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JUDICIAL DISTRICT OF NEW BRITAIN

DOCKET NO. HHB-CV-17-6039788-S : SUPERIOR COURT

GREENWICH EMERGENCY MEDICAL SERVICE, INC. AND EXECUTIVE DIRECTOR, GREENWICH EMERGENCY MEDICAL SERVICE, INC. : JUDICIAL DISTRICT OF NEW BRITAIN

VS. :

FREEDOM OF INFORMATION COMMISSION AND JOSEPH SOTO : JUNE 18, 2019

MEMORANDUM OF DECISION

The plaintiffs, Greenwich Emergency Medical Service, Inc. and its executive director (collectively, GEMS), appeal from the decision of the defendant Freedom of Information Commission (commission), which held that GEMS, a private nonprofit corporation, is the functional equivalent of a public agency and subject to the Freedom of Information Act (act). GEMS contends that the commission misapplied the four-factor functional equivalence test articulated in *Board of Trustees* v. *Freedom of Information Commission*, 181 Conn. 544, 436 A.2d 266 (1980), in light of subsequent decisions explaining the test. GEMS also argues that the commission's decision was procedurally defective because (1) the hearing officer took administrative notice of facts not in evidence, (2) the hearing officer's report was not signed by the officer who conducted the hearing, and (3) the commission permitted the complainant to testify at the commission's meeting without affording an opportunity for cross examination. The commission argues that its decision is consistent with the law and supported by substantial evidence, and that any procedural errors were harmless. The court disagrees with the

Electronic notice sent to all counsel of record.
Mailed to Joseph Soto (non appearing).
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agordanopoulos, Ct Officer 6/18/19

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commission's findings on the first factor in the functional equivalence test, but concludes, nevertheless, that the commission properly determined that GEMS is the functional equivalent of a public agency based on the remaining factors. The court further concludes that the alleged procedural irregularities did not materially prejudice GEMS. For the reasons discussed herein, the appeal is dismissed.

PROCEDURAL BACKGROUND

On December 8, 2016, Joseph Soto requested copies of GEMS' records pertaining to its termination of his employment. He asserted that he was requesting the records pursuant to the act. On December 19, 2016, Soto filed a complaint with the commission, alleging that GEMS had violated the act by failing to respond to his request. A contested case hearing was held on March 24, 2017. Lisa Siegel, a commission staff attorney, served as hearing officer. All parties appeared, stipulated to certain facts, and presented testimony, exhibits, and argument. GEMS argued that it was not subject to the act because it was neither a public agency nor the functional equivalent of a public agency.

On June 30, 2017, the commission issued the report of the hearing officer as its proposed final decision. The report was signed by Commissioner Matthew Streeter as the hearing officer, although Streeter had not, in fact, been present at the hearing. The commission considered the report at its meeting of August 9, 2017, at which Siegel was identified as the hearing officer who had heard the case. Siegel was present at the commission meeting and responded to

commissioners' questions about the proposed decision. GEMS' counsel and the complainant presented argument, and the commission thereafter voted unanimously to adopt the hearing officer's report as the commission's final decision.[1] This appeal followed.

THE COMMISSION'S FINDINGS AND CONCLUSION

General Statutes § 1-200 (1) provides in relevant part: "'Public agency' or 'agency' means: . . . (B) [a]ny person to the extent such person is deemed to be the functional equivalent of a public agency pursuant to law . . . ." The commission took administrative notice of two 1988 commission decisions in which GEMS had been found to be the functional equivalent of a public agency and a 1989 commission decision in which GEMS' status as the functional equivalent of a public agency was assumed without dispute.[2] The commission also took administrative notice of several other decisions in which it had held that emergency medical service providers similar to GEMS are the functional equivalents of public agencies.[3]

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[1] The administrative record e-filed in this appeal omitted the even-numbered pages of the final decision. The record is nevertheless adequate for review because it includes a complete copy of the proposed final decision, which was adopted by the commission without change. In addition, GEMS attached a copy of the final decision to its appeal.

