

FREEDOM OF INFORMATION COMMISSION
OF THE STATE OF CONNECTICUT

In the Matter of a Complaint by

FINAL DECISION

William Comerford,

Complainant

against

Docket #FIC 2018-0250

President, Center Street Cemetery
Association; Town of Wallingford; and
Center Street Cemetery Association,
Town of Wallingford,

Respondents

April 24, 2019

This matter was heard as a contested case on July 9, 2018, November 28, 2018, and January 15, 2019, at which times the complainant and the respondents appeared 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. It is found that, by email dated April 13, 2018, the complainant requested from the respondents the opportunity to review a copy of the agenda and minutes of the July 14, 2014, meeting of the Board of Directors of the respondent Center Street Cemetery Association (“association”); all communications, including emails, between the respondent president and corporation counsel; and all emails sent to and received from the email address “centerstcemetery@sbcglobal.net.”

2. By email to the Commission, dated and filed May 16, 2018, the complainant appealed to the Commission, alleging that the respondents violated the FOI Act by denying his request.

3. It is found that, by email dated May 17, 2018, the respondents denied the request on the ground that the association is not a public agency.

4. At the hearing in this matter, the respondents maintained their position that the association is not a public agency, or the functional equivalent of a public agency. The complainant argued that the association is the functional equivalent of a public agency.

5. Section 1-200(1), G.S., defines “public agency,” as:

(A) Any executive, administrative or legislative office of the state or any political subdivision of the state and any state or town agency, any department, institution, bureau, board, commission, authority or official of the state or of any city, town, borough, municipal corporation, school district, regional district or other district or other political subdivision of the state, including any committee of, or created by, any such office, subdivision, agency, department, institution, bureau, board, commission, authority or official, and also includes any judicial office, official, or body or committee thereof but only with respect to its or their administrative functions, and for purposes of this subparagraph, “judicial office” includes, but is not limited to, the Division of Public Defender Services; (B) Any person to the extent such person is deemed to be the functional equivalent of a public agency pursuant to law; or (C) Any “implementing agency,” as defined in section 32-222.

6. It is found that the respondents are not public agencies under §1-200(1)(A), G.S., or implementing agencies, under §1-200(1)(C), G.S.

7. With respect to whether the respondents are 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) (“Woodstock”). “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).

8. It is found that the Center Street Cemetery, located in Wallingford, Connecticut, is the free public burial ground in the town, and that burials have occurred there since 1683, and have continued through the present day, averaging about 12 burials per year. According to the cemetery’s website, graves are available to Wallingford residents at no cost. See <http://www.centerstreetcemetery.org/fees--faqs.html>. The remains of some of the town’s founders, and of soldiers who fought in the Revolutionary War, Civil War, World War I, World War II, the Korean War and Vietnam War, are buried there. The cemetery is on the National Register of Historic Places, and the association offers guided and self-guided tours of the cemetery to children and other members of the public.

9. The respondents stipulated that the association was created by resolution of the town’s board of selectmen, and approved by the citizens at a town meeting in 1911. Prior to 1911, the board of selectmen operated the cemetery, which had fallen into a state of disrepair. According to the Articles of Association, the association was created “to care for, maintain and

beautify the Center Street Cemetery in the Town of Wallingford.” The association is recognized by the Internal Revenue Service as tax exempt under Section 501(c)(13).

10. It is found that, in the same year the association was created, the association and the town entered into an agreement by which the town granted the association the right to care, control, improve and manage the interior of the cemetery, as well as the right to make rules and regulations regarding the determination of: the manner and to whom lots may be assigned; necessary fees for maintenance and upkeep of lots and monuments; fees for opening of graves; charges incident to the removal of bodies from the cemetery; the transfer of bodies from one section of the cemetery to another when such removal may be deemed advisable; the placing of flowers and shrubbery in the lots and enclosure; and the laying out of walks and driveways (“agreement”). In return, the town agreed to pay the association \$400 per year, and to not interfere with the management of the cemetery by the association or take steps to eject the association, so long as the association acted in accordance with the agreement, which requires that the cemetery be maintained in a “neat, careful, and orderly manner.”

11. Under the agreement, the town retained ownership of the land. The town also has retained responsibility for the maintenance of the wall that borders the cemetery.

12. It is found that the agreement, described in paragraph 10, above, was in effect at the time of the request, described in paragraph 1, above.¹ It is further found that, over time, the amount of funding provided by the town increased from \$400 per year, to the amount deemed necessary each year to maintain and operate the cemetery.

