

FREEDOM OF INFORMATION COMMISSION
OF THE STATE OF CONNECTICUT

In The Matter of a Complaint by

FINAL DECISION
Upon Remand

Marissa Lowthert,

Complainant

against

Docket #FIC 2015-147

Bruce Likly, Chairman, Board of Education, Wilton Public Schools; Christine Finkelstein as Member, Board of Education, Wilton Public Schools; Chris Stroup, as Member, Board of Education, Wilton Public Schools; Laura Schwemm, as member, Board of Education, Wilton Public Schools; Glen Hemmerle, as member, Board of Education, Wilton Public Schools; Lory Rothstein, as member, Board of Education, Wilton Public Schools; and Wilton Public Schools,

Respondents

July 8, 2020

Procedural history

The above-captioned matter was initially heard as a contested case on September 29, 2015, at which time the complainant and the respondents appeared, stipulated to certain facts and presented testimony, exhibits and argument on the complaint. On November 18, 2015, the Commission adopted a final decision in this matter. Notice of such final decision was mailed to the parties on November 23, 2015. By motion dated and filed on December 3, 2015, the complainant moved that the Commission reconsider its final decision. The motion was granted by the Commission at its regular meeting on December 16, 2015.

On January 13, 2016, the Commission affirmed its November 18, 2015 final decision and mailed notice of its Final Decision Upon Reconsideration on January 20, 2016, to the parties. The complainant filed an appeal of the Final Decision Upon

Reconsideration with the Superior Court on March 4, 2016. The appeal was docketed as HHB-CV-16-6032522, Marissa Lowthert v. Freedom of Information Commission et al.

At the February 7, 2017 pretrial in HHB-CV-16-6032522, Marissa Lowthert v. Freedom of Information Commission et al., the parties agreed to settle the administrative appeal. The terms of the settlement were that the complainant would withdraw the appeal in the superior court on the condition that the Commission would conduct an evidentiary hearing encompassing all issues concerning the complaint.

The Commission voted at its February 8, 2017 regular meeting to reconsider its final decision in the matter and to fully consider any jurisdictional and substantive issues.¹ A reopened hearing was held on the above-captioned matter on March 31, 2017, at which time the complainant and the respondents again appeared, stipulated to additional facts and presented additional testimony, exhibits and argument on the complaint. At the request of the parties, the Commission took administrative notice of all facts and testimony, exhibits and argument presented in the September 29, 2015 contested case hearing.

Thereafter, a Report of Hearing Officer Upon Reconsideration, dated May 26, 2017, was issued on June 2, 2017, and was scheduled to be heard by the Commission at its June 28, 2017 regular meeting. However, the hearing officer withdrew the report upon receipt of the complainant's objection and motion for an in camera review, which motion and in camera review are addressed in paragraphs 37 through 40 of the findings, below.

A Second Report of Hearing Officer Upon Reconsideration, dated August 1, 2017, was issued to the parties on August 2, 2017. On August 10, 11, 16 and 21, 2017, the complainant filed various motions with the executive director, hearing officer and the Commission, including a motion that the Commission review certain rulings made by the hearing officer. That motion was denied by the Commission at its August 23, 2017 regular meeting.

Also at its August 23, 2017 regular meeting, the Commission voted to adopt the August 1, 2017 Second Report of Hearing Officer Upon Reconsideration as its final decision. On September 12, 2017, the complainant petitioned for reconsideration of such final decision, and at its regular meeting of September 27, 2017, the Commission unanimously voted to deny the complainant's petition. Notice of such denial was issued to the parties on September 29, 2017.

On November 15, 2017, the complainant appealed the final decision, dated August 23, 2017. The appeal was docketed by the court as HHB-CV-17-6041629-S, Marissa Lowthert v. Freedom of Information Commission, et al., and alleged, in part, that the Commission improperly concluded that there was no "meeting" on January 10, 2014 and that the hearing officer improperly disallowed the testimony of Attorney Andreanna Bellach. After oral argument, the court agreed with the complainant that the hearing

¹ The appeal was later withdrawn.

officer erred by disallowing Attorney Bellach's testimony and, by Order dated May 21, 2019, remanded the matter back to the Commission for the sole purpose of taking the testimony of Attorney Bellach regarding her recollection of who was in attendance when a certain agreement (see paragraph 2 of the findings, below) was signed. The court retained jurisdiction over the appeal.