[2] See the commission's decisions in *Rubinowitz* v. *Greenwich Emergency Medical Service*, Docket #FIC 87-188 (February 24, 1988) (holding that GEMS was subject to the public records provisions of the act); *Pisani* v. *Board of Directors of Greenwich Emergency Medical Service, Inc.*, Docket #FIC 87-199 (February 24, 1988) (holding that GEMS was subject to the open meetings provisions of the act); and *Yudain* v. *Greenwich Emergency Medical Services*, Docket #FIC 89-270 (September 13, 1989) (holding that GEMS violated the act by failing to respond to a records request).

[3] The commission cited its decisions in the following cases: *Rowen* v. *Bethlehem Ambulance Association*, Docket #FIC 2008-098 (August 27, 2008); *Marcucio* v. *Valley Emergency Medical Services, Inc.*, Docket #FIC 2004-245 (March 23, 2005); *Feins* v. *Granby Ambulance Association*, Docket #FIC

In *Board of Trustees* v. *Freedom of Information Commission*, supra, 181 Conn. 554, the Supreme Court identified the following factors to be considered in determining whether a private entity is the functional equivalent of a public agency for purposes of the act: "(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 the government." Id. The contours of the test have been further developed in subsequent decisions. "All relevant factors are to be considered cumulatively, with no single factor being essential or conclusive." (Internal quotation marks omitted.) *Connecticut Humane Society* v. *Freedom of Information Commission*, 218 Conn. 757, 761, 591 A.2d 395 (1991).

GEMS disputed its status as the functional equivalent of a public agency based on changes in its arrangement with the town since the commission's 1988 decisions and on developments in the law, including the decisions in *Domestic Violence Services of Greater New Haven, Inc.* v. *Freedom of Information Commission*, 47 Conn. App. 466, 704 A.2d 827 (1998), and *Envirotest Systems Corp.* v. *Freedom of Information Commission*, 59 Conn. App. 753, 757 A.2d 1202, cert. denied, 254 Conn. 951, 762 A.2d 900 (2000). The commission disagreed.

2000-005 (May 10, 2000); *Pelton* v. *Seymour Ambulance Association,* Docket #FIC 93-113 (October 13, 1993); *Sylvestre* v. *Griswold Ambulance Service*, Docket # FIC 92-[282] (May 26, 1993); and *Bergen and Ellis* v. *Glastonbury Volunteer Ambulance Association, Inc.*, Docket #FIC 91-059 (November 13, 1991). Not cited in the commission's decision, but applying a similar analysis, are decisions in *Karp* v. *Chief, Newington Volunteer Ambulance,* Docket #FIC 91-53 (February 26, 1992), and *Lerman* v. *Chief, Newtown Ambulance Association,* Docket # FIC 2016–0779 (April 12, 2017).

Considering the first factor in the functional equivalence test, whether a private entity performs a governmental function, the commission found that GEMS was created by the town to provide state-of-the-art emergency medical services for the town; that before GEMS was created, the town provided emergency medical services through its police and fire departments and volunteer ambulance services; that GEMS is now the town's sole provider of emergency medical services; and that the town's first selectman had issued a proclamation in 2009, declaring that GEMS performs "a vital public service."[4] Based on those facts, it found that "GEMS performs a

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[4] The following findings are set out in paragraphs 10 of the commission's final decision:

"10. With respect to whether GEMS performs a governmental function, it is found that GEMS was created by the Representative Town Meeting of Greenwich ('RTM') in 1986. It is found that the RTM voted to create GEMS as a non-profit corporation after a study by the town's consultant 'examined the existing Greenwich system and [developed] recommendations for its improvement to create a state of the art EMS service for the Town.' (Respondents' Exhibit 1: *Memorandum, February 18, 1986, from Greenwich's Director of Health and Chair of the Board of Health to Members of the RTM*). It is found that before the creation of GEMS, emergency medical services were provided by various town departments, including police and fire, and by volunteer ambulance services. . . . It is found that GEMS was created to 'contain costs, maximize resources and coordinate services' because the town's 'citizens deserve the best possible emergency care.' (Respondents' Exhibit 2, *Department of Health Special Information Packet for Representative Town Meeting, April 21, 1986*). It is found that GEMS is the sole provider of emergency services to the Town of Greenwich. It is found that the First Selectman of Greenwich and the Director of the Greenwich Department of Health serve as ex-officio members of the Board of Directors. It is found that in 2009, the First Selectman declared that GEMS 'is a vital public service.' It is found that within the parameters of the contract between the Town and GEMS, GEMS is responsible for implementing the Town's promise of 'a state of the art EMS service for the Town' in a manner that contains costs, maximizes resources, and coordinates care. The Commission takes administrative notice of a proclamation by the First Selectman in 2009, which declared GEMS to be 'a vital public service.' (http://www.greenwichct.org/upload/medialibrary/eb7/Proclamation_GEMS_Week_051709.pdf, accessed June 7, 2017)." (Footnote omitted.)

governmental function on behalf of the Town of Greenwich."

