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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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Donna Best,
Complainant(s)
against

Notice of Meeting
Docket #FIC 2011-691

Mayor, Town of Stratford; Director, Human Resources, Town of Stratford; and Town of Stratford,

Respondent(s) August 2, 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: Leon M. Rosenblatt, Esq.
Michael Casey, Esq.

8/2/12/FIC# 2011-691/Trans/wrbp/VDH/TAH

FREEDOM OF INFORMATION COMMISSION
OF THE STATE OF CONNECTICUT

In The Matter of a Complaint by

Report of Hearing Officer

Donna Best,

Complainant

against

Docket #FIC 2011-691

Mayor, Town of Stratford;
Director, Human Resources,
Town of Stratford; and Town
of Stratford,

Respondents

August 2, 2012

The above-captioned matter was heard as a contested case on April 19, 2012, at which time 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 December 20, 2011 and filed December 21, 2011, the complainant appealed to the Commission, alleging that the respondents violated the Freedom of Information ("FOI") Act by entering into a contract with an outside vendor that provides for the destruction or erasure of the respondents' emails after ninety days.
3. The Commission takes administrative notice of the final decision in Docket #FIC 2011-276; Donna Best v. Mayor, Town of Stratford; and Town of Stratford (April 11, 2012) ("Best I"). The Commission dismissed the complaint in Best I, concluding that the respondents had not violated the FOI Act. In that case, the complainant had requested "all documents created between December 1, 2009 and the present that concern or led up to the August 23, 2010 Summary Assessment of the Stratford Emergency Medical Services Final Report." The Commission found that, while the complainant testified that she had seen, sent and received emails while she was employed with the respondents that would be responsive to her request, the respondents were unable to provide such records to the complainant because "the computer server presently used by the respondent Town of Stratford stores emails for only 90 days, after which time they are automatically deleted."

See Best 1, ¶¶ 9-10.

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 1-211(b), G.S., provides:

Except as otherwise provided by state statute, no public agency shall enter into a contract with, or otherwise obligate itself to, any person if such contract or obligation impairs the right of the public under the [FOI] Act to inspect or copy that agency's nonexempt public records existing on-line in, or stored on a device or medium used in connection with, a computer system owned, leased or otherwise used by the agency in the course of its governmental functions.

6. At the hearing in the instant case, the complainant moved to have the exhibits and testimony submitted during the course of the three contested case hearings that occurred in Best I incorporated into the instant case. The respondents joined in the motion, and the motion was granted.

7. It is found that the Town of Stratford contracted with Q-Scend Technologies, Inc. (“Q-Scend”), an outside vendor, to store the town's electronic records. It is further found that the contract between the town and Q-Scend was entered into by the town's previous administration; however, Q-Scend continues to be the town's sole outside repository for electronic records.

8. On June 21, 2012, the hearing officer issued an order directing the respondents to submit into evidence a copy of the contract that currently governs the relationship between the town and Q-Scend. On July 13, 2012, the respondents submitted a copy of the contract. This document has been marked as respondents' post-hearing exhibit 1.

9. It is found that the contract sets forth the terms of a licensing agreement between Q-Scend and the Town of Stratford, whereby Q-Scend provides the town with an email “hosting” service for 500 email boxes, including, inter alia, 1 GB of storage per email box, as well as daily email backups. It is found that the contract submitted to the Commission is silent with regard to how long emails are to be retained by Q-Scend once they are received, or what event triggers the movement of an email from the town's email

system to Q-Scend's storage system.

10. However, based on the testimony at the hearings, it is found that once an employee whose email box is serviced by Q-Scend deletes an email, the email is sent to Q-Scend for storage. It is further found that Q-Scend's storage system is programmed to purge and destroy email on a ninety-day cycle, regardless of the content of the email.

11. The complainant contends that it is the respondents' failure to provide their employees whose email boxes are hosted by Q-Scend with the training they need to evaluate effectively their emails for retention purposes which violates the Public Records Retention Law. The complainant further contends that, given the fact that the respondents have notice that their employees lack this training, combined with the fact that they have acquiesced to the ninety-day storage arrangement, by allowing their employees to continue to delete email without regard to content, the respondents are also violating the FOI Act.

12. The Commission takes administrative notice of the Public Records Administrator's retention schedules pertaining to a municipality's electronic mail. The Commission notes that electronic messages do not comprise a unique records series and that the retention for such records is based on the content of the message. See generally Municipal Records Retention Schedule M1; see also Retention Schedule M1-080 and M1-085, providing respectively that the retention schedule for electronic or paper correspondence is two years for correspondence pertaining to routine agency business, and permanent for correspondence containing agency policy; but see Retention Schedule M1-125, defining transitory electronic mail messages, and providing that such correspondence may be deleted at will.

13. The Commission also takes administrative notice of the Public Records Administrator's General Letter 2009-2, which concerns the management and retention of email and other electronic messages, and which states that "[s]tate and local government officials/supervisors and Records Management Liaison Officers (RMLOs) are responsible for instructing their employees in using the retention schedules and in securing approval for final disposition [of public records]."

14. Based on the evidence produced in Best I, it is found that emails which were responsive to the complainant's request in that case could not be provided to her because, at the time of the request, the records had been forwarded to Q-Scend and more than ninety days had elapsed. Accordingly, the records had been destroyed and were no longer available for the complainant's review or copying. See Best 1, ¶¶ 10-11.

15. It is further found that the time of the contested case hearings in Best I-- that is, on or around November 28, 2011, February 7, 2012 and March 9, 2012, the respondents were not providing their employees whose email boxes were serviced by Q-Scend with training on to how to discern which emails were transitory and could be deleted, from which were not.

16. It is found at the time of the contested case hearing in the instant case, the respondents had still not implemented any training for employees whose emails boxes continue to be serviced by Q-Scend. Rather, it is found that it continued to be the respondents' practice to permit each employee to decide which emails to delete and which to retain without instruction founded on the retention schedules for electronic records. Based on this Commission's decision in Best I, it is found that such practice has resulted in the destruction of records that should have been available to the public.

17. It is further found that, by failing to provide their employees with the appropriate training necessary to understand and comply with the retention schedules, implementation of the respondents' agreement with Q-Scend "impairs the right of the public to inspect or copy [an] agency's nonexempt public records existing on-line in, or stored on a device or medium used in connection with, a computer system owned, leased or otherwise used by the agency in the course of its governmental functions," within meaning of §1-211(b).

18. It is therefore concluded under the facts and circumstances of this case that the respondents are in violation of §1-211(b), G.S.

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

1. The respondents shall forthwith familiarize themselves with this State's Municipal Records Retention Schedule MI.
2. The respondents shall forthwith provide all of their employees whose email boxes are hosted by Q-Scend with instruction in using the retention schedules for electronic mail.
3. Henceforth, the respondents shall strictly comply with the provisions of §1-211(b), G.S.


Valicia Dee Harmon
as Hearing Officer