On August 6, 2019, a Notice of Hearing on Remand and Notice of Deviation from Regulation, was issued to the parties. A Designation of Hearing Officer Upon Court Remand also was issued on August 6, 2019, designating Attorney Kathleen K. Ross as hearing officer, in lieu of Attorney Tracie C. Brown. In such notice and designation, the parties were informed that, pursuant to Section 1-21j-13 of the Regulations of Connecticut State Agencies ("regulations"), the Commission intended to deviate from the regulation requiring that a hearing officer must personally hear any testimony on which a proposed finding is based, and further informed the parties that substitution of the hearing officer was a matter of necessity in order to comply with the court's remand order, because, by the time of the remand order, Attorney Brown was no longer employed by the Commission.

The hearing was scheduled for September 23, 2019. However, on August 29, 2019, the respondents moved the court for a stay of the court proceedings, which motion the court granted. Because of the stay, the Commission postponed the September 23, 2019 hearing. By Order dated November 26, 2019, the court lifted the stay.

By Notice dated December 30, 2019, the hearing was rescheduled to February 4, 2020. On February 4, 2020, the parties and Attorney Bellach appeared. Attorney Bellach testified and one additional exhibit (Respondents' Remanded Exhibit 1) was marked during the hearing. The factual findings regarding Attorney Bellach's testimony and recollection are included in paragraph 21, below.

Factual findings and conclusions of law

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. By email dated February 23, 2015 and filed on February 24, 2015, the complainant appealed to this Commission alleging that the respondents violated the Freedom of Information ("FOI") Act by "failing to conduct BOE business in public without prior public notice, recording of votes and publication of minutes." More specifically, it is the complainant's contention that a certain Common Interest Agreement dated January 10, 2014 (hereinafter the "Agreement") was discussed and voted on at an unnoticed and secret meeting of the respondent board in violation of §1-225, G.S. The complainant requested several remedies, including the imposition of civil penalties.

3. By motion dated and filed on June 23, 2015, and at both hearings on this matter, the respondents moved to dismiss the complaint for lack of subject matter jurisdiction, claiming that the complaint was not timely filed. The respondents contended that because the complainant was aware of the Agreement since December 3, 2014, she had thirty days from that date to file a complaint alleging that the board met in secret to authorize the superintendent to enter into the Agreement. Having filed her complaint well over sixty days after she became aware of the Agreement, they argued, her complaint was not timely filed and must be dismissed. The respondents contended that, in the alternative, the complaint should be dismissed because the respondents never discussed the Agreement as a board but rather the superintendent acted in his capacity as chief financial officer of the school district by which he has the authority to enter into such agreements without board approval.

4. With respect to the jurisdictional issue, §1-206(b)(1), G.S., provides, in relevant part that:

Any person...wrongfully denied the right to attend any meeting of a public agency or denied any other right conferred by the Freedom of Information Act may appeal therefrom to the Freedom of Information Commission, by filing a notice of appeal with said commission. A notice of appeal shall be filed not later than thirty days after such denial, except in the case of an unnoticed or secret meeting, in which case the appeal shall be filed not later than thirty days after the person filing the appeal receives notice in fact that such meeting was held. [Emphasis added].

5. In Marissa Lowthert v. Freedom of Information Commission and Bruce Hampson, Chairman of Miller Driscoll Building Committee, HHB-CV-15-6030425-S, Superior Court of New Britain, (January 17, 2017) the court ruled that in the context of the Freedom of Information Act, notice in fact means actual notice to the person filing the appeal.²

² Following the Court's decision, the Connecticut General Assembly passed Senate Bill 983 (Public Act 17-86), *An Act Concerning Appeals Under the Freedom of Information Act Involving Notice of Meetings*, effective October 1, 2017, which eliminates the term "notice in fact" and substitutes "actual or constructive notice" in the context of "secret or unnoticed" meetings within the meaning of §1-206-(b)(1), G.S., of the FOI Act and provides, in relevant part, that:

Any person denied the right to inspect or copy records under section 1-210 or wrongfully denied the right to attend any meeting of a public agency or denied any other right conferred by the Freedom of Information Act may appeal therefrom to the Freedom of Information Commission, by filing a notice of appeal with said commission. A notice of appeal shall be filed not later than thirty days after such denial, except in the case of an unnoticed or secret meeting, *in which case the appeal shall be filed not later than thirty days after the person filing the appeal receives actual or constructive notice that such meeting was held.* [emphasis added]

6. It is found that on December 3, 2014, the complainant became aware of the Agreement between the respondent board, the superintendent of schools for the Wilton Board of Education and the town of Wilton.

7. Despite learning of the Agreement on December 3, 2014, it is found that the complainant did not inquire about a possible meeting to discuss or approve the Agreement until February 18, 2015, when the respondent chairman informed her via email that there was no record of an agenda, minutes, or votes taken at any meeting during which the board discussed and approved the Agreement.

8. It is found, therefore, that the complainant received notice in fact on February 18, 2015, that there may have been a secret meeting of the respondent board at which it discussed and approved the Agreement.

9. It is found that, the complainant filed her appeal on February 23, 2015, which was within thirty days after she determined there may have been a secret meeting of the respondent board at which it discussed and approved the Agreement. Accordingly, it is concluded that the Commission has jurisdiction to adjudicate the merits of the complaint in this case.

10. With respect to the merits of the complaint, the complainant contended, at both hearings on this matter and in her briefs, that the Agreement had to be approved by the respondent board and that such approval had to be in the form of a vote. In addition, the complainant contended that the superintendent of schools could not have approved the execution of the Agreement on behalf of the respondent board without proper authorization from the respondent board because he did not have the authority to do so. Her contention was, therefore, that because there is no record of a discussion or vote to either approve the Agreement, or to authorize the superintendent to approve execution of the Agreement, in the notices or minutes of the respondent board, such discussion and vote must have occurred in secret.

11. The complainant cited the language of the Agreement in support of her contention that authorization from the respondent board was required and, therefore, was in fact acquired in the form of a vote. It is found that said Agreement provides in relevant part that “[t]his Agreement may be executed by counsel for a Party. Each counsel signing this Agreement represents that he or she has been authorized by his or her client to execute this Agreement on behalf of the client.”

12. In support of her contention that the superintendent lacked authority to approve the execution of the Agreement on behalf of the respondent board, the complainant cited the town of Wilton’s charter which provides in relevant part that:

. . . [t]he Board of Education shall consist of six members. The term of office of each shall be four years and until a successor shall have taken office. Three members shall be elected at one regular Town election and three members

shall be elected at the next succeeding regular Town election, and so forth alternately . . . [t]he Board of Education shall have the powers, duties and responsibilities and shall perform the functions prescribed by law.³

13. The complainant contended that the citation, described in paragraph 12, above, was offered to provide evidence that the superintendent is not the respondent board or a member of the respondent board.

14. In support of her contention that the superintendent lacked authority to approve the execution of the Agreement on behalf of the respondent board, the complainant also cited sections of the bylaws of the respondent board detailing: the role of the respondent board and members; the responsibilities of the board; the number of members, qualification of members, vacancies, terms of office, oath of office, and the manner of resignations; and the role and responsibilities of the attorneys for the respondent board.

15. The complainant contended that the citations described in paragraph 14, above, were offered to provide additional evidence that the superintendent is not the respondent board, or a member thereof, and to provide evidence of the limited role of the respondent board's attorneys.

16. In support of her contention that the superintendent lacked authority to approve the execution of the Agreement on behalf of the respondent board, the complainant also cited the superintendent's employment contract which describes his duties as:

. . . the chief executive officer of the Board. In harmony with the policies of the Board, State Laws, and State Board of Education Regulations, the Superintendent has executive authority over the school system and sole responsibility for its supervision. He has general authority to act at his discretion, subject to later approval by the Board, upon all emergency matters, and those as to which his powers and duties are not particularly set forth or limited. He attends all meetings of the Board and participates in all Board deliberations, except when matters relating to his own employment are under consideration. He advises the Board on policies and plans . . .