Addressing the second functional equivalence factor, the level of government funding, the commission found that GEMS received $4.5 million from the town's general fund in 2015-2016, $4.6 million in 2016-2017, and $4.7 million in 2017-2018. The commission described in detail the manner in which GEMS obtains funding from the town.[5]

The commission rejected GEMS' argument that its funding from the town is merely a fee for services provided to the town. It observed that the contract between GEMS and the town does not specify a fee for GEMS' services. Instead, it requires GEMS to make an annual budget request to the Board of Estimate and Taxation (BET) and to the Representative Town Meeting (RTM). The budget request "is subject to review and approval by the [Town] during the Town budget process, which shall be conclusive and final as to the fixed payment for the ensuing fiscal year." Moreover, if the funding allocated by the town is insufficient, the contract requires GEMS to "use best efforts to continue to provide the services required." Considering the terms of the

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[5] The following findings are set out in paragraph 12 of the commission's final decision:

"12. With respect to the level of government funding, it is found that GEMS received $4.5 million from the General Fund of the Town of Greenwich in 2015-2016; $4.6 million in 2016-2017, and $4.7 million in 2017-2018. It is found that GEMS reviews its budget request with the First Selectman and with the Chair of the RTM, and once the budget request is approved, the RTM votes whether to provide the line-item contribution as part of its budget process. It is found that the Town of Greenwich provides approximately 62% of GEMS's operating budget. It is found, in addition, that GEMS is subsidized by the government in other ways, too, such as using the police department 911 for dispatch. It is found that the Town also makes various in-kind contributions to GEMS."

contract between GEMS and the town, the commission concluded that the town's funding of GEMS was not a fee for service but an allotment of funds by the town. The commission concluded that "the level of government funding of GEMS is substantial."

Concerning the third factor, the extent of government involvement or regulation, the commission took administrative notice of General Statutes §§ 19a-175 through 19a-195, which provide for the state regulation of emergency medical services, including "licensing, certification, and public hearings; financial requirements and insurance; requirements for training, equipment, and personnel; sanctions for violations; inspection and registration of ambulances; communications systems; public education; volunteer personnel and paramedics; and regional councils." The commission found that GEMS is regulated by these statutes and by regulations adopted by the state Department of Health and the Office of Emergency Medical Services pursuant to those statutes. It also found that the town regulates GEMS' operations by contract.[6]

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[6] The following findings are set out in paragraph 19 of the commission's final decision: "[A]s set forth in the contract between GEMS and the Town of Greenwich, the town regulates GEMS's operations by regulating response times, the location of ambulance stations, and the number and type of personnel at each ambulance station, by conducting public education programs, by requiring back up ambulance units; and by specifying the services required as advanced life support or as basic life support. In addition, it is found that GEMS must comply with the directives of the Emergency Medical Services Medical Director appointed by Greenwich Hospital (approved by the Connecticut Department of Public Health as the sponsor hospital to GEMS.) GEMS is required to maintain communications with E-911 as well as any other replacement system instituted by the town. GEMS must maintain its equipment, and must perform pre-employment substance testing and random substance testing of employees. It is found that GEMS is required to make quarterly reports for financial accountability to the town. It is found that the Board of Directors appoints an Executive Director of GEMS, who is subject to performance review by the Board upon request of the town's Board of Health. It is found that the Chair of the town's Board of Health has the authority to meet with the Executive Director of GEMS to discuss the results of the performance

It concluded that the "government involvement with or regulation of GEMS is substantial."

Concerning the fourth factor, whether the entity was created by the government, the commission found that GEMS was created by government, as set forth in paragraph 10 of its final decision.

