

FREEDOM OF INFORMATION COMMISSION  
OF THE STATE OF CONNECTICUT

In The Matter of a Complaint by

FINAL DECISION

John Suggs,

Complainant

against

Docket #FIC 2019-0040

Executive Director, Levitt  
Pavilion for the Performing  
Arts; and Levitt Pavilion  
for the Performing Arts;  
and Friends of the Levitt  
Pavilion, Inc.

Respondents

January 8, 2020

On August 22, 2019, the respondents in the above-captioned matter moved to dismiss the complaint without hearing, pursuant to §1-206(b)(4), G.S.

After consideration of the entire record, the following facts are found and conclusions of law are reached:

1. Section 1-206(b)(4), G.S., provides that:

[n]otwithstanding any provision of this subsection to the contrary, in the case of an appeal to the commission of a denial by a public agency, the commission may, upon motion of such agency, confirm the action of the agency and dismiss the appeal without a hearing if it finds, after examining the notice of appeal and construing all allegations most favorably to the appellant, that (A) the agency has not violated the Freedom of Information Act, or (B) the agency has committed a technical violation of the Freedom of Information Act that constitutes a harmless error that does not infringe the appellant's rights under said act.

2. The motion to dismiss contends that, construing all allegations most favorably to the complainant, the respondent corporation has not violated the Freedom of Information ("FOI") Act, because they are not public agencies. To date, the complainant has not filed an objection to such motion.

3. In the complaint filed January 24, 2019, the complainant alleged that the respondent nonprofit corporation (hereinafter “FLP”), which operates the respondent pavilion, a town-owned performance facility, is the functional equivalent of a public agency; and that the FLP violated the FOI Act by declining to comply with his request for records. In support of such allegation, the complainant contended:

- a. that the operation of the pavilion was previously overseen by a public agency in the Town of Westport, the Levitt Governance Committee, and that FLP now performs that function pursuant to a licensing agreement;
- b. that among its responsibilities, FLP logs in and resolves noise complaints;
- c. that FLP occupies office space in town hall for no fee;
- d. that FLP web activities are hosted on the town server; that FLP; has two staff members who use town email addresses;
- e. that the town covers telephone expenses for FLP and contributes a nominal fee to its operational budget;
- f. that the Board of Directors of FLP exercises advisory authority over the operation of the pavilion and that one member of the Board is the Westport Director of Parks and Recreation; and
- g. that the Levitt Governance Committee is inactive.

4. On February 22, 2019, the complainant filed a second letter supplementing his complaint and further contended that the salary of the FLP executive director is partially paid for with taxpayer funds. On July 3, 2019, the complainant filed with the Commission a copy of a 1974 document entitled “The Levitt Pavilion for the Performing Arts Responsibilities of the Governing Committee” and a copy of the 2012 License Agreement between the FLP and the town of Westport, and suggested that a comparison of the documents proves that the FLP is the functional equivalent of a public agency.

5. With respect to whether FLP is the “functional equivalent” of a public agency, pursuant to §1-200(1)(B), G.S., four factors must be considered: (1) whether the entity performs a governmental function; (2) the level of government funding; (3) the extent of government involvement or regulation; and (4) whether the entity was created by government. See Board of Trustees of Woodstock Academy v. Freedom of Information Commission, 181 Conn. 544, 554 (1980). “All relevant factors are to be considered cumulatively, with no single factor being essential or conclusive.” Connecticut Humane Society v. Freedom of Information Commission, 281 Conn. 757, 761 (1991).

6. The complainant has presented the Commission with a series of factual allegations but has not alleged that the FLP performs a governmental function, that it was created by

government, the extent to which the town is involved in, or regulates, the FLP, or the level of town funding of the FLP. Rather, the complainant relies heavily on the fact that the FLP, pursuant to a licensing agreement with the town, performs many of the same functions that a now defunct government committee previously performed.