17. The complainant also cited the policy with respect to the superintendent adopted on October 17, 1971, and reviewed on October 21, 1993, and October 8, 2009 which states:

³ See Exhibit I – Copy of Town of Wilton's Charter at ARTICLE VIII; Elected Officials and Elections; §C-57 Board of Education; special provisions.

While the ultimate responsibilities rest with the Board, it shall be the policy in the Wilton Public Schools to differentiate as much as possible between the functions of the Board of Education, which establishes general policies for the care, management and control of the schools in the district and of the Superintendent, who serves as chief executive officer and is charged with putting such policies into effect.

The Superintendent shall have the authority to discharge those duties assigned to him/her by the Board and prescribed for him/her by the statutes of the State of Connecticut and the regulations of the State Board of Education. Where his/her duties are not definitely prescribed, he/she shall exercise his/her discretion subject to review by the Board.

The job description of the Superintendent of Schools as well as the policies approved by the Board shall provide direction to the Superintendent in the performance of his/her duties.

18. The complainant contended that the citations described in paragraphs 16 and 17, above, were offered to provide even more evidence that the superintendent is not the respondent board, or a member thereof, and the limitations of his authority.

19. The complainant also cited to the refusal of Attorney Andreanna Bellach, counsel to the respondent board, to testify, even though she was under subpoena issued by the complainant's counsel and present at the hearing. The respondents moved to quash the subpoena, and after the hearing officer declined to enforce the subpoena or rule on the motion to quash for lack of either statutory or regulatory authority to do either, Attorney Bellach left the hearing.⁴ The complainant contended that the Commission should draw a negative inference from Attorney Bellach's unwillingness to testify against her client as to whether there was a secret meeting at which the respondent board discussed and voted to authorize her to execute the Agreement on its behalf.

20. The Commission interprets the complainant's argument, described in paragraph 19, above, to mean that the Commission should draw a negative inference against the respondents for their unwillingness to call Attorney Bellach as a witness. The Commission declines to draw such an inference.

21. Nonetheless, pursuant to the court's remand order, Attorney Bellach testified at the February 4, 2020 hearing, and it is found, that as of the date of such hearing, she had no specific recollection that she attended a meeting on January 10, 2014, who was present, or what was discussed, but that, based on her review of the entries in her

⁴ The complainant was informed that the hearing officer would exercise her authority pursuant to section 1-21j-36(b) of the Commission's regulations to subpoena any witness, including Attorney Bellach, if she found that testimony from that person was necessary and relevant.

calendar for January 10, 2014, she may have attended a meeting at which the superintendent and Ken Bernard (counsel to the town of Wilton) were present, and that the topic of discussion may have been “air quality issues.”

22. As already stated in paragraph 3, above, the respondents contended that there is no record of a discussion or vote at one of its meetings to either approve the Agreement or authorize the superintendent to enter into the Agreement in the notices or the minutes of the respondent board not because there was an unnoticed or secret meeting, but rather because there was no such meeting at all.

23. It is found that the superintendent authorized Attorney Bellach to execute the Agreement on behalf of the respondent board.

24. The superintendent testified, and it is found, that he acted in his capacity as chief executive officer on behalf of the respondent board when he authorized Attorney Bellach to execute the Agreement on its behalf. The superintendent testified, and it is found, that his actions authorizing execution of the Agreement were consistent with his authority to execute agreements he has entered into with vendors, with labor unions to settle grievances, and with his authority to offer administrative and teaching positions.

25. It is concluded that, even if the superintendent did not have the authority to authorize counsel to execute the Agreement on behalf of the respondent board, that does not negate the fact that it was the superintendent who authorized the respondent board’s counsel to execute the Agreement on its behalf.

26. In addition, the respondent chairman, Bruce Likly, testified, and it is found, that the board never held a meeting, secret or otherwise, at which it discussed and/or voted on the Agreement.

27. It is found that in the same email that the complainant claimed was evidence that the respondent board conducted a secret meeting to discuss and vote to authorize the Agreement (described in paragraph 7, above), the respondent chairman informed the complainant that the superintendent, in consultation with him via telephone, had authorized the execution of the Agreement. It is found that the respondent chairman explained in that email that “by statute, as superintendent, Gary [the superintendent] served as chief executive officer of the Board of Education and, as such, he had the authority to authorize our attorneys to execute the joint defense agreement on behalf of the Board of Education, which he did.”