13. It is found that the association is governed by a Board of Directors, and that the daily activities of the cemetery are carried out by a sexton, who was hired and is employed by the association, not the town. It is found that the Board of Directors is elected by the members of the association²; the town does not have the authority to make appointments to such board.

14. The president of the association testified at the hearing in this matter that all decisions regarding the daily operation of the cemetery are made by the association’s Board of Directors, and that the town does not have veto power over any of the day-to-day decisions of the Board of Directors.

15. With regard to whether the association is the “functional equivalent” of a public agency, and specifically whether the association performs a “governmental function” for purposes of the first prong of the Woodstock analysis, the complainant argued, at the hearing in this matter, that because the association gives tours of the cemetery, and the number of burials has decreased over the years, the association’s primary function has become education, which is a governmental function. However, it is found that the cemetery is still actively conducting burials, with the number of burials fluctuating from year to year. Based upon the testimony of the association’s president, as well as other evidence in the record, it is found that the

¹ The town and the association entered into a new management agreement on January 12, 2018.

² Membership in the association is open to any person over the age of 18 who is a resident of the town of Wallingford or who is a descendent of any person buried in the Center Street Cemetery.

cemetery's primary function is performing burials and maintaining the cemetery, and that the educational component of the association's work is incidental thereto.

16. In addition, the complainant, in his post-hearing brief, argued that because the association was created as a "body politic," the association necessarily is performing a governmental function, relying on Winton Park Association v. Freedom of Information Commission, No. CV-08-4019339-S, superior court, judicial district of New Britain (October 7, 2009), and Siobhan Peng v. Neptune Park Association, Docket #FIC 2018-0397 (December 19, 2018). However, those cases did not involve an analysis or application of the "functional equivalent" test. Rather, each of the associations in those cases was found to be a "district or other political subdivision of the state," within the meaning of §1-200(1)(A), G.S., and therefore a public agency, by virtue of the fact that each was discharging limited functions of self-government granted to it by the general assembly, such as police power, the power to raise taxes, and the power to build and maintain sewers and drains within a prescribed area. The nature of these associations was not determined based on the fact that each was designated by its creators as a "body politic."

17. Finally, the complainant argued, in his post-hearing brief, that the association is performing a governmental function in its operation of the cemetery because the town previously operated the cemetery. However, the complainant cited no case law to support the assertion that if the government previously performed a particular function, then such function necessarily is a governmental function, and the Commission is aware of no such case.

18. In determining whether an entity is performing a governmental function, courts have looked to whether the function at issue is one traditionally performed by government, such as fire prevention, police protection, sanitation, public health, and parks and recreation; or one that has evolved into a governmental function, such as the prevention and treatment of family violence. See Domestic Violence Services of Greater New Haven, Inc., v. Freedom of Information Commission, 47 Conn. App. 466, 474 (1998). But in determining whether an entity is performing a "governmental function," courts also have looked to whether the government is "really involved in the core of the program;" whether the entity has the power to govern, regulate or make decisions affecting government; and whether the entity is required by law to perform the function at issue, or is merely performing the function pursuant to a contract with the government. *Id.* at 474-5.

19. In Domestic Violence, the Court concluded that, although Domestic Violence Services of Greater New Haven ("DVS"), was performing a service that had evolved into a governmental function, it further concluded that the governmental function prong of the Woodstock test was not met because DVS was not required to perform such service, but rather was doing so pursuant to a contract with the government, and because government was not "really involved in the core of the program." The court further found it relevant that DVS had no power to govern, regulate, or make decisions affecting government. *Id.* at 475.

20. Similarly in Envirotest Systems Corporation v. Freedom of Information Commission, 58 Conn. App. 753 (2000), the Court found that Envirotest Systems Corporation ("ESC") was performing a governmental function in that it was providing automobile emissions

testing which testing required by statute. However, the Court concluded that the governmental function prong of the Woodstock test was not met because ESC was providing such function pursuant to a contract with the state and “otherwise ...[had] no obligation to provide emissions inspections.” Envirotest at 759.

21. By contrast, in Woodstock, the Court concluded that Woodstock Academy was performing a governmental function in that it was fulfilling, through a statutory scheme, the constitutional mandate to provide a free public education. Woodstock at 547.

22. It is found that operation of a cemetery is not a traditional governmental function, and that operation of a cemetery has not evolved into a governmental function over time. However, even if operation of a cemetery was deemed to be a governmental function, it is found that the association is not required to perform this function, but rather, operates the cemetery pursuant to the agreement, described in paragraph 10, above. It is found that the association does not have power to govern, regulate, or make decisions affecting government.

23. Accordingly, it is found that the association is not performing a “governmental function,” for purposes of the Woodstock analysis.

