

Respondents Post Hearing Brief in Opposition to Complaint
FIC Docket No. 2016-00836

I. Background and Facts

The respondents, Town of Haddam (“Haddam”) and Lizz Milardo, Haddam First Selectman (“First Selectman”) (collectively, “Respondents”), oppose the November 30, 2016 Freedom of Information Act (“FOIA”) complaint (“Complaint”) of Mr. Ed Schwing (“Complainant”). The Hearing Officer, Principal Attorney Tracie C. Brown (“Hearing Officer”), conducted a thorough review of this matter on February 17, 2017 (“Hearing”). Optional post-hearing briefs were invited for submission on March 3, 2017. The Respondents sought and were granted with the consent of the Complainant a one week extension of time, on February 28, 2017, to March 6, 2017 for both parties. The Respondents submitted that the Complaint is without merit and should be dismissed.

Haddam is governed by a Town Charter (“Charter”) and the Code of the Town of Haddam (“Code”). Pursuant to the Charter and the Code, Haddam follows a Town Meeting form of government directed by a Board of Selectmen (“BOS”). The BOS is composed of a first selectman and two selectmen who are elected and take office every two years, in November.¹

The First Selectman was elected in the November 2015. Among other campaign issues, improving poor cellular telephone service in Haddam was and remains one of her priorities. Starting pretty much from scratch, the First Selectman investigated options and opportunities for improvement.

On May 5, 2016, the First Selectman engaged the services of Energy Site Solutions, LLC (“ESS”), to expand cell tower service. With ESS, the First Selectman explored a potential agreement with Homeland Towers, LLC (“Homeland”). Homeland is in the business of leasing

¹ See, Charter, Article VI: Board of Selectmen; <http://ecode360.com/12123654>

ground space for tower construction. Homeland is not a cell phone service provider. Following investigation and negotiation, and after a review by Haddam Planning and Zoning, the BOS presented the idea of leasing town property for two cell phone towers at a Town Meeting. On November 17, 2016, Haddam held a Town Meeting where residents resolved to lease two small sections of town land to Homeland for cell phone tower use. On November 21, 2016, the First Selectman executed a lease with Homeland consistent with those resolutions.

Complainant asserts that Respondents failed to provide timely access to public records pursuant to FOIA, Section 1-210. The Complainant further contends that the BOS improperly added to the agenda of a November 2, 2016 BOS meeting an update on the initiative to improve cellular service and a request for the Town Meeting authorizing the resolutions to lease the proposed portions of Haddam owned land for cell phone tower use.

At the Hearing, Complainant relied upon the facts alleged in his November 30, 2016 complaint along with the seven attachments presented as Hearing Exhibits.² His arguments are not reiterated here but are discussed as appropriate in the sections below.

² The Addendum contains the exhibits of both parties and all pages are number A1 – A212:
Complainant Exhibit A - October 26, 2016 emails, Schwing to Milardo and Milardo to Schwing
Complainant Exhibit B – November 2, 2015 Haddam BOS’s Meeting Agenda
Complainant Exhibit C – November 2, 2016 Haddam BOS’s Meeting Minutes (Unapproved)
Complainant Exhibit D – November 9, 2016 Notice of November 17, 2016 Haddam Town Meeting
Complainant Exhibit E – April 28, 2016 emails, Aronow, Milardo and Milardo to Aronow
Complainant Exhibit F – January 19, 2017 Letter from Ricciardelli to Schwing
Complainant Exhibit G – January 25 and 30, 2017 emails, between Milardo and Schwing
Respondents’ Exhibit 1 – June 22- 28, 2016 emails between Schwing, Milardo and Ricciardelli
Respondents’ Exhibit 2 – June 28 – July 15, 2016 emails between Ricciardelli, Schwing and Milardo
Respondents’ Exhibit 3 – May 5, 2016 Agreement, Haddam and ESS
Respondents’ Exhibit 4 – November 2, 2016 email, Vergati to Milardo, Carella, and unsigned agreements
Respondents’ Exhibit 5 – November 30, 2016 Agreement CT402, Haddam and Homeland
Respondents’ Exhibit 6 – November 30, 2016 Agreement CT400B, Haddam and Homeland
Respondents’ Exhibit 7 – Documents produced to Schwing by Respondents

The Respondents offered two witnesses at the Hearing and seven exhibits. Attorney Rich Carella provided a brief overview of the statutory and Charter required process followed by Haddam to lease town property to Homeland. The First Selectman testified regarding her personal knowledge of Respondents' efforts to improve cell phone service in Haddam.