28. Yet, the complainant insisted on having an explanation for Attorney Bellach’s “representation” (in the form of her signature to the Agreement) that she had been “authorized” by her client – the respondent board – to enter into the Agreement as the language in that Agreement indicates. In that regard, she again requested that Attorney Bellach be subpoenaed to testify at the hearing, which request was denied by the hearing officer, and which denial (as well as other alleged errors) was appealed to the superior

court, resulting in the remand order, as set forth in the procedural history of this case, on pages 2-3, above.

29. It is found that in an effort to address the complainant's issue described in paragraph 28, above, the respondent chairman located what he described as minutes from a December 5, 2013 meeting that recorded the respondent board's appointment of the firm of Shipman & Goodman LLP "... on matters specifically educational in nature to complement the legal advice on matters of general law provided by the town counsel." It is found, however, that contrary to the respondent chairman's testimony, the statement is not found in the minutes of a meeting but rather in a memo from the superintendent to the board in which he makes that recommendation.

30. The complainant cited this error in her post-hearing brief. She also claimed that the firm of Shipman & Goodwin LLP had only been approved by the board in the years 2009, 2014, 2015 and 2016. She contended that the respondent board's minutes do not record a vote to appoint Shipman & Goodwin LLP as its legal counsel in 2010, 2011, 2012, or 2013. She contended that both facts contradict the testimony of the respondent chairman. She contended that the respondent chairman thereby committed perjury and therefore, that he lacked credibility and his testimony should not be relied upon by this Commission.

31. It is found, however, that the superintendent's recommendation described in paragraph 29, above, was related to an item of business that was noticed on the Consent Agenda for the December 5, 2013 meeting of the respondent board - specifically "Appointment: Counsel to the Board." It is found that, every year between 2009 and 2016, the consent agenda includes "Appointment: Counsel to the Board" as an item of business and that during those years the entire consent agenda was approved. It is found that the law firm of Shipman & Goodwin LLP has served as counsel to the respondent board since at least 2009. It is further found that by approving the entire consent agenda during those years, it was the intention of the respondent board to approve the items listed therein, including the appointment of counsel. It is found that, in fact, such approval had the effect of the respondent board approving the firm as its legal counsel notwithstanding whether the name of the firm appeared in any of the minutes. It is found that there was only one year in which the law firm of Shipman & Goodwin LLP was not approved via consent agenda and that was in 2010 when the board voted to remove that item from the agenda. It is found that, while there is no evidence in the record as to the exact manner in which Shipman & Goodwin LLP was approved by the respondent board to serve as its counsel in 2010, the evidence in the record supports the fact that it had served as counsel during that year and any contentions to the contrary are ineffective.

32. It is found, therefore, that all the evidence in the record of this case is consistent on the issue described in paragraphs 29 through 31, above, including the testimony of the respondent chairman at the March 31, 2017 hearing. The Commission has no reason to believe that the respondent chairman committed perjury in this matter.

33. It is found that, on or about January 10, 2014, the date on which the Agreement became effective, the First Selectman met with the superintendent, Attorney Bellach, and at least two other attorneys. It is found that issues regarding facilities and the former director of maintenance were discussed.

34. At the September 29, 2015 hearing, the complainant contended that the January 10, 2014 meeting, described in paragraph 33, above, was a secret or unnoticed meeting of the respondent board. She contended that because the superintendent could not remember whether any of the respondent board's members were in attendance or whether or not any other issues were discussed, that the respondents, therefore, failed to provide evidence to demonstrate that the respondent board did not hold a meeting on January 10, 2014, and that consequently the Commission must conclude that an unnoticed meeting of a committee of the respondent board, including but not limited to a quorum of the respondent board, was held.

35. The complainant's allegations, described in paragraph 34, above, were not fairly raised in her February 23, 2015 appeal to this Commission.

