

TO: Freedom of Information Commission
FROM: Thomas A. Hennick
RE: Minutes of the Commission's regular meeting of May 23, 2018

A regular meeting of the Freedom of Information Commission was held on May 23, 2018, in the Freedom of Information Hearing Room, 18-20 Trinity Street, Hartford, Connecticut. The meeting convened at 2:07 p.m. with the following Commissioners present:

Commissioner Owen P. Eagan, presiding
Commissioner Jay Shaw (participated via speakerphone)
Commissioner Jonathan J. Einhorn
Commissioner Matthew Streeter
Commissioner Christopher P. Hankins
Commissioner Michael C. Daly
Commissioner Lenny T. Winkler
Commissioner Ryan P. Barry
Commissioner Sean McElligott

Also present were staff members, Colleen M. Murphy, Mary E. Schwind, Victor R. Perpetua, Tracie C. Brown, Kathleen K. Ross, Lisa F. Siegel, Valicia D. Harmon, Paula S. Pearlman, Cindy Cannata, and Thomas A. Hennick.

The Commissioners voted, 8-0, to approve the Commission's regular meeting minutes of May 9, 2018. Commissioner Barry did not participate in this matter.

Those in attendance were informed that the Commission does not ordinarily record the remarks made at its meetings, but will do so on request.

[Docket #FIC 2017-0296](#)

Alejandro Velez v. Scott Semple, Commissioner, State of Connecticut, Department of Correction; and State of Connecticut, Department of Correction

The Commissioners unanimously voted to adopt the Hearing Officer's Report.

[Docket #FIC 2017-0361](#)

Deshawn Tyson v. Anthony Campbell, Chief, Police Department, City of New Haven; and Police Department, City of New Haven

Deshawn Tyson participated via speakerphone. Attorney Kathleen Foster appeared on behalf of the respondents. The Commissioners unanimously voted to adopt the Hearing Officer's Report. The proceedings were recorded digitally.

[Docket #FIC 2017-0440](#)

Kacey Lewis v. Commissioner, State of Connecticut,
Department of Correction; and State of Connecticut,
Department of Correction

The Commissioners unanimously voted to adopt the Hearing Officer's Report.

[Docket #FIC 2017-0334](#)

J.R. McMullen v. President, Board of Representatives, City of
Stamford; Board of Representatives, City of Stamford; and City of
Stamford

J.R. McMullen appeared on his own behalf. Attorney Amy Livolsi appeared on behalf of the respondents. The Commissioners voted, 8-0, to amend the Hearing Officer's Report. The Commissioners voted, 8-0, to adopt the Hearing Officer's Report as amended.* The proceedings were recorded digitally. Commissioner Shaw did not participate in this matter.

[Docket #FIC 2017-0354](#)

Nadine Blakely v. Commissioner, State of Connecticut,
Department of Administrative Services; and State of
Connecticut, Department of Administrative Services

The Commissioners unanimously voted to adopt the Hearing Officer's Report.

[Docket #FIC 2017-0480](#)

Joe Cooper and Journal Inquirer v. Town Administrator,
Town of Andover; and Town of Andover

The Commissioners unanimously voted to adopt the Hearing Officer's Report.

[Docket #FIC 2017-0482](#)

Lauren Yandow and Rivereast News Bulletin v. Town
Administrator, Town of Andover; and Town of Andover

The Commissioners unanimously voted to adopt the Hearing Officer's Report.

[Docket #FIC 2017-0521](#)

Crystal Matthews, Esq. v. Commissioner, State of
Connecticut, Department of Emergency Services and Public
Protection; and State of Connecticut, Department of
Emergency Services and Public Protection

The Commissioners unanimously voted to amend the Hearing Officer's Report. The Commissioners unanimously voted to adopt the Hearing Officer's Report as amended.*

[Docket #FIC 2017-0571](#)

Len Besthoff and NBC Connecticut v. Ariel Marzouca-Jaunai, Chairman, Blue Hills Fire District Commission; Jacqueline Massey-Greene, Vice Chair, Blue Hills Fire District Commission; and Blue Hills Fire District Commission

The Commissioners unanimously voted to amend the Hearing Officer's Report. The Commissioners unanimously voted to adopt the Hearing Officer's Report as amended.*

[Docket #FIC 2017-0650](#)

Charles Cornelius v. Raul Pino, Commissioner, State of Connecticut, Department of Public Health; and State of Connecticut, Department of Public Health

The Commissioners unanimously voted to adopt the Hearing Officer's Report.

