

FREEDOM OF INFORMATION COMMISSION
OF THE STATE OF CONNECTICUT

In The Matter of a Complaint by

FINAL DECISION

David Rosengren,

Complainant

against

Docket #FIC 2018-0427

Daniel V. Jerram, First Selectman,
Town of New Hartford; and Town
of New Hartford,

Respondents

July 10, 2019

The above-captioned matter was heard as a contested case on January 18, 2019, at which time the complainant and the respondents appeared, stipulated to certain facts, 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 July 9, 2018 to the respondents, the complainant made a request for the following:
 - a. Any and all responses or inquiries, referring or relating to a certain request for bids (RFB) for the purpose of drinking water and/or wastewater systems prepared by the Town of New Hartford and/or the Water Pollution Control Authority of the Town of New Hartford;
 - b. Any and all communications referring or relating to the RFB;
 - c. Any and all communications between members of the Asset Evaluation Committee (AEC) or between the AEC, its members and others referring or relating to the proposed sale of New Hartford's water and/or

sewer system(s) or the RFB;

- d. Any other documents in possession of the New Hartford Board of Selectmen, the WPCA and/or the AEC referring or relating to the RFB.

3. By letter received and filed on August 7, 2018, the complainant appealed to this Commission, alleging that the respondents violated the Freedom of Information "FOI" Act by failing to comply with his records request. Additionally, the complainant requested the imposition of civil penalties against the respondents.

4. 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.

5. 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, (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.

6. 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."

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

8. It is found that, by letter dated September 10, 2018, the respondents first acknowledged receipt of the complainant's July 9, 2018, request, described in paragraph 2, above. It is also found that, by such letter, the respondents contended that any records that were responsive to requests 2.a and 2.b, above, were protected, since a contract had not been executed with a bidder, but that such records would be provided upon

completion of negotiations. It is further found that, by such letter, the respondents also informed the complainant that they would search for and review any records that were responsive to the request described in paragraph 2.c and 2.d, above.

9. It is found that the AEC is a subcommittee of the New Hartford Board of Selectmen, and that the respondent first selectman is a member of such subcommittee. It is also found that the Water Pollution Control Authority (WPCA) that is referenced in the request letter described in paragraph 2, above, is a separate agency within the Town of New Hartford. It is concluded that the respondents are not required to retrieve WPCA records for the complainant. Rather, the complainant is free to request records from the WPCA directly.

10. With respect to the request as described in paragraph 2.a and 2.b, above, the respondents contended that §1-210(b)(24), G.S., provides a basis to withhold such records from the complainant.

11. Section 1-210(b)(24) G.S., provides that disclosure is not required of:

Responses to any request for proposals or bid solicitation issued by a public agency or any record or file made by a public agency in connection with the contract award process, until such contract is executed or negotiations for the award of such contract have ended, whichever occurs earlier, provided the chief executive officer of such public agency certifies that the public interest in the disclosure of such responses, record or file is outweighed by the public interest in the confidentiality of such responses, record or file.

12. It is found that the Town of New Hartford issued a Request for Bids for Purchase of Drinking Water and/or Wastewater Systems at some point prior to December 21, 2017. It is found that such request is a bid solicitation within the meaning of §1-210(b)(24), G.S.

13. It is found that the town received three bids in response to the RFB. It is also found that a letter of intent was issued to one bidder, Aquarion Company, in May, 2018.

14. The complainant contended that, since the Town issued the letter of intent to Aquarion Company, the respondents cannot use the exemption at §1-210(b)(24), G.S. However, it is found that, at the time of the request and denial in this matter, and at the time of the hearing, the underlying contract had not been executed, and negotiations for the award of such contract had not ended, within the meaning of §1-210(b)(24), G.S.

15. At the hearing in this matter, the respondent first selectman, who is the chief executive officer of the town, testified as to why he believed that the public interest in withholding the records described in paragraph 2.a and 2.b, above, outweighed the public

interest in disclosing such records. Specifically, the respondent first selectman testified that, since the contract had not yet been awarded, and since the bidding process might need to be reopened based on other factors, release of all bidding information would be premature and could lead to unfair advantages to bidders, in potential disadvantage to the interests of the town. The respondent first selectman further testified that once the contract is executed, he would make the records described in paragraph 2.a and 2.b, above, publicly available.

16. At the hearing in this matter and on brief, the complainant contended that the respondents did not certify that the public interest in the disclosure of the requested records is outweighed by the public interest in the confidentiality of such records within the meaning of §1-210(b)(24), G.S., at the time of the denial of the request in this matter. Therefore, the complainant contended that the respondents cannot rely upon §1-210(b)(24), G.S., to withhold the requested records.

17. The Commission notes that a separate exemption in the FOI Act also requires as a necessary element that the public agency must make a determination that the public interest in withholding outweighs the public interest in disclosure. Specifically, §1-210(b)(1), G.S., exempts from mandatory disclosure “Preliminary drafts or notes provided the public agency has determined that the public interest in withholding such documents clearly outweighs the public interest in disclosure (emphasis added).”

