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FREEDOM OF INFORMATION



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Douglas Fleming and Kevin Brolin,
Complainant(s)
against

Notice of Meeting

Docket #FIC 2016-0534

President, Board of Directors, Connecticut Trees of Honor
Memorial; and Board of Directors, Connecticut Trees of Honor
Memorial,

Respondent(s)

April 4, 2017

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, April 26, 2017**. 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 April 13, 2017**. 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 April 13, 2017**. **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 April 13, 2017**, 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: Douglas Fleming and Kevin Brolin
Attorney Scott S. Orenstein

FIC# 2016-0534/Trans/wrbp/KKR/TAH/2017-04-04

FREEDOM OF INFORMATION COMMISSION
OF THE STATE OF CONNECTICUT

In the Matter of a Complaint by

Report of Hearing Officer

Douglas Fleming and Kevin Brolin,

Complainants

against

Docket #FIC 2016-0534

President, Board of Directors,
Connecticut Trees of Honor Memorial;
and Board of Directors, Connecticut
Trees of Honor Memorial,

Respondents

April 4, 2017

The above-captioned matter was heard as a contested case on October 14, 2016, December 14, 2016, and January 23, 2017, at which times the complainants 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 letter dated July 1, 2016, the complainants requested certain financial records from the respondents, such as income statements, balance sheets and reconciliation reports. In addition, it is found that, by letter dated July 5, 2016, the complainants requested copies of "the meeting minutes of any and all executive sessions from May 2014 to present," as well as "all board member notes, emails and other communications regarding executive sessions."

2. It is found that, by letter dated July 12, 2016, the respondents denied the requests, described in paragraph 1, above, on the ground that the Connecticut Trees of Honor Memorial ("CTHM") is not a "public agency," or the functional equivalent of a "public agency," under the Freedom of Information ("FOI") Act.

3. By letter dated July 19, 2016, and filed July 22, 2016, the complainants appealed to this Commission, alleging that the respondents violated the FOI Act by denying their requests.

4. 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.

5. It is concluded that the CTHM is not a “public agency,” as that term is defined in §§1-200(1)(A) and 1-200(1)(C), G.S.

6. With respect to whether CTHM 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).

7. It is found that CTHM was created as a tax exempt 501(c)(3) charitable organization by Susan Martucci, a private individual, who is a “Blue Star Mother,”¹ for the purpose of constructing a living trees memorial to honor “fallen heroes” from Connecticut, who served in the wars in Afghanistan and Iraq, and all other veterans.

8. It is found that CTHM is located in Veterans Memorial Park, a public park in Middletown, Connecticut (“city”). It is found that the city leased the parcel of land on which the memorial is located, to CTHM, in consideration of the annual sum of \$1.00, for a term of 30 years, renewable at CTHM’s option for an additional 30 years (“lease”). The lease states that the lease is intended as a partnership for the benefit of the public and entitles the city to “certain continuing rights in order to meet its continuing obligation to protect and preserve the premises as a public asset.”²

¹The Commission takes administrative notice of The Blue Star Mothers of America, Inc.’s website, which states that it is a non-partisan, non-political, non-sectarian organization of mothers, stepmothers, grandmothers, foster mothers and female legal guardians who have children serving in the military, guard or reserves, or children who are veterans. See <http://www.bluestarmothers.org/about-us>.

²“Premises” is defined in the lease as “a living trees memorial on a parcel of land in Veterans Memorial Park.”

9. It is found that the design of the memorial was subject to approval by the city. Specifically, the lease requires the city's approval of CTHM's tree selection, in addition to wetlands commission and planning and zoning approval. In addition, it is found that the city, by the terms of the lease, required CTHM to "move earth to dig out the water feature area and to build up other areas for CTHM's path and tree planting," beginning on April 15, 2014, weather permitting. The lease further required CTHM to "install the main path, hero's plaques and trees within 2 years following the date of completion of CTHM's earthwork."

10. It is found that the city has the right to "enter and inspect the premises," and that CTHM is required to "keep the premises and all areas appurtenant thereto in a neat and clutter free condition at all times and shall remove all equipment and materials when requested by the city."

11. It is found that CTHM may not assign the lease, or sublet the premises. It is found that "all permanent plantings will belong to the city at the conclusion of the lease."

12. It is found that the city requires CTHM to "secure a fund balance to cover annual tree and memorial elements' routine maintenance" and that the lease specifies the amount of such fund balance for each year of the lease.

