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FREEDOM OF INFORMATION



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Matthew Kauffman, Kathleen Megan and
the Hartford Courant,
Complainant(s)
against

Notice of Meeting

Docket #FIC 2015-452

Board of Trustees, State of Connecticut, University of
Connecticut; and State of Connecticut, University of
Connecticut,
Respondent(s)

January 26, 2016

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 24, 2016**. 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 11, 2016**. 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 11, 2016**. **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 **fifteen (15) copies** be filed **ON OR BEFORE February 11, 2016**, 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: Matthew Kauffman and Kathleen Megan
Holly J. Bray, Esq.

2016-01-26/FIC# 2015-452/Trans/wrbp/LFS//TAH

FREEDOM OF INFORMATION COMMISSION
OF THE STATE OF CONNECTICUT

In the Matter of a Complaint by

Report of Hearing Officer

Matthew Kauffman, Kathleen Megan and
the Hartford Courant,

Complainant

against

Docket #FIC 2015-452

Chair, State of Connecticut, Board of
Trustees, Financial Affairs Committee,
University of Connecticut; and State of
Connecticut, University of Connecticut,
Board of Trustees, Financial Affairs
Committee,

Respondents

January 14, 2016

The above-captioned matter was heard as a contested case on September 21, 2015, 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 the Financial Affairs Committee, composed of members of the Board of Trustees, held a meeting on June 24, 2015.¹
3. It is found that the agenda for the meeting described the meeting as a “budget workshop” and indicated a planned executive session for “budget presentation.” It is found that the committee held such executive session, as planned.
4. It is found that the complainant Megan was not permitted to attend the executive session.

¹ The Financial Affairs Committee is a committee of the Board of Trustees. The caption has been amended to reflect that the alleged violation of the FOI Act was by the Financial Affairs Committee of the Board of Trustees of the University of Connecticut.

5. By letter filed July 13, 2015, the complainants appealed to this Commission, alleging that the respondents violated the Freedom of Information (“FOI”) Act by improperly convening in executive session during their meeting of June 24, 2015.

6. Section 1-225, G.S., provides, in relevant part:

The meetings of all public agencies, except executive sessions, as defined in subdivision (6) of section 1-200, shall be open to the public...

7. Section 1-200(6), G.S., in relevant part, provides:

(6) ‘Executive sessions’ means a meeting of a public agency at which the public is excluded for one or more of the following purposes: ... (E) discussion of any matter which would result in the disclosure of public records or the information contained therein described in subsection (b) of section 1-210.

8. Section 1-210(b)(1), G.S., provides that disclosure is not required 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.”

9. Section 1-210(e)(1), G.S., provides:

Notwithstanding the provisions of subdivisions (1) ... of subsection (b) of this section, disclosure shall be required of:

(1) Interagency or intra-agency memoranda or letters, advisory opinions, recommendations or any report comprising part of the process by which governmental decisions and policies are formulated, except disclosure shall not be required of a preliminary draft of a memorandum, prepared by a member of the staff of a public agency, which is subject to revision prior to submission to or discussion among the members of such agency[.]

10. It is found that the Financial Affairs Committee consists of four trustees. It is found that the executive session on June 24, 2015, was attended by 33 people: 14 trustees (at the time of the respondents’ meeting, there were 20 trustees on the board) and 19 senior administration officials, including the President of the University, the Chief of Staff, the Provost, the Chief Financial Officer (“CFO”), the Interim Vice-President for Health Affairs, the General Counsel, the Vice-President for Communications, the Director of Athletics, the Director of Governmental Relations, and the Student Trustee-elect, among others.

11. It is found that the executive session lasted for 90 minutes.

12. It is found that after the executive session, the Financial Affairs Committee reconvened in open session, during which the CFO publicly presented the budget to the trustees. It is found that the trustees and the administration officials asked no questions about the budget during the open session, there was no discussion of the budget, and no changes were made. It is found that the committee voted to send the budget to the full Board of Trustees.