18. The statutory language in §1-210(b)(24), G.S., which was added to the FOI Act in 2007 by Public Act 213, differs in three respects with regard to the determination which must be made. First, such language requires that the chief executive officer must make the determination personally. Second, such language requires that such officer must certify his or her determination. Third, such language does not require that such officer has determined that the public interest in withholding clearly outweighs the public interest in disclosure, as is the case in §1-210(b)(1), G.S. Rather, such language is in the present tense, and requires that such officer “certifies” that the balancing test set forth therein is met.

19. The Commission notes the legislature could have explicitly required that the certification occur at the time of the denial, or earlier, as the complainant contended. It did not. The legislature could also have required that the certification be made in writing. It did not. Moreover, even with regard to the “has determined” language set forth in §1-210(b)(1), G.S., the Appellate Court has refused to read into such statute a requirement that a public agency provide its rationale for withholding disclosure of applicable records at a specific time, when the legislature has expressed no intent to include such a restriction. Lewin v. Freedom of Information Commission, 91 Conn. App. 521, 528 (2005).

20. Pursuant to §1-2z, G.S., the meaning of a statute shall, in the first instance, be ascertained from the text of the statute itself and its relationship to other statutes. It is concluded that §1-210(b)(24), G.S., does not require that the chief executive officer of a

public agency certify that the public interest in withholding outweighs the public interest in disclosure at the time of a denial of access to, or copies of, public records.

21. The complainant also contended that the Commission should further review the adequacy of the decision made by the chief executive officer, contending that there are important public policy reasons for disclosure. However, it is found that the chief executive officer's reasoning is not frivolous or patently unfounded. See Van Norstrand v. Freedom of Info. Comm'n, 211 Conn. 339, 345 (1989) (examining review of balancing test in context of §1-210(b)(1), G.S.) Therefore, such reasoning shall not be further examined.

22. Based on the facts and circumstances of this case, it is found that respondent's testimony described in paragraph 15, above, constitutes the necessary certification required by §1-210(b)(24), G.S.

23. The complainant also contended that the bids of the two bidders who did not receive a letter of intent should be disclosed since "there is no possible way that disclosure could influence the pursuit of a deal with Acquarion" and further that all bids should be released because "the Town is no longer engaged in a sale of wastewater and is pursuing a public-private partnership." The Commission is not persuaded by such arguments and characterizations. As found in paragraph 14, above, at the time of the request and denial in this matter, and at the time of the hearing, the underlying contract had not been executed, and negotiations for the award of such contract had not ended, within the meaning of §1-210(b)(24), G.S.

24. With respect to the records described in paragraph 2.a and 2.b, above, it is concluded that all elements of §1-210(b)(24), G.S., are met, and that such records are exempt by virtue of such provision. Accordingly, it is concluded that the respondents did not violate §§1-210(a) and 1-212(a), G.S., by denying the complainant copies of such records.

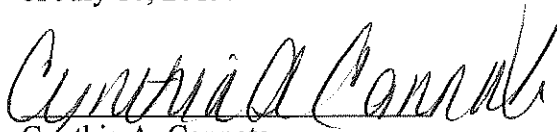
25. With respect to the records described in paragraph 2.c and 2.d, above, it is found that the respondents did not present evidence to demonstrate that they had made an effort to provide such records to the complainant, although the respondents pledged to do so at the hearing in this matter. Accordingly, it concluded that the respondents violated §§1-210(a) and §1-212(a), G.S., by withholding such records from the complainant.

26. After consideration of the entire record in this case, the Commission declines to consider the imposition of civil penalties against the respondents.

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

1. Forthwith, if they have not already done so, respondents shall provide the complainant with copies of the requested records, described in paragraph 2.c and 2.d, above, free of charge.

Approved by Order of the Freedom of Information Commission at its regular meeting
of July 10, 2019.

A handwritten signature in cursive script, appearing to read "Cynthia A. Cannata".

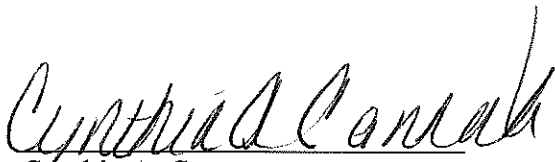
Cynthia A. Cannata
Acting Clerk of the Commission

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:

DAVID ROSENGREN, c/o Attorney Robert J. Krzys, PO Box 207, New Hartford, CT 06057

**DANIEL V. JERRAM, FIRST SELECTMAN, TOWN OF NEW HARTFORD;
AND TOWN OF NEW HARTFORD**, 530 Main Street, New Hartford, CT 06057

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

Cynthia A. Cannata
Acting Clerk of the Commission