13. It is found that, although the lease states that CTHM is required to provide "the funding, materials, and in-kind donations for the installation and routine maintenance of memorial trees, plaques, flowers, monuments, and other memorial elements in the project," it is also found that the city provided, installed and agreed to maintain, at no cost to CTHM, "a water line to the water feature and spigot;" and an "electrical system to the ceremonial plaza connecting the city's utilities in the park." It is found that the city also agreed to provide, at no cost to CTHM, upgrades to park roads and parking areas at the park, "including the area surrounding the memorial site..." and electricity and water at the memorial site. The city also agreed to install and maintain storm drains "as needed in and around the memorial site..." and to maintain the grass areas in and around the memorial site," each at no cost to CTHM.

14. It is found that the majority of the remaining site work was performed by volunteers and that CTHM accepts/receives cash donations from private individuals and businesses. It is also found that CTHM applied, and received funds, for construction of the memorial from the State of Connecticut Department of Energy and Environmental Protection ("DEEP"), under a "grant-in-aid, on a reimbursement basis" up to a maximum of \$500,000. It is found that, as of December 2016, CTHM had received approximately \$500,000 from DEEP.

15. With regard to the first of the four factors, set forth in paragraph 6, above, the Commission takes administrative notice of the following facts: most municipal governments in the state of Connecticut have a parks or a parks and recreation department responsible for maintaining the local public parks within their borders; parks located on state property in the state of Connecticut are maintained by state government under the auspices of DEEP; and the National Parks Service, within the United States Department of the Interior, establishes and maintains national parks, monuments, battlefields, military parks, historical parks, historical sites, seashores, rivers, and trails located in every state, the District of Columbia, Guam, Puerto

Rico, the Virgin Islands and American Samoa.³ Accordingly, it is concluded that establishing and maintaining parks is a governmental function.

16. With regard to the second factor, it is found that CTHM received significant funding from the government, in the form of both cash (from the state) and in-kind contributions (from the city), as described in paragraphs 8, 13 and 14, above. The complainants estimated, at the hearing in this matter, that the level of governmental funding is approximately 50 percent, an estimate not rebutted by the respondents.

17. With regard to the third factor, based upon the findings in paragraphs 8 through 13, above, it is concluded that the level of government involvement and regulation of CTHM is substantial.

18. With regard to the fourth factor, it is found that CTHM was not created by government (see paragraph 7, above).

19. Taking all four of the relevant factors into consideration, and based upon the totality of all of the evidence presented in this case, it is concluded that CTHM is the “functional equivalent” of a public agency, within the meaning of §1-200(1)(B), G.S.

20. Based upon the foregoing, it is further concluded that the requested records, described in paragraph 1, above, are public records within the meaning of §§1-200(5) and 1-210(a), G.S.

21. Section 1-200(5), G.S., provides:

“Public records or files” means any recorded data or information relating to the conduct of the public’s business prepared, owned, used, received or retained by a public agency, or to which a public agency is entitled to receive a copy by law or contract under section 1-218, whether such data or information be handwritten, typed, tape-recorded, printed, photostated, photographed or recorded by any other method.

22. Section 1-210(a), G.S., provides in relevant part that:

[e]xcept as otherwise provided by any federal law or state statute, all records maintained or kept on file by any public agency, whether or not such records are required by any law or by any rule or regulation, shall be public records and every person shall have the right to (1) inspect such records promptly during regular office or business hours or . . . (3) receive a copy of such records in accordance with section 1-212. (Emphasis added).

³ See <https://www.nps.gov/aboutus/faqs.htm> (National Parks Service website--about us).

23. Section 1-212(a), G.S., provides in relevant part that “[a]ny person applying in writing shall receive, promptly upon request, a plain, facsimile, electronic or certified copy of any public record.”

24. The respondents alternatively claimed that the requested records are exempt from disclosure pursuant to §§1-210(b)(5)(B) and 1-210(b)(10), G.S.

25. However, at the hearings in this matter, the respondents’ witness was unable to identify, with certainty, what records CTHM maintains that are responsive to the requests, described in paragraph 1, above. Accordingly, the hearing officer ordered the respondents to conduct a search for responsive records and submit a letter to the Commission, with a copy to the complainants, on or before March 6, 2017, identifying all responsive records they maintain. The Commission did not receive this letter from the respondents.

26. In addition, the hearing officer ordered the respondents to submit all responsive records claimed to be exempt from disclosure to the Commission for in camera inspection, and on March 21, 2017, the respondents submitted 233 pages of records in response to this order.

