



FREEDOM OF INFORMATION



Connecticut Freedom of Information Commission • 18-20 Trinity Street, Suite 100 • Hartford, CT 06106
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David Collins and the New London Day,
Complainant(s)
against

Notice of Meeting

Docket #FIC 2014-163

Governor, State of Connecticut, Office of the Governor;
and State of Connecticut, Office of the Governor,
Respondent(s)

January 28, 2015

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, February 11, 2015**. 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 February 6, 2015**. 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 February 6, 2015**. 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 February 6, 2015**, 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: David Collins
Michael Skold, Esq.

2015-01-28/FIC# 2014-163/Trans/wrbp/VDH//KKR

FREEDOM OF INFORMATION COMMISSION
OF THE STATE OF CONNECTICUT

In the Matter of a Complaint by

Report of Hearing Officer

David Collins and the
New London Day,

Complainants

against

Docket #FIC 2014-163

Governor, State of Connecticut,
Office of the Governor; and
State of Connecticut, Office of
the Governor,

Respondents

January 21, 2015

The above-captioned matter was heard as a contested case on September 12, 2014, at which time the complainants 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 email dated February 19, 2014, the complainants requested copies of the following records:
 - a. any and all agreements between the state and the Mashantucket Pequot and Mohegan tribes in regards to the establishment of keno in the state;
 - b. any and all agreements between the state and the Mashantucket Pequot and Mohegan tribes in regards to police enforcement at the two casinos run by the tribes; and
 - c. all correspondence, including email, from the governor's office and staff, as well as any state employees involved in negotiating the agreements with the tribes, pertaining to the agreements and/or

negotiation of them.¹

3. With regard to the requested correspondence described in paragraph 2.c, above, it is further found that the complainants clarified that they were requesting correspondence relating to the agreements, whether the agreements were signed or not, for one year preceding the date of the instant FOI request. It is found that the respondents understood the scope and the nature of the request in this regard.

4. It is found that, by letter dated February 21, 2014, the respondents acknowledged the complainants' request, and stated that they were in the process of "collecting and reviewing what records within the Office of the Governor may be responsive to your request, and what exemptions to disclosure may be applicable." The respondents also stated that: "When this review is complete, we will provide the appropriate response."

5. By letter dated March 17, 2014 and filed March 19, 2014, the complainants appealed to this Commission, alleging that the respondents violated the Freedom of Information ("FOI") Act by failing to provide them with copies of any of the records described in paragraph 2, above.

6. 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.

7. 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

¹ The Commission notes that the request for correspondence referenced in paragraph 2.c, above, seeks both correspondence related to any agreement or negotiations between the state and either tribe with regard to the "establishment of keno," (see ¶2.a, above), as well as correspondence related to any agreement or negotiations between the state and either tribe with regard to police enforcement matters on tribal grounds, (see ¶2.b, above).

such records in accordance with section 1-212.

8. 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.”

9. 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.

10. At the start of the contested case hearing, the complainants clarified that, on August 25, 2014, the respondents had provided them with twenty-five pages of responsive records as well as with a CD containing email records. According to the complainants, both the hardcopy records and the records on the CD seemed to respond thoroughly to the request concerning the “tribal police enforcement” agreements, set forth in paragraph 2.b, above, as well as to the correspondence concerning “tribal police enforcement” matters set forth in 2.c, above. However, the complainants contended that the records were not responsive to the keno aspect of the request set forth paragraph 2.a or to correspondence regarding keno set forth in paragraph 2.c, above.

11. The complainants further contended that they believed the respondents’ disclosure of records and overall handling of this request violated the promptness requirements of the FOI Act.

12. With regard to the promptness issue, the respondents’ main contention was that they believed the complainants had agreed and were willing to wait for copies of records until the state and the tribes had finalized certain negotiations. The respondents’ also contended that the responsive records in their possession were exempt from disclosure pursuant to §1-210(b)(1), G.S., until certain negotiations were completed.

13. Section 1-210(b)(1), G.S., provides, in relevant part, that the FOI Act shall not require mandatory disclosure of:

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....