24. With regard to the level of “government funding,” the parties stipulated that the association receives approximately 80 percent of its funding from the town of Wallingford. For fiscal year 2017-2018, the town appropriated \$81,375 to the association; for 2016-2017, the town appropriated \$77,750; for 2015-2016, the town appropriated \$75,000; for 2014-2015, the town appropriated \$72,204. It is found that the amount requested by the association from the town is the amount deemed necessary each year to maintain and operate the cemetery.

25. It is found that the association has received other funds from the town, including approximately \$20,000 toward the purchase of a backhoe for the association’s use in 2007. In 2014, the association received funding in the form of a grant in the amount of \$275,000 from the state of Connecticut for the construction of a garage/office, for the association’s sole use, on the property adjacent to the cemetery.

26. The courts have distinguished between funding that constitutes consideration for services provided pursuant to a contract, i.e., “fee for service,” and “a direct allotment of government funds,” and concluded that a “fee for service” arrangement pursuant to a contract is not “government funding,” for purposes of the Woodstock analysis. See Domestic Violence at 476; Envirotest at 759-760.

27. In the present case, the parties did not brief or argue this distinction and the respondents stipulated that the government funding prong of the Woodstock test is met in this case.

28. Based upon the stipulation, it is found that the association is substantially funded by government.

29. With regard to “the extent of government involvement or regulation,” the Appellate Court concluded that, in order to satisfy the government regulation prong of the functional equivalent test, the entity “must operate under direct, pervasive or continuous regulatory control.” Hallas v. Freedom of Information Commission, 18 Conn. App. 291, 296, *cert. denied*, 212 Conn. 804 (1989). In Domestic Violence, the Appellate Court further opined that if the “government does not have day-to-day involvement in the ongoing activities of the [entity, then] the third prong of the functional equivalent test is not met.” Domestic Violence at 477.

30. At the hearing in the present matter, the complainant offered evidence of some involvement by the town with the association, such as occasional assistance by the town with leaf removal from the cemetery grounds, assistance by a town employee with the creation of guidelines for the issuance of a Request for Proposal by the association, and minutes of meetings of the Board of Directors that make reference to the association’s consultation with the mayor on certain issues. The complainant also pointed to the fact that on a few occasions, the association consulted with the town’s attorney regarding certain legal questions. However, it is found that such evidence does not amount to direct, pervasive or continuous regulatory control by the town, nor does it demonstrate that the town is involved in the day-to-day activities of the association.

31. The complainant further argued that the association is significantly regulated or controlled by the town because the association is financially dependent on the town, citing Yantic Volunteer Fire Company v. Freedom of Information Commission, No. CV-40106511, superior court, judicial district of New London (October 15, 1995), *affirmed* Yantic Volunteer Fire Company v. Freedom of Information Commission, 42 Conn. App. 519 (1996). However, Yantic was decided before the Appellate Court’s decision in Domestic Violence, which requires “day-to-day” involvement. Even if the foregoing analysis in Yantic is still good law, the evidence before the court in that case demonstrated that after a dispute between the town and the fire company, the fire company’s budget was frozen and its firefighting activities were suspended by the city manager. No such evidence of control was offered in the present case.

32. Accordingly, because the government does not exercise the type of “extensive, detailed and virtually day-to-day supervision” required by the courts to satisfy the governmental involvement or regulation prong of the Woodstock test, it is found that the level of government involvement or regulation is not substantial.

33. In summary, it is found that two of the four prongs of the Woodstock test, i.e., created by government and substantial government funding, are met in this case. However, it is found that the association is not performing a “governmental function” and is not significantly controlled or regulated by government. On balance, it is concluded that the respondents are not the “functional equivalent,” of a public agency, under §1-200(1)(B), G.S.

34. Accordingly, it is concluded that the requested records, described in paragraph 1, above, are not public records, within the meaning of §§1-200(5) and 1-210(a), G.S., and that therefore, the respondents did not violate the FOI Act by withholding such records from the complainant.

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

1. The complaint is dismissed.

Approved by Order of the Freedom of Information Commission at its regular meeting of April 24, 2019.

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:

WILLIAM COMERFORD, c/o Attorney Craig C. Fishbein, 100 South Main Street, PO Box 363, Wallingford, CT 06492

PRESIDENT, CENTER STREET CEMETERY ASSOCIATION, TOWN OF WALLINGFORD; AND CENTER STREET CEMETERY ASSOCIATION, TOWN OF WALLINGFORD, c/o Attorney D. Randall DiBella, Cramer & Anderson, 51 Main Street, New Milford, CT 06776

Cynthia A. Cannata
Acting Clerk of the Commission