13. It is found that the Board of Trustees met immediately after the adjournment of the committee meeting. It is found that the full board took up the budget, asked no questions, and voted to adopt the budget as sent by the Financial Affairs Committee.

14. It is found that the budget was for \$1.3 billion.

15. It is found that later on the day of the meeting, on June 24, 2015, the respondents' general counsel explained, in an email to the complainants, who had questioned the executive session: "The budget is a draft until the Board acts on it. To get to a final budget there are many preliminary drafts and many notes. The Board is entitled to discuss those drafts and notes 'and the information contained therein' in executive session provided UConn makes the statutory determination about the public interest."

16. It is found that two days later, on June 26, 2015, the respondents acknowledged in a "statement" emailed to the complainant Megan that "[t]he budget and hundreds of highly detailed pages of supporting and explanatory documents regarding UConn's spending plans, revenues, costs, and capital projects were posted online, made available to the public ... on June 19, five days before the board meeting."

17. It is found that, although the agenda described the Financial Affairs Committee meeting as a "budget workshop" and described the executive session as the "budget presentation," the minutes for the meeting do not mention the budget in describing the reason for the executive session. Instead, it is found, the minutes state that the purpose of the executive session was "to discuss commercial or financial information given in confidence and preliminary drafts and notes[.]"

18. Despite the respondents' representation in their minutes regarding their reasons for the executive session, the respondents no longer asserted at the hearing in this matter that the executive session was to discuss commercial or financial information given in confidence.

19. Rather, it is found that at the hearing in this matter, the respondents claimed that although they discussed the budget during the executive session, the actual reason for the executive session was to discuss the CFO's "working papers," which, they contend, are exempt from disclosure as "preliminary drafts and notes."

20. It is found that neither the minutes of the June 24, 2015 meeting, nor either of the respondents' subsequent statements to the complainants specifically identify the CFO's "working papers" as the reason for the executive session.

21. It is found that by “working papers,” the respondents mean the hundreds of pages of budget data (hereinafter “budget data”) that the CFO brought with him into the executive session. It is found that such data was in the form of spread sheets containing budget information pertaining to each of UConn’s nearly 700 budgetary units. It is found that creating the budget is a months-long process, during which each of the budgetary units submits a proposed budget to the CFO, who analyzes the budget proposals in light of various revenue assumptions. It is found that the budget data that the CFO brought to the executive session contained data about various budget proposals and budget scenarios.

22. It is found that the CFO brought the budget data to the executive session so that he and his staff could use them as a resource as the trustees discussed various “what if’s” pertaining to the budget; for example, he testified, what if financial aid were reduced, or cuts were made to athletics. It is found that the CFO relied on the budget data in order to give the trustees accurate information in response to their questions about the budget under consideration. It is found that the budget data represented the most reliable budget information available to the CFO and the trustees, having been revised and refined over the previous months based on revenue assumptions and deficit reduction measures.

23. It is found that the trustees used, or could have used if they chose, the detailed budget scenarios in the budget data papers to help them make a decision about the \$1.3 billion budget then under consideration.

24. It is found that the budget data formed the foundational support for the budget.

25. It is also found, as the respondents concede, that during the entire 90-minute session, the trustees did not ask any questions about most of the information contained in the hundreds of pages of budget data.

26. It is also found that, as the respondents admit, the 19 senior administration officials attended the executive session in order to answer any of the trustees’ questions and to give their opinions about the proposed spending plan outlined in the budget and other budget scenarios.

27. The respondents claim that the CFO’s budget data – what the respondents call the CFO’s “working papers” -- was exempt from disclosure pursuant to §1-210(b)(1), G.S., and that they were entitled to discuss the budget data in executive session.

28. It is found that the respondents describe their executive session as a question-and-answer session. It is found that such 90-minute session was a discussion within the meaning of §1-200(6)(E), G.S., which is the respondents’ claimed reason for their executive session.