7. The Commission takes administrative notice of the record and Final Decision in Docket #FIC 2017-0360; Joan Coe v. David Ryan, President, Simsbury Performing Arts Center Board; and Simsbury Performing Arts Center Board (January 10, 2018). In that matter, the Commission considered whether the respondent non-profit corporation therein, which had assumed the functions of running a town-owned performing arts facility from a defunct town board, and which received some funding, internet and phone services, and facilities maintenance from the town, was the functional equivalent of a public agency.

8. In Docket # 2017-0360, the Commission concluded that the nonprofit at issue did not perform a governmental function, finding at paragraph 16 therein:

It is found that providing culturally enriching entertainment is not a traditional governmental function. Although the town itself, for many years, undertook this function, it is found that [the nonprofit] is not required to provide entertainment to the public pursuant to any statute, but rather, provides such service only pursuant to a contract. It is found that SPAC, Inc., does not have the power to govern, regulate or make decisions affecting government. Accordingly, it is found that SPAC, Inc., does not perform a governmental function.

9. In Docket # FIC 2017-0360, the Commission concluded that the government regulation prong was not met, since the town did not exercise the type of “extensive, detailed and virtually day-to-day supervision” required by the courts to satisfy that prong of the Woodstock test, even though in that matter the town had the authority to appoint a majority of the members of the board of directors of the nonprofit. See Hallas v. Freedom of Information Commission, 18 Conn. App. 291, 296, *cert. denied*, 212 Conn. 804 (1989) (in order to satisfy the government regulation prong of the functional equivalent test, the entity “must operate under direct, pervasive or continuous regulatory control.”)

10. In Docket # FIC 2017-0360, the Commission concluded that the nonprofit at issue was not the functional equivalent of a public agency.

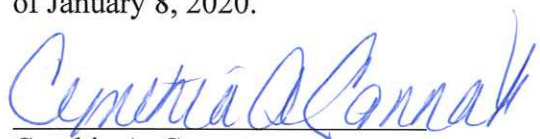
11. The Commission also takes administrative notice of the record and Final Decision in Docket # FIC2018-0250; William Comerford v. President Center Street Association et al. (April 24, 2019), in which a cemetery association operating a town owned cemetery was found not be the functional equivalent of a public agency, although it had succeeded a public agency which had previously performed the same functions. Accordingly, the fact that a private entity may take over functions that a public agency formerly performed is not determinative of whether the private entity constitutes the functional equivalent of a public agency under Connecticut law.

13. Construing all allegations most favorably to the complainant, it is concluded as a matter of law that none of the respondents are the functional equivalent of a public agency, and therefore, the respondents have not violated the FOI Act, as alleged in the complaint.

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

1. The complaint is hereby dismissed without a hearing pursuant to §1-206(b)(4), G.S.

Approved by Order of the Freedom of Information Commission at its regular meeting of January 8, 2020.



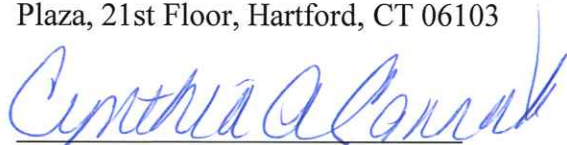
Cynthia A. Cannata  
Acting Clerk of the Commission

PURSUANT TO SECTION 4-180(c), G.S., THE FOLLOWING ARE THE NAMES OF EACH PARTY AND THE MOST RECENT MAILING ADDRESS, PROVIDED TO THE FREEDOM OF INFORMATION COMMISSION, OF THE PARTIES OR THEIR AUTHORIZED REPRESENTATIVE.

THE PARTIES TO THIS CONTESTED CASE ARE:

**JOHN SUGGS**, 64 Center Street, Westport, CT 06880

**EXECUTIVE DIRECTOR, LEVITT PAVILION FOR THE PERFORMING ARTS; LEVITT PAVILION FOR THE PERFORMING ARTS; AND FRIENDS OF THE LEVITT PAVILION**, c/o Attorney Mary M. Miller, Reid and Riege, P.C., One Financial Plaza, 21st Floor, Hartford, CT 06103



Cynthia A. Cannata  
Acting Clerk of the Commission