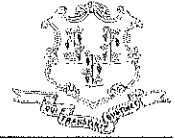


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FREEDOM OF INFORMATION



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

against

First Selectman, Town of Monroe; and
Town of Monroe,
Respondent(s)

Notice of Rescheduled
Commission Meeting

Docket #FIC 2013-218

December 3, 2013

This will notify you that the Freedom of Information Commission has rescheduled the above-captioned matter, which had been noticed to be heard on Wednesday, December 18, 2013 at 2:00 p.m.

The Commission will consider the case at its meeting to be held at the Freedom of Information Commission Hearing Room, 18-20 Trinity Street, 1st floor, Hartford, Connecticut, at **2:00 p.m. on Wednesday, January 22, 2014.**

Any brief, memorandum of law or request for additional time, as referenced in the November 18, 2013 Transmittal of Proposed Final Decision, must be received by the Commission on or before January 10, 2014.

By Order of the Freedom of
Information Commission

W. Paradis
Acting Clerk of the Commission

Notice to: Scott Jascha
John P. Fracassini, Esq.

12/3/13/FIC# 2013-218/ReschedTrans/wrbp/KKR/TAH

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Scott Jascha,
Complainant(s)
against

Notice of Meeting

Docket #FIC 2013-218

First Selectman, Town of Monroe; and
Town of Monroe,

November 18, 2013

Respondent(s)

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 **special 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, December 18, 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 November 29, 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, an **original and fourteen (14) copies** must be filed *on or before November 29, 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 November 29, 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: Scott Jascha
John P. Fracassini, Esq.

11/18/13/FIC# 2013-218/SpecialMtgTrans/wrbp/KKR/TAH

FREEDOM OF INFORMATION COMMISSION
OF THE STATE OF CONNECTICUT

In the Matter of a Complaint by

Report of Hearing Officer

Scott Jascha,

Complainant

against

Docket #FIC 2013-218

First Selectman, Town of Monroe; and
Town of Monroe,

Respondents

October 15, 2013

The above-captioned matter was heard as a contested case on August 26, 2013, 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), G.S.
2. It is found that, by letters to the respondents dated February 12, 2013, March 13, 2013 and March 15, 2013, the complainant requested a copy of, or an opportunity to inspect, certain records, including emails, correspondence and legal opinions, pertaining to property located at 15 Oak Ridge Road in Monroe, Connecticut.
3. It is found that, upon realizing the respondents had not received the February 12th letter of request, the complainant then emailed such request to the town zoning enforcement officer, who received it on March 12, 2013. It is further found that the requests, described in paragraph 2, above, were forwarded to the town attorney, who also was acting as the town's FOI officer, for review and response.
4. It is found that, by letter dated March 19, 2013, the town attorney acknowledged receipt of the March 13th and March 15th letters of request, and erroneously informed the complainant that, as of March 19, 2013, the town had not received the February 12th letter of request.
5. It is found that the town attorney further stated, in the March 19th letter, that certain records responsive to the March 13th and March 15th letters of request were covered by the attorney-client privilege and would not be provided, and that any responsive records not covered by the privilege would be provided "no later than two weeks from the date of this letter

or sooner.” The town attorney also informed the complainant that certain requested records did not exist.

6. By email dated and filed April 12, 2013, the complainant appealed to this Commission, alleging that the respondents violated the Freedom of Information (FOI) Act by failing to comply with the requests for records, described in paragraph 2, above.

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. 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 . . . (3) receive a copy of such records in accordance with section 1-212.

9. 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.”

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

11. It is found that, by letter dated May 9, 2013, the respondents provided the complainant with copies of all records responsive to the February 12th letter of request, described in paragraphs 2 and 3, above. It is found that such records consist of two (2) one-page letters and one email.

12. At the hearing in this matter, the complainant argued that the respondents failed to provide the records, described in paragraph 11, above, to him promptly, within the meaning of §§1-210(a) and 1-212(a), G.S.

13. The meaning of the word “promptly” is a particularly fact-based question that has been previously addressed by the FOI Commission. 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. The Commission also gave the following guidance:

The Commission believes that timely access to public records by persons seeking them is a fundamental right conferred by the Freedom of Information Act. Providing such access is therefore as much a part of their mission as their other major functions. Although each agency must determine its own set of priorities in dealing with its responsibilities within its limited resources, providing access to public records should be considered as one such priority. Thus, it should take precedence over routine work that has no immediate or pressing deadline.

14. 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.