On October 26, 2016 the Complainant requested documents from the Respondents. *10/26/16 Email, Schwing to Milardo, A1*. This was not his first document request regarding the cell phone service initiative. A prior request for documents by the Complainant in June, 2016, is relevant to this request because it demonstrates both the prior course of dealing between the parties and that a central document regarding ESS was already provided. Respondents' Hearing testimony and Exhibits demonstrate that, on June 22, 2016, at 5:55 p.m., Complainant requested "a contract with a cell phone company." *Respondents' Exhibit 1, p 4; A18*. The First Selectman responded 25 minutes later that evening and clearly informed the Complainant that there was no such cell phone company contract. *Id., A16*. The Complainant clarified his request, at 8:05 p.m. *Id., A16*. On Tuesday, June 28, 2016, the Respondent acknowledged the Complainant's clarified request. *A15*. On July 7, 2016, Respondent provided a copy of the Haddam - ESS agreement. *See, Exhibits 2 and 3, A19, 20, 22-30*. These events in June and July are relevant to the current FOIA appeal because when Respondents provided the May 5, 2016 Haddam – ESS agreement to the Complainant he was given the primary document provided what the respondents maintain and reasonably believed to be the central document in its possession regarding the Complainant's second of four October 26, 2016 requests. *See Complainant's Exhibit A; A1*.

Subsequently, on July 13, 2016 the Complainant requested "a list of the properties [the First Selectman] has made available." *Respondents' Exhibit 2; A19*. He was apparently seeking to

know the locations under consideration for cell phone tower use. The Respondent informed the Complainant that he was not going to receive such a list because one didn't exist -- he was told that he had "all of the information we have on the above referenced matter." *Id.* In fact, at the Hearing the First Selectman testified that she had no such list in July; the only cell phone tower related agreement document regarding ESS was provided; there was no agreement with Homeland; and the Respondent had no other ESS documents in July. She was, in fact, still developing the relationship with Homeland throughout the summer and the ESS agreement was disclosed. As further demonstrated by the Respondents at the Hearing, the terms of the proposed agreement with Homeland would remain the subject of negotiation between the Respondents and Homeland until November 2, 2016. *See, email from Vergati to Milardo dated November 2, 2016, Exhibit 4; A31.*

After receiving Complainant's October 26, 2016 request, the First Selectman replied almost immediately. *See Emails between Schwing and Milardo; A1.* The First Selectman clearly informed the Complainant that no agreement had been reached with Homeland. Again, at the Hearing, the First Selectman testified that the only agreement regarding cell phone service improvement as of October 26, 2016, was the ESS Agreement previously provided, on July 7, 2016 **A19**. The Complainant acknowledged receipt of this agreement in his Hearing testimony and that between July 13, 2016 (the date of his email regarding the ESS agreement) and October 26, 2016, he had made no other requests for documents. In addition, after October 26, 2016 he made no further request for documents.

On November 2, 2016, the BOS held its regularly scheduled monthly meeting. *See Complainant's Exhibit B; A2.* The agenda contained, in relevant part, an entry for "9. New

Business.” There was no explicit agenda item for the developing relationship with Homeland or a status update on cell phone service improvement. The First Selectman testified that she did not add the cell phone tower item to the agenda because, as of the 24 hour deadline prior to the start of the meeting to publish the agenda, she did not yet have a finalized proposed agreement from Homeland. She did not want to present a proposed agreement to the BOS, or the public, while the terms of the agreement were still being negotiated.

On the morning of the November 2, 2016 BOS Meeting, the lease terms were completed on the proposed agreement with Homeland. Homeland emailed the Lease to Respondents at 11:12 a.m. See *Respondents’ Exhibit 4*; **A31, A32-116**. At the November 2, 2016 BOS Meeting, the First Selectman gave an overview of the status of the cell phone service improvement initiative. She gave her update under the New Business agenda item. *Claimant’s Exhibit C*; **A4, at A6-7**. Indeed, she relayed that there was a very significant concern in Haddam that cell phone service needed improvement: “[T]here is no cell phone connectio[n] on the 154 corridor and it’s a big concern for safety.” *Id.*; **A6**. She then continued to update the public regarding the status of her efforts to work with collaborating private companies, ESS and Homeland, to potentially develop a combination of publically owned and privately held property for the prospective construction of cell phone towers. It was in Haddam’s interest to negotiate the placement of towers on public land to enhance revenue to the Town and for safety reasons. One other benefit of utilizing the Haddam fire station location was the use of one of the towers by first responders in order to improve emergency communication. The First Selectman marshalled public comment and input from the two other members of the BOS. Subject to a Town Meeting as required by Haddam Charter, the First Selectman called for resolution approval by Haddam residents on two

proposed cell phone tower leases. The other members of the BOS supported the call for a Special Town Meeting. The minutes reflect recognition by the BOS that notice of the Town Meeting would be required per the Charter. *Id.*; **A 6-7**. On November 9, 2016, the BOS issued Legal Notice of the Town Meeting. See, Claimant's Exhibit D. **A11**