14. It is found that, in 2013, the legislature passed a public act authorizing the Commissioner of the Department Emergency Services and Public Protection (“DESPP”) and the Chief State’s Attorney to execute separate Memoranda of Agreements (“MOAs”) with both the Mohegan Tribe and Mashantucket Pequot Tribe to allow the tribal police of the two tribes to have peace officer status. It is further found that, by allowing the tribal police to have peace officer status, the tribal police would be transformed into something akin to a municipal police department, in that the tribal police would have arrest powers under Connecticut state law with regard to individuals at the casinos on tribal grounds.

15. It is also found that, in 2013, the legislature passed a separate public act permitting the Connecticut State Lottery Commission to create a keno game. It is further found that this public act included a component which permitted the state to engage in negotiations with the Mashantucket Pequot Tribe and the Mohegan Tribe with regard to revenue sharing. It is found that the rationale behind the revenue sharing negotiations centered on the tribes' position that, pursuant to tribal compacts, they had a legal monopoly over keno. Accordingly, it is found that, in order for the state to run a keno game, it had to come to an agreement with the two tribes to waive certain rights that they had (or thought they had) pursuant to the tribal compacts. Finally it is found that, subsequently, in 2013, the public act that had authorized the establishment of a keno game was rescinded, thereby mooting the need for the state to engage in revenue sharing negotiations with the tribes.

16. With respect to the part of the request seeking the agreements and correspondence concerning "keno," the respondents contended that they had located only three emails in their possession which were responsive to the request, but that all three emails were exempt from disclosure. The respondents contended that they had no "draft" or "preliminary" contracts or agreements between the state and either of the tribes with regard to keno in their possession. With regard to the part of the request seeking records relative to the "tribal police enforcement" issue, the respondents contended that they had provided the complainants with all responsive records on August 25, 2014.

17. It is found that the complainants directed their request for records to the Governor's Director of Communications. It is found that the request was subsequently assigned to a Deputy General Counsel within the Office of the Governor (the "assigned counsel"). It is found that the assigned counsel, on behalf of the respondents, acknowledged the request two days after it had been received by the Director of Communications.

18. It is further found that the complainants filed their complaint with this Commission on March 17, 2014, twenty-four days after the respondents had acknowledged the request.

19. It is found, however, that, very shortly after the respondents acknowledged receipt of the request, constructive communication between the parties broke down.

20. With regard to the tribal police enforcement aspect of the request, it is found that sometime after issuing the acknowledgement letter, the assigned counsel contacted the Under Secretary for the Office of Policy and Management ("OPM") for Criminal Justice Affairs (the "Under Secretary"). It is found that the Under Secretary was of the opinion that, because the state and the two tribes had just begun negotiations, all of the responsive records were preliminary drafts, not subject to disclosure under the FOI Act. Thereafter, the assigned counsel further consulted with the Director of Communications and the Governor's General Counsel. It is found that all three concurred with the Under Secretary's assessment that the responsive tribal police enforcement records were preliminary drafts, not subject to disclosure under the FOI Act. It is found, however, that,

while the respondents came to this determination, they never shared this determination with the complainants.

21. On or about March 17, 2014, the complainants advised the Director of Communications that they were going to write a story about the Malloy administration's lack of responsiveness to FOI requests.

22. Thereafter, it is found that the assigned counsel was under the impression that the Director of Communications had engaged in a conversation with the complainants, informing them that he would check into the status of the request. It is further found that the assigned counsel also was under the impression that the Under Secretary had spoken to the complainants on behalf of the administration regarding this request. It is further found that the respondents were also under the impression that the complainants mistakenly believed that the tribal police enforcement MOAs had already been executed.

23. In addition, it is found that the assigned counsel further believed that the Under Secretary had again spoken to the complainants, informing them that the tribal police enforcement issue was still being negotiated. It is found that the assigned counsel was under the additional impression that, as a result of this conversation, the complainants had agreed to wait for the records responsive to the tribal police enforcement issue until the negotiations were completed and the MOAs were executed.

24. It is found that the complainants never withdrew any aspect of their complaint in this case.

25. It is found that MOA between the state and the Mohegan Tribe was executed on May 27, 2014. It is found that the MOA between the state and the Mashantucket Pequot Tribe was executed on August 1, 2014.

