty pages of records in response to the complainant's September 25, 2012 request.

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

"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.

8. Sections 1-210(a) and 1-212(a), G.S., state, respectively, in relevant parts:

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, (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.

...

Any person applying in writing shall receive, promptly upon request, a plain, facsimile, electronic or certified copy of any public record.

9. It is concluded that the requested records are “public records” within the meaning of §§1-200(5), 1-210(a) and 1-212(a), G.S. It is also concluded that the September 25, 2012 request is not a proper subject of the complaint that was filed before the September 25, 2012 request, as previously stated, on July 27, 2012. The complainant argued at the hearing that the September 25, 2012 request was an elaboration of the earlier requests. But the Commission must adjudicate whether the complaint correctly alleged violations of the FOIA when filed.

10. At the hearing, the respondents requested the imposition of a \$1,000 civil penalty on the complainant, citing the complainant’s requests for “summaries of oral advice”, the complainant’s expertise as a highly skilled lawyer, and the substantial expense that the respondent Town of Darien has incurred. At the close of the hearing, respondents agreed to hold their request for civil penalties in abeyance.

11. It is found that the complainant and his neighbor, J. Willson Ropp, have been engaged in a protracted land use dispute related to an easement on the complainant’s property. At the time of the hearing, at least five different actions related to the dispute were pending in various courts. The actions of the respondents in performance of their public duties have become entangled in this land use dispute. Of course, this broader dispute is only context here and is beyond the Commission’s jurisdiction.

12. The sworn testimony of two witnesses at the hearing, including the respondent Zoning Enforcement Officer, was, and it is found that, there were no written legal opinions rendered concerning the legal issues referenced in the complainant’s requests of June 29, 2012, July 13, 2012, and July 16, 2012. Therefore, it is also found that the respondents did not maintain such records.

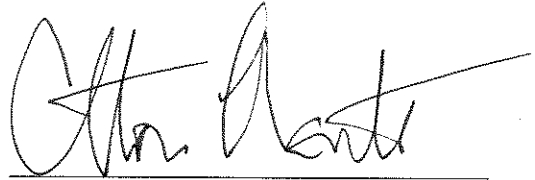
13. It is found that there was also no specific evidence that all records maintained by the respondents within the scope of the complainant’s requests of June 29, 2012, July 13, 2012, and July 16, 2012 were not disclosed. The fact that the records responsive to the September 25, 2012 request were not provided with the July 17, 2012 disclosure is not relevant. Nor are alleged defects relevant here in the search conducted in response to the September 25, 2012 request. Moreover, the July 17, 2012 disclosure was prompt.

15. The Superior Court has affirmed the numerous decisions of the Commission over many years stating the principle that public agencies need not create documents that they did not “maintain” in order to satisfy FOIA requests. Kimberly Albright-Lazzari et al. v. Colleen Murphy, Connecticut Freedom of Information Commission et al., CV105014984S, 2011 Conn. Super. LEXIS 1031, April 21, 2011, p. 9. Concerning records maintained by other public agencies, see also James A. Lash, First Selectman of the Town of Greenwich, et al. v. FOIC et al., 116 Conn. App. 171, 188, 976 A. 2d 739 (2009), reversed in part on other grounds, 300 Conn. 511, 14 A. 3d 998 (2011).

16. It is concluded that the respondents did not violate §§1-210(a) and 1-212(a), G.S., by failing to provide copies of requested records which they maintained.

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

1. The complaint is hereby dismissed.

A handwritten signature in black ink, appearing to read "Clifton A. Leonhardt", written over a horizontal line.

Clifton A. Leonhardt
as Hearing Officer