On November 17, 2016, Haddam convened the Town Meeting pursuant to the foregoing notice and voted nearly unanimously to authorize lease of the two locations set forth therein. The First Selectmen testified at the Hearing that the Town Meeting was exceedingly well attended and that only one attendee voted against the resolutions. The Complainant abstained from the vote. On November 21, 2016, the First Selectman executed the lease agreements. See *Respondents' Exhibits 5 and 6*; **A117-203, at A127, A172**. These agreements were subsequently executed by Homeland Towers' President, Mr. Manny Vicente, on November 30, 2016, and then returned to the First Selectman. *Id.*; **A128, A172**. Unbeknownst to the Respondents, Complainant filed his FOIA complaint the same day.

The First Selectman was surprised to receive the Complaint. At the Hearing she testified that she believed the Complainant had received all of the information he had requested, that the Respondents had to provide. The ESS agreement was provided in July, 2016, and the Leases in connection with the November 17, 2016 Town Meeting did not exist until after the October 26, 2016 request. Subsequent to receiving the Complaint and learning that the Complainant was not satisfied with the documents that had been provided, the First Selectman conducted a further search for documents and the Complaint was provided in January, 2017, eight pages of emails and the First Selectman's personal notes. See *Complainant's Exhibit F and G*; **A 13-14**; *Respondent's Exhibit 7, A 204-210*.

II. Law and Argument

Respondent complied with the Freedom of Information Act with respect to Complainant's document request of October 26, 2016 ("Request"), the November 2 BOS Meeting, and the November 17, 2016 Town Meeting.

A. Homeland Document Requests

Items 1, 3, and 4 of the Complainant's Request concern Homeland Documents. Respondents' compliance with the request regarding the Homeland documents was reasonable and timely in light of the totality of factors regarding the development of the Haddam – Homeland agreement. As can be seen from the email provided to the Complainant, on October 26, 2016, from the First Selectman, his Request was immediately acknowledged within hours of his request. **A1** Complainant was subsequently provided copies of the Homeland – Haddam proposed lease in connection with the properly noticed and convened November 17, 2016 Town Meeting, along with any other interested participant in the Town Meeting. Noteworthy, the record clearly reflects that the lease documents did not yet exist at the time Complainant submitted his October 26, 2016 request. The Homeland lease was emailed to the First Selectman on November 2, 2016. The Complainant has offered no evidence that after receiving the Respondents' October 26, 2016 acknowledgment of his Request, the Complainant ever indicated to the Respondents that he was dissatisfied with the Respondents' reply or proposed path toward compliance. On October 26, 2016, at 1:02 PM the First Selectman wrote to the Complainant:

Ed,
I am [in] receipt of your request. I will work on compiling 1, 2 and 4.
I do not have a final draft of 3.

A1.

Nowhere in the record concerning the timeframe between October 26, 2016 (receipt of this email from the First Selectman) and the filing of his FOIA Complaint (November 30, 2016) has the Complainant indicated that he expressed any concern over the First Selectman's same day response to his Request. Indeed, with respect to the Complainant's prior requests for documents, in June and July, 2016, for example, the Complainant expressed an urgency related to his documents request and he followed up when he was dissatisfied with Respondents' compliance. *See, e.g. June 28 and July 13, 2016 emails between Schwing and Ricciardelli (CC: Hennick, Thomas); A 19- 20.* For example, on June 22, 2016, the Complainant submitted a written request for the cell phone service improvement project documents. The First Selectman immediately responded and after attempts were made to clarify Complainant's request, the Respondent indicated that a copy of the ESS agreement would be provided. The Complainant made clear at that time his opinion that:

However, four working days have gone by and now I am just receiving an acknowledgement that my request was received