29. The Connecticut Supreme Court has “interpreted the phrase ‘preliminary notes or drafts’ within the meaning of § [1-210](b)(1)... Examining, first, the common meaning of the words contained in this phrase, [the Court] observed that ‘preliminary’ is defined as ‘something that precedes or is introductory or preparatory.’ As an adjective it describes something that is ‘preceding the main discourse or business.’ A ‘draft’ is defined as ‘a preliminary outline of a plan, document or drawing....’ American Heritage Dictionary of the English Language. By using

the nearly synonymous words ‘preliminary’ and ‘draft,’ the legislation makes it very evident that preparatory materials are not required to be disclosed... Preliminary drafts or notes reflect that aspect of the agency’s function that precedes formal and informed decisionmaking.... It is records of this preliminary, deliberative and predecisional process that we conclude the exemption was meant to encompass.” (Citations omitted; internal quotation marks omitted.) Shew v. FOI Commission, 245 Conn. 149, 164 (1998).

30. A “note” is defined as “a brief writing intended to assist the memory or to serve as the basis for a fuller statement...an often informal record of impressions or incidents.” Webster’s Third New International Dictionary.

31. Section 1-210(b)(1), G.S., does not apply to “a completed document to be used by [a public official or employee] in the course of his [or her] public duties.” James Strillacci, Chief of Police v. FOI Commission, judicial district of New Britain, Docket No. CV08-4018120 (April 20, 2009). “A document that is final in itself and not deliberative does not qualify for the exception.” University of Connecticut Health Center v. FOI Commission, judicial district of New Britain, Docket No. CV11-6008847 (February 27, 2012).

32. It is found, as the respondents concede, that the budget data is not a draft of the budget. It is also found that the budget data is not a draft of any other document. It is found that the budget data is, instead, a set of completed documents, final in themselves. It is found that the budget data is not deliberative; as the complainants observe in their brief, it is found that the data consists of “numbers, representing the cost or value of various programs.” Moreover, it is found that the budget data was not preparatory or introductory in any way, and was brought to the executive session to facilitate the trustees’ decision-making during their meeting.

33. It is also found that the budget data (except as described in paragraph 34, below) is not a “note” within the meaning of §1-210(b)(1), G.S. Although the CFO testified that the budget data was intended to serve as a memory aide, it is found that the hundreds of pages of documents functioned as a memory aide only in that it would be impossible to remember hundreds of pages of budget numbers. It is found that the budget data was not a brief or informal writing intended to serve as the basis for a fuller statement.

34. It is found that the budget data also included some notations by the CFO and his staff in the margins of some of the hundreds of pages of spreadsheets. It is found that such notations are notes within the meaning of §1-210(b)(1), G.S.

35. However, notwithstanding any finding that the margin notes are notes within the meaning of §1-210(b)(1), G.S., and even if the budget data were a preliminary draft or note (although the Commission found in paragraphs 32 and 33, above, that the budget data was not a preliminary draft or note), it is concluded that §1-210(c)(1), G.S., requires disclosure of any report comprising part of the process by which governmental decisions and policies are formulated.

36. The respondents contend that the budget data is not “any report” within the meaning of §1-210(e)(1), G.S.

37. It is found that “report” is defined as “something that gives information.” Webster’s Third New International Dictionary. It is concluded that “any report” as it is used in §1-210(e)(1), G.S., sweeps broadly; and it is found that the hundreds of pages of budget data and margin notes fall within the term’s meaning.

38. It is further found that the budget data and notes comprised part of the process by which the Financial Affairs Committee – and the 10 additional trustees present in the executive session – made decisions about the budget and formulated policies that were reflected in the adopted budget.

39. It is also found that the budget data and notes are not a preliminary draft of a memorandum, prepared by a member of the staff of a public agency, nor were they subject to revision prior to submission to or discussion among the members of such agency, within the meaning of §1-210(b)(e)(1), G.S.

40. It is concluded that 1-210(b)(1), G.S., does not exempt from disclosure any of the hundreds of pages of budget data that the CFO brought into the executive session.

