

FREEDOM OF INFORMATION COMMISSION
OF THE STATE OF CONNECTICUT

In The Matter of a Complaint by

FINAL DECISION

Katherine Camara,

Complainant

against

Docket #FIC 2016-0678

Ken Demirs, as member,
Planning Commission,
Town of Watertown;
Planning Commission,
Town of Watertown; and
Town of Watertown,

Respondents

June 14, 2017

The above-captioned matter was heard as a contested case on December 1, 2016 and March 20, 2017, 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 letter dated September 8, 2016, the complainant requested that the respondents provide her with copies of the following records:
 - a. The resignation letter of Eric Markiewicz from the Planning and Zoning Commission; and
 - b. The personal cell phone records of Commissioner Ken Demirs for calls and text messages made or received during the Planning and Zoning Commission meeting of September 7, 2016 that pertained in any way to the Planning and Zoning Commission.
3. It is found that, by email dated September 9, 2016, the respondents acknowledged the request, and indicated that they had no records responsive to the

request set forth in paragraph 2.b, above.

4. By letter dated September 11, 2016 and filed September 23, 2016, the complainant appealed to the Commission, alleging that the respondents violated the Freedom of Information Act (“FOI Act”) by failing to provide her with a copy of the records described in paragraph 2, above. In the complaint, the complainant requested that the Commission impose a civil penalty against the Town of Watertown.

5. 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.

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

[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.

7. 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.”

8. It is found that the requested records are public records within the meaning of §§1-200(5), 1-210(a), and 1-212(a), G.S.

9. It is found that, prior to the first contested case hearing, the respondents provided the complainant with a copy of the resignation letter described in paragraph 2.a, above. Accordingly, the only records at issue in this case are the records described in paragraph 2.b, above.

10. It is found that, on September 7, 2016, the P&Z Commission held a regular meeting. It is found that, during the course of this meeting, Commissioner Ken Demirs used and/or looked at his personal cell phone multiple times. The complainant contended that it was her belief that Commissioner Demirs may have been using his cell phone during the meeting for business related to the meeting. She further contended that, if her

belief was correct, she would be entitled to receive a copy of the records evidencing such cell phone usage.

11. By email dated November 29, 2016, the respondents disclosed to the complainant a photograph of one page of text messages from Commissioner Demirs' personal cell phone. The respondents contended that, while the text messages were not actually responsive to the request because they did not pertain to the substantive work of the P&Z Commission, they were disclosed because they were sent and/or received during the September 7th public meeting.

12. At the December 1, 2016 contested case hearing, the complainant put on her case. The complainant entered into evidence multiple photographs from the September 7th public meeting, along with a video of the meeting, in which it appears that Commissioner Demirs is either using or looking at this cell phone during the meeting on multiple occasions. The complainant contended that, on some of the occasions when Commissioner Demirs was using his cell phone, the applicant appearing before the P&Z Commission was simultaneously using his cell phone. The complainant contended that she was concerned that Commissioner Demirs may have been inappropriately electronically communicating with the applicant. Finally, the complainant contended that, based on the numerous times that the commissioner looked at and/or used his personal cell phone during the meeting, there should be more records responsive to the request set forth in paragraph 2.b, above.

13. Because Commissioner Demirs was not available to appear at the December 1, 2016 contested case hearing, the hearing was continued to March 20, 2017.

14. Commissioner Demirs appeared and testified at the March 20, 2017 continued contested case hearing.

15. It is found that the one page of text messages, which was disclosed to the complainant on November 29, 2016, was the only record responsive to the request in paragraph 2.b, above. It is found that, when he originally reviewed his cell phone, Commissioner Demirs did not believe that he had any records that actually pertained to the business of the P&Z Commission and so informed his counsel. However, it is found that, upon further reflection, Commissioner Demirs decided that the first three text messages on the page, while not substantively related to the P&Z Commission's business, were sent and received while the September 7th meeting was in progress and therefore should be disclosed. These text messages stated the following: "[Commissioner Demirs]: Are you here"; "[Reply]: No. Getting play by play though," and "[Commissioner Demirs]: K."

16. It is further found that the fourth message and final message on the page states the following, "[Reply]: Burns did work for the town Conflict of Interest Ask the question." It is found that this message was not received or reviewed by Commissioner Demirs until after the meeting was over. It is further found that Commissioner Demirs did not believe that this text message was actually responsive to the request set forth in paragraph 2.b, above, as it was not "made or received" during the September 7th public

meeting. It is found, however, that Commissioner Demirs nonetheless disclosed the fourth text message to the complainant.

17. In addition, it is found that, after the December 1st contested case hearing but before the March 20th continued contested case hearing, the complainant filed four motions to amend the instant appeal. The first motion requested that the appeal be amended to reflect that the complainant was requesting the imposition of a civil penalty against Commissioner Demirs, rather than against the Town of Watertown. The second motion requested that the Commission consider declaring all actions taken by the P&Z Commission at the September 7th meeting null and void. The third motion incorporated the civil penalty request from the first motion and the null and void request from the second motion and further requested that the Commission consider declaring “the September 7, 2016 [P&Z] Commission of Watertown meeting illegal.” The fourth motion reiterated the requests raised in the third motion. These motions are denied.

18. Finally, during the December 1st continued contested case hearing, as the hearing officer was explaining that, because the instant appeal was based on a request for copies of public records, any civil penalties declaring the actions taken by the P&Z Commission at the September 7th meeting to be “null and void” or “illegal” would be inappropriate (as such remedies would be most appropriately considered upon a conclusion that a public agency conducted an unnoticed or secret public meeting), the complainant moved to amend the appeal to include the allegation that the September 7th meeting was illegal.

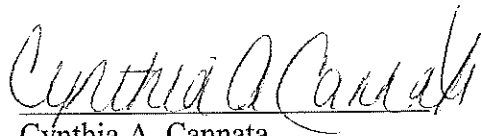
19. The Notice of Hearing and Order to Show Cause, which was issued in this case on November 10, 2016, is the process by which the Commission provides the respondents with notice of what the complainant is alleging and furnishes the respondents with an exact copy of the complainant’s appeal and all filed documentation. See Notice of Hearing and Order to Show Cause, ¶4 (“The RESPONDENT(S) named above is (are) hereby ORDERED to appear on the date and time, and at the place indicated . . . in order to show cause why this appeal should not be sustained. . . . A copy of the complaint in this matter (one page) and attachment (thirteen pages) is attached to this Notice and Order.”). It would be unfairly prejudicial to the respondents to permit an amendment of the appeal after the Notice of Hearing and Order to Show Cause has issued and during the final stage of the contested case hearing proceedings. Accordingly, the complainant’s fifth motion to amend the appeal is denied.

20. It is concluded that the respondents did not violate the FOI Act as alleged in the complaint.

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

1. The complaint is dismissed.

Approved by Order of the Freedom of Information Commission at its regular meeting of June 14, 2017.

A handwritten signature in cursive script, reading "Cynthia A. Cannata". The signature is written in black ink and is positioned above the printed name.

Cynthia A. Cannata
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:

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Town of Watertown; Planning Commission,
Town of Watertown; and Town of Watertown
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Cynthia A. Cannata
Acting Clerk of the Commission