Taking all the factors into consideration, the commission found that GEMS is subject to the act because it is the functional equivalent of a public agency. It also found that GEMS violated the act by failing to provide requested records promptly. It ordered GEMS to provide the complainant, without charge, copies of any requested records he had not yet received and to comply henceforth with the requirements of General Statutes §§ 1-210 (a) and 1-212 (a).

SCOPE OF REVIEW

This appeal is reviewed pursuant to General Statutes § 4-183 of the Uniform Administrative Procedure Act (UAPA).[7] Under the UAPA, "it is [not] the function of . . . this court to retry the case or to substitute its judgment for that of the administrative agency. . . .

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review. In addition, the town requires GEMS to create and maintain records of emergency calls and complaints, and specifies more than a dozen types of information that must be collected on each call."

[7] General Statutes § 4-183 (j) establishes the scope of review. It provides in relevant part: "The court shall not substitute its judgment for that of the agency as to the weight of the evidence on questions of fact. The court shall affirm the decision of the agency unless the court finds that substantial rights of the person appealing have been prejudiced because the administrative findings, inferences, conclusions, or decisions are: (1) In violation of constitutional or statutory provisions; (2) in excess of the statutory authority of the agency; (3) made upon unlawful procedure; (4) affected by other error of law; (5) clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record; or (6) arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion."

Even for conclusions of law, the court's ultimate duty is only to decide whether, in light of the evidence, the [agency] has acted unreasonably, arbitrarily, illegally, or in abuse of its discretion." (Citation omitted; internal quotation marks omitted.) *Chairperson, Connecticut Medical Examining Board* v. *Freedom of Information Commission*, 310 Conn. 276, 281, 77 A.3d 121 (2013).

Although the courts ordinarily afford deference to the construction of a statute applied by the administrative agency empowered by law to carry out the statute's purposes, "[c]ases that present pure questions of law . . . invoke a broader standard of review than is . . . involved in deciding whether, in light of the evidence, the agency has acted unreasonably, arbitrarily, illegally or in abuse of its discretion." (Internal quotation marks omitted.) *Dept. of Public Safety* v. *Freedom of Information Commission*, 298 Conn. 703, 716, 6 A.3d 763 (2010). "[A]n agency's interpretation of a statute is accorded deference when the agency's interpretation has been formally articulated and applied for an extended period of time, and that interpretation is reasonable." (Internal quotation marks omitted.) Id., 717.

Because determining whether a private entity is a "public agency" for purposes of the act requires an interpretation of General Statutes § 1-200, that determination is a matter of law. See *Domestic Violence Services of Greater New Haven, Inc.* v. *Freedom of Information Commission*, supra, 47 Conn. App. 471. "The interpretation of statutes presents a question of law. . . . Although the factual and discretionary determinations of administrative agencies are to be given

considerable weight by the courts . . . it is for the courts, and not for administrative agencies, to expound and apply governing principles of law." (Internal quotation marks omitted.) *Connecticut Humane Society* v. *Freedom of Information Commission*, supra, 218 Conn. 761-62. When construing a statute, the court's fundamental objective is to "ascertain and give effect to the apparent intent of the legislature." (Internal quotation marks omitted.) *Commissioner of Public Safety v. Freedom of Information Commission,* 301 Conn. 323, 338, 21 A.3d 737 (2011).

DISCUSSION

In 1980, the Supreme Court construed the term "public agency" as used in the act to encompass a private entity if that entity is the functional equivalent of a public agency. *Board of Trustees* v. *Freedom of Information Commission*, supra, 218 Conn. 544.[8] The private entity at issue in *Board of Trustees* was Woodstock Academy. The academy had been created by a

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[8] In 1980, when the Supreme Court decided *Board of Trustees* v. *Freedom of Information Commission*, supra, 218 Conn. 544, General Statutes § 1-200 was numbered § 1-18a and did not contain a reference to functional equivalence. Section 1-200 (1) was amended in 2001 to provide in relevant part as follows:

> "(1) 'Public agency' or 'agency' means:
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> "(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 . . .
>
> "(B) Any person to the extent such person is deemed to be the functional equivalent of a public agency pursuant to law . . . ."

special corporate charter of the legislature. Its charter stated that its sole purpose was to operate a school for the inhabitants of the town and its vicinity. The town of Woodstock did not have a public high school. General Statutes § 10-33 requires such a town to designate a state-approved high school for its students to attend, and the town must pay the tuition of each town student attending the school.[9] Woodstock Academy was a state-approved high school pursuant to General Statutes § 10-34.[10] *Board of Trustees* v. *Freedom of Information Commission,* supra, 181 Conn. 546-47.