41. It is further concluded that the discussion of such budget data by the respondents in open session would not have resulted in the disclosure of public records or the information contained therein described §1-210(b)(1), G.S.

42. Accordingly, it is concluded that the respondents failed to prove that §1-200(6)(E), G.S., provided a legal basis for the executive session.

43. It is found that the respondents believed that public discussion of the budget and how to allocate scarce financial resources would not serve the public interest. It is found that the respondents sought an environment where board members could ask questions “in a discrete environment.” It is found, as the respondents testified, that they sought a “frank discussion with our board where they are able to ask any question without there being a disproportionate impact on our patients, our students, [and] our faculty by the mere fact of asking the question.” It is found that the respondents sought to avoid having trustees ask sensitive questions in public, such as questions about eliminating academic programs or certain sports programs, reducing financial aid, or restructuring employee benefits, so that such questions would not “become something that affects the reputation of the university.”

44. However, the Connecticut Supreme Court has long recognized that the legislature expressed a “general commitment to open governmental proceedings. The overarching legislative policy of the FOIA is one that favors the open conduct of government ... The sponsors of the FOIA understood the legislation to express the people's sovereignty over the agencies which serve them ... and this court consistently has interpreted that expression to require diligent protection of the public’s right of access to agency proceedings. Our construction of the [FOIA] must be guided by the policy favoring disclosure and exceptions to disclosure must be narrowly construed...In light of these principles, the statutory definition of public meetings contained in §[1-225(a)] must be read to limit rather than to expand the opportunities for public agencies to hold closed hearings...*Although the legislature’s narrowly tailored*

approach to the FOIA exclusions and exemptions may add a layer of complexity to agency administration, the legislature implicitly has decided that the associated costs are outweighed by the benefits derived from open government.” (Citations omitted; emphasis added; internal quotation marks omitted.) Glastonbury Educ. Association v. Freedom of Information Commission, 234 Conn. 704, 712 (1995).

45. It is concluded, therefore, that the respondents violated §1-225(a), G.S., as alleged, by convening in executive session for an improper reason.

46. At the hearing in this matter, the complainants also alleged that the respondents violated the §1-231(a), G.S, which provides in relevant part:

At an executive session of a public agency, attendance shall be limited to members of said body and persons invited by said body to present testimony or opinion pertinent to matters before said body provided that such persons' attendance shall be limited to the period for which their presence is necessary to present such testimony or opinion[.]

47. The Commission declines to adjudicate the complainants' allegation with respect to §1-231, G.S., because such allegation was not fairly raised in the complaint. Nevertheless, the Commission makes the following observations, in paragraphs 48 and 49, below, based on the evidentiary record in this matter.

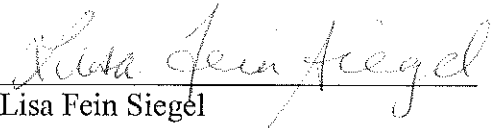
48. Attendance at the executive session was not limited to the four members of the Financial Affairs Committee, as 10 additional members of the Board of Trustees and 19 members of the university's senior administration attended and participated in the entire 90-minute executive session.

49. The respondents claim that attendance by the senior administration was necessary so they could answer the questions of the 14 trustees who attended the closed session. The respondents did not establish that those in attendance provided testimony or opinion or that their attendance was limited to the period for which their presence was necessary. Instead, the presence and participation by so many university officials and trustees supports an inference that the discussion was not confined merely to the CFO's "working papers," but was instead a broad substantive discussion concerning the budget involving a majority of the board of trustees and most if not all of the university's senior administration officials.

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

1. Within 60 days of the notice of final decision in this matter, the respondents shall cause amended minutes to be filed of the June 24, 2015 executive session budget presentation. In preparing such minutes, the respondents shall ensure that the minutes disclose what transpired in the executive session to the same degree as would have been revealed by conducting the session in public.

2. Henceforth, the respondents shall strictly comply with the open meeting provision of §§1-225(a), G.S.



Lisa Fein Siegel
as Hearing Officer