27. It is found that such records include lists of in-kind contributions, tax return “Schedule O,” banking summaries, balance sheets, checking reconciliations, PayPal transaction details, cash flow statements, and records of deposits and withdrawals. It is found that such records are responsive to the complainants’ July 1, 2016 request for financial records. It is further found that the respondents did not submit any records responsive to the complainants’ July 5, 2016, request for in camera inspection.

28. With regard to the respondents’ claim that all of the in camera records are exempt from disclosure pursuant to §1-210(b)(5)(B), G.S., that provision states that disclosure is not required of “[c]ommercial or financial information given in confidence, not required by statute.”

29. It is found that the respondents did not offer any evidence in support of their §1-210(b)(5)(B), G.S., claim of exemption.

30. After careful inspection of the in camera records, it is found that such records are “financial information.” However, it is further found that the respondents failed to prove that such information was “given in confidence,” and “not required by statute.”

31. Accordingly it is concluded that none of the in camera records are exempt from disclosure pursuant to §1-210(b)(5)(B), G.S.

32. With regard to the respondents’ claim that all of the in camera records are exempt from disclosure pursuant to §1-210(b)(10), G.S., that provision states that disclosure is not required of :

[r]ecords, tax returns, reports and statements exempted by federal law or the general statutes or communications privileged by the attorney-client relationship, marital

relationship, clergy-penitent relationship, doctor-patient relationship, therapist-patient relationship or any other privilege established by the common law or the general statutes, including any such records, tax returns, reports or communications that were created or made prior to the establishment of the applicable privilege under the common law or the general statutes.

33. The respondents failed to identify, on the index to the in camera records, which portion of §1-210(b)(10), G.S., they claimed for each such record. However, after careful inspection of the in camera records, it is found that IC 2016-0534-004 through 006 are “Schedule O” to CTHM’s tax returns for the years 2014 and 2015.

34. It is found that CTHM filed a tax return with the Internal Revenue Service (“IRS”) on Form 990 EZ for the years 2014 and 2015. It is found that Form 990 EZ specifically indicates, on the first page, in large typeface, that the return is “Open to Public Inspection.” It is found that Schedule O is a part of Form 990 EZ, and that Schedule O itself states that it is “Open to Public Inspection.” It is found that the respondents provided a copy of Form 990 EZ to the complainants for the years 2014 and 2015, but that they withheld Schedule O to each return. It is found that the complainants requested a copy of CTHM’s tax returns for 2014 and 2015 from the IRS, that the IRS provided such copy to the complainants, which included Schedule O.⁴

35. The respondents did not cite any federal law or state statute exempting the records described in paragraph 34, above, from disclosure, and it is found that they did not offer any evidence in support of their §1-210(b)(10), G.S., claim of exemption.

36. Based upon the foregoing, it is concluded that the records described in paragraph 34, above, are not exempt from disclosure pursuant to §1-210(b)(10), G.S., and that the respondents violated §§1-210(a) and 1-212(a), G.S., by withholding those records from the complainants.

37. It is also found that the respondents failed to prove that any of the remainder of the in camera records are “records...reports and statements,” exempt from disclosure pursuant to any federal law or state statute, or that such records are privileged under the common law or general statutes. At the hearing in this matter, however, the complainants indicated that they would not object to the redaction of the names of individuals identified in the records of PayPal transactions (IC 2016-0534-123 through 141).

38. Based upon the foregoing, it is concluded that the respondents violated §§1-210(a) and 1-212(a), G.S., by withholding the remainder of the in camera records from the complainants, except for the names of the individuals identified in the records of PayPal transactions.

⁴ These returns, including Schedule O, were marked as an exhibit in this matter.

39. With regard to the complainants' July 5, 2016 request, it is found that, to the extent the respondents maintain records responsive to such request, the respondents violated §§1-210(a) and 1-212(a), G.S., by withholding such records from the complainants.

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

1. Forthwith, the respondents shall provide a copy of the in camera records to the complainants, free of charge.
2. In complying with paragraph 1 of the order, the respondents may redact the names of individuals contained in the records described in paragraph 38 of the findings, above.
3. Within ten (10) days of the date of the transmittal of the final decision in this matter, the respondents shall (a) conduct a thorough search for all records responsive to the complainant's July 5, 2016 request, and (b) provide a copy of all such records they maintain to the complainants, free of charge.
4. Henceforth, the respondents shall strictly comply with the disclosure requirements in §§1-210(a) and 1-212(a), G.S.



Kathleen K. Ross
as Hearing Officer