36. Nevertheless, it is found that there is absolutely no evidence in the record of this case to support a finding that the respondents, or a committee thereof, held a meeting within the meaning of §1-200(2), G.S., on January 10, 2014. It is also found that the complainant's contentions, described in paragraph 34, above, are unsupported and reflect her "grasping at straws" to find evidence of a violation.

37. Lastly, the complainant requested that the hearing officer conduct an in camera review of a certain memorandum dated February 27, 2014, contending that it might reveal when the respondent board members held the alleged secret meeting and specifically whether it was held on January 10, 2014.

38. It is found that the February 27, 2014 memorandum is an attorney-client privileged memorandum that was purportedly the basis for the Wilton Board of Education's executive session on February 27, 2014 and was the subject the complainant's appeal in Docket #FIC2014-171; Marissa Lowthert v. Bruce Likly, Chairman, Board of Education, Wilton Public Schools; and Board of Education, Wilton Public Schools.

39. Pursuant to the hearing officer's Order for Production of Records for In Camera Inspection, issued on June 9, 2017, the respondents produced the memorandum for in camera inspection on Wednesday, June 28, 2017. The records have been identified as IC-2015-147-01 through IC-2015-147-07.⁵

⁵ Pursuant to the same order, the respondents also produced additional records that were the subject of the complainant's appeal in Docket #FIC 2014-276, Marissa Lowthert v. Gary Richards, Superintendent of Schools, Wilton Public Schools; Cheryl Jensen-Gerner, Principal, Miller Driscoll School, Wilton Public Schools; and Wilton Public Schools. However, the complainant objected to the Commission's review of those records and by letter dated July 3, 2017, moved that such records be stricken from the record. Consequently, such records will not be considered herein. In addition, the complainant's motion that the in

40. It is found that, upon careful review of the in camera records identified as IC-2015-147-01 through IC-2015-147-07, there is absolutely and unequivocally no evidence therein that the respondent board met to discuss and/or voted on the Common Interest Agreement dated January 10, 2014.

41. It is found that neither the respondent board, nor a committee thereof, held a meeting within the meaning of §1-200(2), G.S., on January 10, 2014.

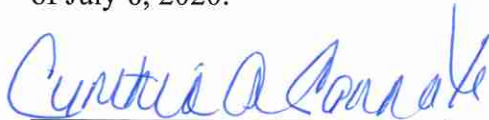
42. Based on all of the foregoing, it is found that the respondents did not violate the FOI Act as alleged by the complainant in her appeal to this Commission dated February 23, 2015.

43. Consequently, there is no basis on which to consider the complainant's request for remedies including her request for the imposition of a civil penalty.

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.

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



Cynthia A. Cannata
Acting Clerk of the Commission

camera index completed by the respondents dated June 28, 2017 be withdrawn, revised and resubmitted (included in the same July 3, 2017 letter described in paragraph 40, above) is hereby denied.

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:

MARISSA LOWTHERT, c/o Attorney Michael C. Harrington, Ford Harrison LLP, City Place II, 185 Asylum Avenue, Ste. 160, Hartford, CT 06103

BRUCE LIKLY, CHAIRMAN, BOARD OF EDUCATION, WILTON PUBLIC SCHOOLS, c/o Attorney Christopher A. Tracey, Shipman & Goodwin LLP, 300 Atlantic Street, Stamford, CT 06901; **CHRISTINE FINKELSTEIN AS MEMBER, BOARD OF EDUCATION, WILTON PUBLIC SCHOOLS; CHRIS STROUP, AS MEMBER, BOARD OF EDUCATION, WILTON PUBLIC SCHOOLS; LAURA SCHWEMM, AS MEMBER, BOARD OF EDUCATION, WILTON PUBLIC SCHOOLS; GLEN HEMMERLE, AS MEMBER, BOARD OF EDUCATION, WILTON PUBLIC SCHOOLS; LORY ROTHSTEIN, AS MEMBER, BOARD OF EDUCATION, WILTON PUBLIC SCHOOLS; WILTON PUBLIC SCHOOLS**, c/o Attorney Peter J. Murphy and Attorney Anne Littlefield, Shipman & Goodwin LLP, One Constitution Plaza, Hartford, CT 06103



Cynthia A. Cannata
Acting Clerk of the Commission