In determining that Woodstock Academy, although a private school, was the functional equivalent of a public agency, the Supreme Court drew upon decisions construing the federal Freedom of Information Act to articulate a four-factor test. The court recognized, as federal courts had stated, that "any general definition (of any agency) can be of only limited utility to a court confronted with one of the myriad arrangements for getting the business of government done. . . . The unavoidable fact is that each new arrangement must be examined anew and in its

[9] General Statutes § 10-33 provides: "Any local board of education which does not maintain a high school shall designate a high school approved by the State Board of Education as the school which any child may attend who has completed an elementary school course, and such board of education shall pay the tuition of such child residing with a parent or guardian in such school district and attending such high school."

[10] General Statutes § 10-34 provides: The State Board of Education may examine any incorporated or endowed high school or academy in this state and, if it appears that such school or academy meets the requirements of the State Board of Education for the approval of public high schools, said board may approve such school or academy under the provisions of this part, and any town in which a high school is not maintained shall pay the whole of the tuition fees of pupils attending such school or academy, except if it is a school under ecclesiastical control."

own context." (Internal quotation marks omitted.) Id., 554, quoting *Washington Research Project, Inc.* v. *Dept. of Health, Education & Welfare,* 504 F.2d 238 (D.C. Cir.1974), cert. denied, 421 U.S. 963, 95 S. Ct. 1951, 44 L. Ed. 2d 450 (1975). "A case by case application of the factors noted above is best suited to ensure that the general rule of disclosure underlying this state's [Freedom of Information Act] is not undermined by nominal appellations which obscure functional realities." *Board of Trustees* v. *Freedom of Information Commission*, supra, 218 Conn. 555-56.

A

On appeal, GEMS first challenges the commission's application of the functional equivalence test, arguing that the test has evolved since the commission first found that GEMS was the functional equivalent of a public agency in 1988. It cannot be disputed that the functional equivalence test has been explained in the *Connecticut Humane Society*, *Domestic Violence Services*, and *Envirotest* decisions. Those decisions, however, reiterate that each case must be examined on its own facts. In this case, the court concludes that the facts found by the commission on three of the four factors are sufficiently strong to support its ultimate conclusion that GEMS is the functional equivalent of a public agency.

The first factor in the functional equivalence test asks whether the private entity performs a governmental function. In *Board of Trustees,* of course, education was recognized as a fundamental governmental function guaranteed by the state constitution. Id., 546-47.

Subsequent cases have identified other governmental functions. "Traditionally, state and local governments have provided fire prevention, police protection, sanitation, public health, and parks and recreation in discharging their dual functions of administering the public law and furnishing public services." (Internal quotation marks omitted.) *Domestic Violence Services of Greater New Haven, Inc.* v. *Freedom of Information Commission*, supra, 47 Conn. App. 474.

The commission has long viewed the provision of emergency medical services to be a fundamental governmental function similar to police protection and fire prevention.[11] Indeed, as the record in this case reveals, emergency medical services have long been provided by police officers or firefighters in their roles as first responders providing for public safety.

The determination that emergency medical services are a governmental function, however, does not necessarily establish that the first factor in the functional equivalence test is met. In evaluating this first factor, courts have also considered (1) whether the private entity is statutorily required to perform the governmental function; (2) whether the private entity performs the governmental function pursuant to a contract; and (3) whether the private entity has the power to make decisions that bind the government. See *Connecticut Humane Society* v. *Freedom of Information Commission,* supra, 218 Conn. 764-65 (plaintiff society performed governmental function by engaging in law enforcement and other statutorily authorized activities,

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[11] Commission decisions finding an ambulance association or emergency medical association to be the functional equivalent of a public agency are cited in footnotes 2 and 3, supra.

but functional equivalence test was not satisfied because society was not required to perform such activities by statute); *Domestic Violence Services of Greater New Haven, Inc.* v. *Freedom of Information Commission*, supra, 47 Conn. App. 474-75 (first prong of functional equivalence test was not satisfied where nonprofit advocacy organization performed governmental service pursuant to contract, but was not statutorily required to do so, and had no power to govern, regulate, or make decisions that bound government agency); *Envirotest Services Corp.* v. *Freedom of Information Commission*, supra, 59 Conn. App. 758-59 (first prong of functional equivalence test was not satisfied where for-profit corporation performed governmental function pursuant to contract but was not statutorily required to do so).