Schwing email to Ricciardelli; A 20- 21. It is should be noted that the Complainant's foregoing email was factually inaccurate. Contrary to his statement, in fact, his request was acknowledged well within four working days after it was received. The First Selectman had responded to his initial request approximately 26 minutes after receiving it, on the same day of his request, on June 22, 2016, at 6:21 p.m. *See Respondents' Exhibit 1, June 22, 2016 email Milardo to Schwing, A16.* Following clarification of his request, after 8:00 p.m. that same day, the Respondent informed the Complainant well within four working days at 8:59, a.m., on June 28, 2016, that a copy of the Haddam - ESS agreement would be provided. **A15** Then, less than five working days later a copy

of the ESS agreement was provided to the Complainant at 3:39 pm, on July 7, 2016. **A 19 – 20.** On July 13, 2016, the Complainant sought clarification regarding other documents from ESS and he was clearly told that he had all the information in Respondent's possession on the matter. **A19.** Thus, the record indicates no further substantive communication with the Complainant regarding the ESS matter and the Respondents properly assumed the Complainant was satisfied with Respondents' compliance concerning ESS. Still, despite the Complainant's factual inaccuracies regarding the promptness of the Respondents' compliance with his June request, the point remains that the Complaint had demonstrated a prior history of expressing when his requests for documents were either time-sensitive or inadequately addressed and the Respondents have reasonably relied upon Complainant's history in that regard. It was reasonable for the Respondents to assume that its email to the Complainant on October 26, 2016 was received in the spirit in which it was sent—the Respondents were trying to comply with the Complainant's request. The Respondents clearly told the Complainant that there was no agreement with Homeland. He seemed to accept this response as satisfactory and has not submitted any evidence that he communicated he was unaccepting of the Respondents' email. The fact that there was no agreement between Haddam and Homeland as of the date of the October 26, 2016 Request by the Complainant has been unmistakably established as irrefutable through both the Respondent's Hearing testimony and unopposed Exhibits. Moreover, the Respondents also provided testimony through the First Selectman that as of October 26, 2016, there very few, if any, other documents related to Haddam and Homeland. The agreement with ESS had already been provided, months prior. In January, 2017, after receiving the FOIA Complaint, the Respondent did provide a very few further documents, *totaling only 8 pages.* **A13,**

A14, A 204 – 210 These additional emails included no material documents, and the Complainant has demonstrated no prejudice or harm from receiving them in January, 2017. Rather they included only emails demonstrating why there were so few other documents. The January, 2017 provided documents included:

- 1) May 2016 emails between ESS and the First Selectman directing that following the May 5, 2016 agreement with ESS, potential cell phone tower providers would be in direct contact with ESS. **A 204 – 205**
- 2) October 25, 2016 emails between Haddam Corporation Counsel, Attorney Rich Carella, and Homeland confirming that the Homeland – Haddam lease terms were still unfinished and being negotiated as of the date of the Complainants Request **A 206 - 208**; and,
- 3) The First Selectman’s handwritten notes concerning her research to advance improved cell phone service following conversations with ESS and Homeland. **A 209 – 210**

B. ESS Document Requests

Complainant’s reference to item number 2 of his October 26, 2016 Request as a basis for an alleged violation of FIOA is especially disconcerting given the fact that the Haddam - ESS agreement was requested and provided to him in July, 2016. In addition, he inquired after receiving a copy of that agreement regarding whether there was any list of properties under consideration by ESS and Haddam for cell phone tower development and he was clearly told that he was in possession of all the information Haddam had on the matter. **A19** In January, 2017, the only additional documents provided regarding ESS simply establish why there were no other documents exchanged: ESS’s director of operations, Mr. Regulbuto indicated that the First Selectman “should direct all inquiries to [him].” See *May 16, 2016 email of Regulbuto to Milardo*, **A204** Thus, there was no expectation on the part of the Respondents that the Complainant was

seeking the ESS document again, on October 26, 2016, and the record now reflects Regulbuto directed the First Selectman to refer inquiries from private cell phone tower companies to him. *Id.* In any event, the First Selectmen testified that all requested documents were provided and Complainant has failed to demonstrate any unreasonable delay or that he was deprived of receipt of any substantive ESS Documents. He has also failed to articulate what “harm” was caused and would have been prevented had the 8 pages of documents provided by the Respondents in January, 2017, been provided earlier.

C. Notice of the November 2, 2016 BOS Meeting

Complainant’s final criticism of the Respondents is that it was improper for the BOS to include an update regarding the cell phone service improvement project in the new business section of the agenda of the November 2, 2016 BOS meeting and to call a Special Town Meeting for the purpose of authorizing the First Selectman to enter into a lease agreement with Homeland for the two cell phone tower sites. At the November 2, 2016 BOS meeting, the First Selectman updated the Board regarding a proposed lease agreement that she had received earlier that same day. *See Minutes, A6.* In fact, the resolution that was considered and passed with respect to the Lease was entirely dependent and subject to the Town Meeting. **A 211, ¶”1”**. As such, Complainant’s complaint in this regard reflects a fundamental misunderstanding of the purpose of the First Selectman’s November 2 BOS update on the project and the requirements under a Town Meeting form of local government for leasing town property. The Complainant’s objection to the inclusion of First Selectman’s update regarding the cell phone service subject to the Town Meeting also elevates form over substance. Considered to its logical end, Complaint’s argument

regarding the BOS scheduling a Special Town Meeting at a regularly scheduled BOS monthly meeting boarders on the absurd.