Docket #FIC 2017-0676

Kevin Brookman v. Chief, Police Department, City of Hartford; Police Department, City of Hartford; and City of Hartford

The Commissioners unanimously voted to adopt the Hearing Officer's Report.

Colleen M. Murphy and Paula S. Pearlman reported on legislation.

The meeting was adjourned at 4:00 p.m.

Thomas A. Hennick
MINREGmeeting 05232018/tah/05242018

* See Attached for amendments

AMENDMENTS

[Docket #FIC 2017-0334](#)

J.R. McMullen v. President, Board of Representatives, City of Stamford; Board of Representatives, City of Stamford; and City of Stamford

The Hearing Officer's Report is amended as follows:

24. At the hearing **AND ON BRIEF**, the respondents argued that the BOR is a "party" to the pending litigation, described in paragraphs 22 and 23, above. [They contended that the BOR is part of the governing body of the City of Stamford with authority over the City's budget and personnel issues and had a "great interest in knowing" about the City's exposure and liability relating to the handling of the pending cases and effect on the fiscal health of the City, as well as the potential impact on the BOR's decision-making on issues concerning the City that are unrelated to the pending cases.

25. On brief, the respondents contended that footnote 8 of the Superior Court decision in Board of Estimate and Taxation for the Town of Greenwich, et. al. v. Freedom of Information Commission, et.al., 103014 CTSUP, New Britain, J.D. (Schuman, J.) (Oct. 30, 2014) ("Board of Estimate"), is on point and supports their contention that a public agency need not be a named party in litigation in order to qualify as a "party" within the meaning of §1-200(6), G.S. In that case, the Greenwich Board of Estimate and Taxation convened an executive session, at which it discussed an alleged pending claim against the town. In footnote 8, the court stated the following:

The plaintiffs point to the commission's finding that there was no claim pending "against the Board of Estimate and Taxation..."... The court agrees with the plaintiffs that, because the board governs finances for the entire town, it is not necessary, contrary to the commission's suggestion, for a claim to state a planned action against the board itself and that a planned action against any of the plaintiff agencies or even the town as a whole acting on behalf of these agencies would suffice to establish a pending claim in this case. As explained below, however, the plaintiffs do not meet even this expanded standard.

26. However, the Board of Estimate case can be distinguished as follows: that the footnote is specific to the particular facts of that underlying case; that such case involved a "pending claim", rather than "pending litigation", and that in such matter, unlike the facts herein, the agency which *conducted* the executive session was claiming the exception set forth in §1-200(6)(B), G.S. Additionally, the Commission notes that the court ultimately dismissed the appeal in the Board of Estimate case, because the plaintiffs therein failed to prove the other elements of §1-200(6)(B), G.S. Further, subsequent to the decision in Board of Estimate, the Supreme Court again reviewed the

meaning of the term “party” in §1-200(6)(B), G.S., and did not adopt the reasoning in the Board of Estimate footnote. Rather, the Court reiterated that its interpretation, adopting the definition of “party” in Black’s Law Dictionary, which defines that term in relevant part as “[o]ne by or against whom a lawsuit is brought....” Planning and Zoning Commission of the Town of Monroe, et. al. v. Freedom of Information Commission, et. al., 316 Conn. 1, 13 (2015), citing Black’s Law Dictionary (9th Ed. 2009) p. 1232; accord Chairperson, Connecticut Medical Examining Board v. Freedom of Information Commission, 310 Conn. 276, 288 (2013) (“An agency can be a party to the claim, but only if the claim is directed at the agency itself.”)

