



FREEDOM OF INFORMATION



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

Notice of Meeting

Docket #FIC 2012-054

Commissioner, State of Connecticut,
Department of Energy and Environmental
Protection; and State of Connecticut,
Department of Energy and Environmental
Protection,

Respondent(s)

August 3, 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, August 22, 2012**. 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 August 10, 2012**. 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 August 10, 2012**. **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 August 10, 2012**, 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: Kevin Ziolkovski
Melinda M. Decker, Esq.

8/3/2012/FIC# 2012-054/Trans/wrbp/CAL//GFD

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FREEDOM OF INFORMATION COMMISSION
OF THE STATE OF CONNECTICUT

In the Matter of a Complaint by

Report of Hearing Officer

Kevin Ziolkovski,

Complainant

against

Docket # FIC 2012-054

Commissioner, State of Connecticut,
Department of Energy and Environmental
Protection; and State of Connecticut,
Department of Energy and Environmental
Protection,

Respondents

July 25, 2012

The above-captioned matter was heard as a contested case on June 18, 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 letter dated December 17, 2011, the complainant made a request to the respondents for copies of records in four categories: a) any information regarding the Bloomingdale road crossing of Hunts Brook in the Town of Waterford; b) any information regarding Miller's Pond and the Miller's Pond dam in the Town of Waterford, from the date of its original construction to the date of the request; c) any information regarding the reconstruction of the Old Mill Road bridge crossing of Hunts Brook in the Town of Waterford, from June 1982 to the date of the request; and d) the original emergency response plan for the failure of the Miller's Pond dam in the Town of Waterford and any updated versions of such plan (the "requested records").
3. It is found that by letter dated December 22, 2011, Ms. Mary Lou Kramer acknowledged the complainant's request on behalf of the respondents. She stated that, given the scope of the request, it may take the respondents "some time" to search its files. She also stated that, as each Bureau completed its search, the complainant would be notified.

4. By letter dated January 30, 2012, postmarked January 31, 2012 and filed with the Commission on February 1, 2012, the complainant appealed to the Commission, alleging that the respondents' failure to provide the records requested by his December 17, 2011 letter violated the Freedom of Information Act ("FOIA"). The complainant also alleged that, prior to his written request for documents, as early as April 2010, he had had several telephone conversations with Art Christian of the Dam Safety Division in which he had requested this information.

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

"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.

6. 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.

7. At the hearing, counsel for the respondents objected to the introduction of evidence relating to the complainant's telephone conversations with Mr. Christian during 2010. Her grounds for the objection were that the Commission's jurisdiction was limited to one year, apparently referring to the requirement of §1-206(b)(1), G.S., that the Commission shall "hear and decide the appeal within one year after the filing of the notice of appeal." The hearing officer overruled the objection, stating that the complainant should be allowed to introduce evidence showing that his request for records was a continuing one and that the respondents had not provided records promptly, as the complainant contended.

8. It is found that on May 21, 2010, the complainant had a telephone conversation lasting approximately eight minutes with Mr. Christian of the Dam Safety Division. The complainant and Mr. Christian spoke again for approximately two minutes on July 19, 2010. On August 11, 2010, the complainant left a voicemail for Mr. Christian.

9. The testimony of the complainant and the testimony of Mr. Christian conflict concerning whether the complainant's telephone remarks constituted a request for records. The complainant maintained that he requested the requested records, while Mr. Christian maintains the complainant was seeking information concerning the flooding of his property. There was no written request for copies of records in 2010.

10. It is further found that many of the relevant records date from the early 1990's, immediately prior to the modification of the Miller's Pond dam in 1994 and 1995. (The dam was originally constructed during the 1870's.) Mr. Christian informed the complainant during their 2010 telephone conversations that the person who oversaw the dam reconstruction in the early 1990's was no longer employed by the Department of Environmental Protection ("DEP"), the predecessor of the respondent Department of Energy and Environmental Protection (sometimes "DEEP"). Mr. Christian testified that in 2010 he was overwhelmed with the quantity of records on file and stated that he was aware that he did not answer the complainant's question as to whether the DEP had the designer consider downstream flooding impacts when the dam modification was allowed in 1994 and 1995.

11. It is found that the complainant wrote an email dated November 18, 2010 to State Representative Elizabeth Ritter stating that he had an initial conversation with Mr. Christian "in which I outlined my concerns" (emphasis added). The email further stated that the complainant followed up with a second call "to check on the progress of gathering the information I was looking for." The email also mentioned the complainant's voicemail left for Mr. Christian and added that the complainant had not heard "anything from [DEEP] or any other agency addressing my questions and concerns" (emphasis added).

12. It is further found that the complainant has a claim before the Office of the Claims Commissioner which has been disallowed because he did not file within a required one year time period. As of the hearing date herein, the complainant had until July 16, 2012 to file a response at the Office of the Claims Commissioner and stated his position that he did not timely file his original claim because he could not get relevant records from the DEP.

13. It is also found that there was a sixteen month gap of no communication between the complainant's last phone call to Mr. Christian on August 11, 2010 and his written records request dated December 17, 2011. During this time, the complainant did not follow up seeking records from the respondents.

14. Given the findings in paragraphs 11 through 16, and especially the complainant's own characterization of his conversations with Mr. Christian in his email to

Representative Ritter (paragraph 14), it is found that the complainant failed to prove that his oral telephone conversations in 2010 constituted any records request. The weight of the evidence is that in 2010 the complainant was trying to determine whether the DEP had the designer consider downstream flooding impacts during the 1990's modification, but was unable to get a clear response. It is therefore found that there was no records request prior to his first written request dated December 17, 2011.

15. It is found that on March 30, 2012 the respondents provided over 1,493 pages of records and 119 maps to the complainant. It is further found that such disclosure was reasonably prompt given the volume and nature of records requested, the fact that the complainant did not tell the respondents there was any urgency due to a claim before the Office of the Claims Commissioner, and did not follow up with Mary Lou Kramer who had acknowledged his request.

16. At the hearing, the complainant also contended that the respondents had not provided him with all of the records he had requested. Specifically, the complainant indicated that records were missing from the March 30, 2012 disclosure and should have been created concerning: a) a hydrologic assessment from about 1994 of the Millers Pond dam and spillway reviewing downstream flooding impact changes due to the lengthened spillway; b) a hydrologic assessment from about 1994 of the downstream road crossing; c) data or assessments used by DEP in 2006/2007 when the DEP ordered the low outlet closed; and d) any records regarding the old Mill Road bridge crossing, the reconstruction of the stream, and dam removal in the area of the bridge.

17. It is found that by letter dated June 21, 2012, counsel for the respondents informed the complainant that "Mr. Christian conducted another search...and found no responsive records." She also referenced the location of the 1985 emergency operation plan in the records that were provided on March 30, 2012.

18. It is concluded that the respondents performed a diligent search for the records requested on December 17, 2011, provided the complainant with all the requested records maintained by the respondent Department, and did not violate §§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. The complaint is hereby dismissed.



Clifton A. Leonhardt
as Hearing Officer