15. It is found that, upon receipt of the requests, described in paragraphs 2 and 3, above, the town attorney asked the zoning enforcement officer and the first selectman, sometime around the end of March, 2013, to conduct a search of their emails and files for records responsive to such requests. It is found that the zoning enforcement officer, in turn, spoke with other town employees whom he believed might have responsive records, and asked them to search for such records.

16. It is found that the records responsive to the February 12th letter of request, described in paragraph 11, above, were located in the town attorney’s office, however. The town attorney testified that he did not provide copies of such records to the complainant prior to May 9, 2013, because he was familiar with the complainant as someone who had been involved in a property dispute with his (the complainant’s) neighbor, which dispute had included litigation, and he was fearful of potential litigation against the town by the complainant. According to the town attorney, he therefore delayed the release of the letters until he had gathered all responsive records so that his response would be “thorough and complete.”

17. Based upon the foregoing, it is found that the respondents failed to provide the records, described in paragraph 11, above, promptly.

18. Accordingly, it is concluded that the respondents violated the promptness provisions in §§1-210(a) and 1-212, G.S.

19. With regard to the March 13, 2013 request, it is found that the town attorney provided the complainant, by letter dated May 9, 2013, with all records the respondents maintain that are responsive to such request, except for certain emails claimed by the respondents to be attorney-client privileged. The hearing officer ordered the respondents to submit such records to the Commission for in camera inspection. It is found that such records consist of emails between the town attorney and the first selectman or the zoning enforcement officer.

20. With regard to the respondents' claim that the requested records, or portions thereof, are protected by the attorney-client privilege, the applicability of the exemption contained in §1-210(b)(10), G.S., is governed by established Connecticut law defining the privilege. That law is well set forth in Maxwell v. FOI Commission, 260 Conn. 143 (2002). In that case, the Supreme Court stated that §52-146r, G.S., which established a statutory privilege for communications between public agencies and their attorneys, merely codifies "the common-law attorney-client privilege as this court previously had defined it." Id. at 149.

21. Section 52-146r(2), G.S., defines "confidential communications" as:

All oral and written communications transmitted in confidence between a public official or employee of a public agency acting in the performance of his or her duties or within the scope of his or her employment and a government attorney relating to legal advice sought by the public agency or a public official or employee of such public agency from that attorney, and all records prepared by the government attorney in furtherance of the rendition of such legal advice...

22. As our Supreme Court has stated, a four part test must be applied to determine whether communications are privileged: "(1) the attorney must be acting in a professional capacity for the agency; (2) the communications must be made to the attorney by current employees or officials of the agency; (3) the communications must relate to the legal advice sought by the agency from the attorney, and (4) the communications must be made in confidence." Lash v. Freedom of Information Commission, 300 Conn. 511, 516 (2011), citing Shew v. Freedom of Information Commission, 245 Conn. 149, 159 (1998).

24. After careful inspection of the in camera records, it is found that Attorney John Fracassini was acting as legal counsel for the Town of Monroe; that the emails at issue were between Attorney Fracassini and current town officials; that the emails relate to legal advice sought by the town from Attorney Fracassini; and that the communications were made in confidence.

25. The complainant argued that, because the town attorney had discussed the town's position regarding the dispute, described in paragraph 16 above, with him and with counsel for the neighbor, the attorney-client privilege was waived.

26. It is found, however, that Attorney Fracassini did not discuss the legal advice contained in the emails submitted for in camera inspection in this matter with anyone other than his client and that the client in this matter did not waive the attorney-client privilege.

27. Accordingly, it is concluded that in camera records are protected by the attorney-client privilege and that the respondents did not violate the FOI Act by withholding the in camera records from the complainant.

28. With regard to the March 15th request, it is found that, by letter dated May 17, 2013, the respondents provided all records responsive to such request, with the exception of one email that was included in the in camera records, described in paragraph 19, above.

29. Although the complainant did not specifically argue at the hearing in this matter that the respondents failed to respond promptly to his March 13th and March 15th letters of request, it is found that the respondents did not offer any evidence regarding the approximately two month delay in providing the responsive records, or any evidence regarding the factors described in paragraph 14, above.

30. Accordingly, it is concluded that the respondents violated the promptness provisions in §§1-210(a) and 1-212, G.S.

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

1. Henceforth, the respondents shall strictly comply with the promptness provisions of §§1-210(a) and 1-212(a), G.S.



Kathleen K. Ross
as Hearing Officer