27. Moreover, the issue of whether the BOR, or the Committee of the Whole, is or was a “party” to the litigation described in paragraphs 22 and 23, above, is irrelevant, since it is found in paragraphs 12 and 17, above, that the executive session at issue was an executive session of the Public Safety Committee, not of the BOR or the Committee of the Whole. It is also found that the respondents offered no evidence to prove that the Public Safety Committee, which met on May 25th, in executive session, was a “party” to the pending cases, within the meaning of §1-200(6)(B), G.S.]

[28.] 25. HOWEVER, THE ISSUE OF WHETHER THE BOR, THE COMMITTEE OF THE WHOLE, OR THE PUBLIC SAFETY COMMITTEE, IS OR WAS A “PARTY” TO THE LITIGATION DESCRIBED IN PARAGRAPHS 22 AND 23, ABOVE, IS NOT DETERMINATIVE UNDER THE COMPLEX FACTS AND CIRCUMSTANCES OF THIS CASE. [Finally,] Even if any of the respondents were found to be parties to the litigation described in paragraphs 22 and 23, above, the respondents failed to prove the other elements of §1-200(6)(B), G.S., as discussed below. [See Board of Estimate (all elements must be proved).]

[29.] 26. It is found that the respondents failed to prove that the purpose for entering executive session was for discussion of strategy and negotiations with respect to pending litigation. Rather, based on the evidence in this matter, it appears that the purpose of the executive session was to have corporation counsel provide the members of the Public Safety Committee and the Committee of the Whole with a status update on the pending litigation. Furthermore, as testified to by Attorney Emmett, no substantive discussion actually occurred in executive session relating to any pending claims or litigation.

[30.] 27. At the hearing in this matter, the respondents also argued that they properly went into executive session pursuant to §1-200(6)(E), G.S., which allows an executive session for “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.” The respondents claimed that the record to be discussed constituted a preliminary draft, within the meaning of §1-210(b)(1), G.S.; a record pertaining to strategy and negotiations with respect to pending claims or pending litigation, within the meaning of §1-210(b)(4), G.S., and an attorney-client privileged communication, within the meaning of §1-210(b)(10), G.S., respectively.

[31.] **28.** On January 18, 2018, the hearing officer ordered the respondents to submit such records for in camera inspection. By email received on February 1, 2018, the respondents provided the hearing officer with a document titled “Confidential Settlement Agreement and Release” (“Settlement Agreement”), and a privilege log, which have been marked as Respondents’ Exhibit 12 (after-filed). In their February 1st email, the respondents informed the hearing officer that: “As the conditions upon which this Agreement was predicated have recently been satisfied, the Respondent no longer claims exemption of this record. However, at the time of the hearing before you, the conditions were not yet met, and the document was claimed under §1-210(b)(4). Consequently, I have enclosed a privilege log to confirm our claim of exemption that existed at the time of the hearing.”¹

[32.] **29.** Section 1-210(b)(4), G.S., provides that disclosure is not required of “[r]ecords pertaining to strategy and negotiations with respect to pending claims or pending litigation to which the public agency is a party until such litigation or claim has been finally adjudicated or otherwise settled....”

[33.] **30.** At the hearing, Attorney Emmett testified that the purpose of the executive session was also to discuss “documents” pertaining to “strategy and negotiations” with respect to pending claims or pending litigation. She testified that such documents were in “draft form” and “had not been finally signed off on.” Attorney Emmett did not specifically identify the documents.

[34.] **31.** It is found, based upon a review of the Settlement Agreement, described in paragraph [31] **28**, above, that such document pertained to the settlement of the pending lawsuit in Madonna Badger v. City of Stamford, Robert D. DeMarco and Ernest Orgera, District of Connecticut, Civil Action No. 3:13-cv-00011-SRU, and contained certain delineated conditions. It is also found that the Settlement Agreement was signed by the plaintiff and by Attorney Emmett, on behalf of the City of Stamford, prior to the May 25th meeting at issue in this matter.

[35.] **32.** It is found that the respondents failed to prove that the signed Settlement Agreement, which was provided to the hearing officer, pertained to “strategy and negotiations” with respect to pending litigation, within the meaning of §1-210(b)(4), G.S. Accordingly, it is found that the respondents failed to prove that they went into executive session to discuss a record constituting a record pertaining to strategy and negotiations with respect to pending claims or pending litigation, within the meaning of §1-210(b)(4), G.S.