The duties and responsibilities of the First Selectman and the Board of Selectman are set forth in the Town Charter, as follows. Charter Section 7-1 Chief Executive an Administrative Officer, provides, in relevant part, that:

The First Selectman shall be the chief executive and administrative officer of the Town, and shall spend sufficient time required to carry out his duties as charged by the General Statutes and specifically described in Section 7-2 and 7-3 of this Charter.

The First Selectman shall have all the powers, duties and responsibilities conferred upon that office by law and which are not inconsistent with this Charter; and in addition, [s]he shall have such powers as are necessary or incidental to the discharge of these duties and responsibilities as set forth in this Charter.

The First Selectman shall be a full voting and participating member of the Board of Selectmen and he shall preside at meetings of the Board when present.

Emphasis Added. The First Selectman's duties are set forth in Section 7-2:

Under the general policy direction of the Board of Selectmen, the First Selectman shall:

(c) Be responsible for **making a continuous review of the current and future needs of the Town** [S]he shall keep the Board of Selectmen fully informed as to the financial condition of the Town;

[(f)] Be responsible for the **coordination and guidance of the Board of Selectmen** in the discharge of all the Board's duties and responsibilities.

(g) Be responsible for the **development of a set of priorities which shall provide a guide for those things the Town shall attempt to accomplish** during the coming year, and which shall serve as a policy guide in the development of the Annual Town Budget.

Emphasis Added. Section 3-4(b) provides:

Special Town Meetings may be called from time to time by the Board of Selectmen and as required by Sections 3-7(e) and 3-8(b) of this Charter.”

Section 3-8(a) provides:

The Board of Selectmen may call a Special Town Meeting to enact resolutions at any time in the discharge of their duties.”

Finally, Section 3-9 requires that:

The acceptance and abandonment of roads by the Town, **the sale or other disposition of real estate of the Town used or reserved for Town purposes** and the purchase or other acquisition of real estate for such purpose **shall require approval of Town Meeting**. . . .

Emphasis added.

Consistent with the foregoing provision of the Charter, the First Selectman, having received a final proposed lease from Homeland on the morning of the regularly scheduled November 2, 2016 BOS monthly meeting, provided a timely update to the Two Selectmen regarding the latest development in Haddam’s efforts to improve cell phone service along Route 154. She informed them that proposed lease terms had just recently been finalized but before they could move forward with execution of the lease, Section 3-9 of the Charter (above) properly required approval of a resolution at a Town Meeting regarding the “other disposition of real estate of the Town or reserved for Town purposes” *Id.* Rather than wait until after the Town Meeting to express the BOS’ support for the initiative, the BOS indicated its support by adopting a formal resolution to call for the Town Meeting, and authorizing the First Selectman to execute the lease, “*Subject to the approval of Town Meeting.*” **A211.**

Pursuant to Section 3-4(b) the BOS is absolutely and appropriately the duly authorized entity to call for the meeting. The BOS appropriately noticed the Town Meeting as requested by the First Selectman and the resolution to authorize the leases with Homeland were almost

unanimously ratified. See also, General Statutes Section 7-1, (“[S]pecial town meetings may be convened when the selectmen deem it necessary. . . .”).

Thus, Complainant’s view that the BOS’ consideration of the new developments in the cell phone service improvement project at the November 2, 2016 BOS Meeting under “New Business” was improper is completely at odds with the Charter’s requirement that the First Selectmen: set town improvement priorities for Haddam; keep the BOS apprised of any material developments regarding those priorities; and, that the BOS is required to call a Town Meeting whenever and prior to Haddam leasing town property as was the case here. It would be absurd for the Town to be required to notice a preliminary meeting with an agenda item resolution in order and prior to calling a “Special Town Meeting”. If that were the case one wonders how a Special Town meeting could ever properly be called, under the Complainant’s view.

III. Conclusion

WHEREFORE, the Respondents submit that the Commission should find that Respondents complied with the Freedom of Information Act in all respects regarding Complainant’s October 26, 2011 request, the November 2, 2016 BOS meeting and the November 17, 2016 Town Meeting. Accordingly, the imposition of civil penalties must be declined.

FOR THE RESPONDENTS,

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