26. It is found that, on or around, August 7, 2014, the assigned counsel began to organize the responsive tribal police enforcement records for disclosure to the complainants. It is further found that, at this time, the assigned counsel separated the records into the following three categories: First, records that were clearly relevant to the request and had to be disclosed to the complainants; second, internal agency communications; and third, records reflecting legal advice.

27. It is found that the respondents sent the tribal police enforcement records to the complainants under cover of letter dated August 25, 2014. It is found that the respondents sent the complainants all of the records in their possession, except for the records that were protected by the attorney-client privilege because they contained legal advice from the Office of the Attorney General to the Office of the Governor. The complainants are not challenging the respondents' position that such records are exempt from disclosure pursuant to the attorney-client privilege.

28. With regard to the keno aspect of the request, it is found that OPM was in charge of drafting and negotiating the keno agreement. It is found that the assigned

counsel contacted the person at OPM who was in charge of the keno negotiations to verify whether OPM had ever provided the respondents' office with any of the keno agreements, or had communicated with the respondents regarding such agreements or their negotiation. It is found that the assigned counsel determined that only one communication existed (an email, a response, and a reply to the initial email), and the respondents were never in possession of any of the responsive records.

29. It is found, however, that the assigned counsel ran a search for responsive emails in the respondents' office, and that such search yielded only the three emails referenced in paragraph 28, above. The respondents contend that these emails are privileged attorney-client communications. The complainants are not challenging the respondents' claim that the three emails are exempt from disclosure pursuant to the attorney-client privilege.

30. The complainants maintain that the respondents should have forwarded the keno request to the appropriate person at OPM because this is a practice that the Director of Communications has implemented in the past. While the Commission understands the complainants' position, it is concluded that the respondents have no affirmative obligation to forward a request onto another public agency. See Lash, et al. v. FOIC, et al., 300 Conn. 511, 521-522 (2001) (affirming appellate court's determination that one public agency has no duty to make available the records of another public agency).

31. With regard to promptness, the Commission has previously opined that the word "promptly" in §1-210, G.S., means "quickly and without undue delay, taking into account all of the factors presented by a particular request . . . [including] the volume of statements requested; the amount of personnel time necessary to comply with the request; the time by which the requester needs the information contained in the statements; 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 loss of the personnel time involved in complying with the request." See FOI Commission Advisory Opinion #51 (Jan. 11, 1982). The Commission also recommended in Advisory Opinion #51 that, if immediate compliance is not possible, the agency should explain the circumstances to the requester.

32. At the time the respondents received this request, it is found that they were involved in a short legislative session. It is further found that the respondents had just submitted to the legislature the Governor's complete legislative package. It is found that, subsequent to this submission, the attorneys in the Office of the Governor, including the assigned counsel, were busy preparing for the various legislative hearings. It is further found that there are four attorneys in the Office of the Governor, and that their duties include drafting and negotiating bills, opining on ethical matters, and working with multiple public agencies. It is further found that, of the four attorney in the respondents' office, two of the attorneys were relatively new to the office.

33. Nonetheless, in this case, it is found that six months and five days elapsed between the date that the respondents acknowledged the request and the date that the

respondents forwarded the requested records to the complainants. It is found that, for much of this time, the complainants were simply waiting to receive a response from the respondents pursuant to the terms specifically set forth in the respondents' acknowledgment. See ¶ 4, above. Moreover, while the respondents contend that the records which were ultimately provided to the complainants were exempt pursuant to §1-210(b)(1), G.S., as preliminary drafts until the tribal police enforcement MOAs were executed, it is found that there is insufficient evidence in the record from which this Commission can reasonably find that all of the records described in paragraph 26, above, were exempt until the MOAs were executed.

34. It is concluded therefore that, based on the totality of the findings above, the respondents violated §§1-210(a) and 1-212(a), G.S., by failing to provide the complainants promptly with copies of the requested records.

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 requirements of §§1-210(a) and 1-212(a), G.S.



Valicia Dee Harmon
Valicia Dee Harmon
as Hearing Officer