¹ The Commission notes that in their February 1st email, including the privilege log, and post-hearing brief, the respondents did not cite to their previous claims of exemption pursuant to §§ 1-210(b)(1) and 1-210(b)(10), G.S. It is found that the respondents failed to prove that they went into executive session to discuss a record constituting a preliminary draft, within the meaning of §1-210(b)(1), G.S., or an attorney-client privileged communication, within the meaning of §1-210(b)(10), G.S.

[36.] **33.** It is therefore concluded that the respondent Public Safety Committee violated §1-225(a), G.S., by entering into the executive session for an impermissible purpose.

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

1. Henceforth, the respondent Public Safety Committee shall strictly comply with §1-225(a), G.S.

2. The complaint is dismissed against the respondents BOR and Committee of the Whole.

3. THE PUBLIC SAFETY COMMITTEE SHALL CONTACT COMMISSION STAFF TO SCHEDULE A TRAINING SESSION. THE COMMISSION ALSO STRONGLY ENCOURAGES ALL OF THE RESPONDENTS TO ATTEND SUCH SESSION TO ADDRESS SEVERAL CONCERNS RAISED IN THIS MATTER THAT WERE NOT ADDRESSED IN THE REPORT BECAUSE THEY WERE NOT RAISED IN THE COMPLAINT.

[Docket #FIC 2017-0521](#)

Crystal Matthews, Esq. v. Commissioner, State of Connecticut, Department of Emergency Services and Public Protection; and State of Connecticut, Department of Emergency Services and Public Protection

The Hearing Officer's Report is amended as follows:

11. IT IS FOUND THAT THE RESPONDENTS FAILED TO PROVE THAT SUCH IN CAMERA RECORDS ARE PRELIMINARY DRAFTS OR NOTES WITHIN THE MEANING OF 1-210(b)(1), G.S. It is found, [however] **MOREOVER**, that the respondents offered no evidence at the hearing in this matter that the respondent department made a determination that the public interest in withholding any of the in camera records clearly outweighed the public interest in disclosure. It is therefore found that the respondents failed to prove that any of the in camera records, or portions thereof, are exempt from disclosure pursuant to §1-210(b)(1), G.S.

[Docket #FIC 2017-0571](#)

Len Besthoff and NBC Connecticut v. Ariel Marzouca-Jaunai, Chairman, Blue Hills Fire District Commission; Jacqueline Massey-Greene, Vice Chair, Blue Hills Fire District Commission; and Blue Hills Fire District Commission

The Hearing Officer's Report is amended as follows:

18. However, the more concerning matter in this case is the complainants' second allegation. It found that, after the respondents adjourned the September 21st meeting into an executive session, and after the respondents properly received and discussed their attorney's legal advice on a variety of matters, Chairwoman Marzouca-Jaunai asked her counsel "about how to go about giving out bonuses. More specifically, she asked if writing up a list would be public knowledge or if someone who was not [sic] a public official could make decisions without disclosing it to the public." See Complainants' Ex. B (Affidavit of Commissioner Farmer). It is found that Commissioner Farmer objected to this topic being discussed further in executive session, that the respondents' counsel agreed and that the discussion was ended.

24. With regard to the complainants' request for civil penalties, it is found as follows: the respondents readily admitted at the contested case hearing that they violated §1-225(d), G.S., by using too generic a description on their agenda to apprise the public of the purpose of the September 21st executive session. It is further found that, prior to the March 23, 2018 contested case hearing, the respondents requested and attended a general FOI training session. The respondents seemed to embrace the opportunity to receive FOI training, not as a punishment, but as an opportunity to learn the law and conduct their meetings appropriately. Nonetheless, the evidence adduced at the contested case hearing reveals that the respondents are struggling with requirements of the FOI Act. **ALTHOUGH THE COMMISSION DECLINES TO ISSUE A CIVIL PENALTY**, it [It] is concluded that the respondents are in need of an additional FOI training session that focuses on the permissible subjects for executive session and one is so ordered.