In addressing the first factor of the functional equivalence test in this case, the commission did not properly apply the analysis developed in the *Domestic Violence Services* and *Envirotest* decisions. The commission considered the history of GEMS' formation, the manner in which emergency services had been provided in Greenwich before GEMS was created, and the mayor's proclamation in 2009 declaring that GEMS performs a "vital public service."[12] While those facts may be relevant, they are not dispositive of the first factor. The commission failed to consider whether GEMS is statutorily required to perform a governmental function, whether it performs the function pursuant to contract, and whether it has any power to govern or to make

[12] GEMS argues that consideration of the mayor's proclamation was improper because it was not introduced at the contested case hearing. That argument is addressed later in this decision.

decisions that bind the town.

Whether GEMS is required by statute to perform a governmental function is a close question. In *Board of Trustees* v. *Freedom of Information Commission*, supra, 218 Conn. 554-55, the court concluded that Woodstock Academy was required to provide educational services because (1) General Statutes § 10-33 required a town without a high school to designate a state-approved high school for its high school students, and (2) Woodstock Academy's charter provided that the sole purpose of the academy was to provide education for the residents of Woodstock and the vicinity. In this case, (1) General Statutes § 19a-181b requires all municipalities to provide for emergency medical services, and (2) GEMS is approved by the state as the sole provider of such services for Greenwich. Although GEMS' articles of incorporation were not introduced into evidence, its executive director testified that GEMS provides emergency medical services only for Greenwich. GEMS is essentially a single-purpose entity; that purpose is to provide emergency medical services and incidental related services for Greenwich. While it also contracts with Greenwich Hospital to provide an EMS coordinator to assist the hospital's medical director in carrying out certain duties that are required of sponsor hospitals by the regulations governing "mobile intensive care services," the hospital contract is necessarily related to GEMS' role as the sole provider of emergency medical services for Greenwich.

The relationship of GEMS to the town of Greenwich is thus quite similar to that of Woodstock Academy to the town of Woodstock. But there are other issues to consider regarding

the first prong of the test. GEMS provides its services to the town pursuant to a contract that attempts to make GEMS independent from the town, at least in some respects, and to insulate the town from liability for GEMS' actions or employees. And, although GEMS might be said to administer the town's emergency medical services program, it does so in a manner that is closely regulated by state laws and regulations and by its contract with the town. It does not have the power to govern or to make decisions that bind the town.

Under the Appellate Court's decision in *Domestic Violence Services of Greater New Haven, Inc.* v. *Freedom of Information Commission*, 47 Conn. App. 475, the first factor of the functional equivalence test is not satisfied if a private entity lacks the power to govern, to regulate, or to make decisions that bind the government. Consequently, the first factor is not satisfied in this case. Failure to satisfy the first factor, however, does not preclude a finding that GEMS is the functional equivalent of a public agency. See *Meri-Weather, Inc.* v. *Freedom of Information Commission*, 47 Conn. Supp. 113, 120, 78 A.2d 1038 (2000), affirmed, 63 Conn. App. 695, 778 A.2d 1006 (2001) (entity that did not satisfy first and second factors nevertheless found to be functional equivalent of public agency because third and fourth factors were satisfied).

The second factor in the functional equivalence test examines the level of government funding. As to this factor, the commission found that the town provided $4.5 million from its general fund in 2015-2016, $4.6 million in 2016-2017, and $4.7 million in 2017-2018. The

commission further found that these payments constituted approximately 62 percent of GEMS' operating budget.[13] The commission found that GEMS is also subsidized by the town in other ways, including use of the police department's 911 service for dispatch.

In finding that the second factor was satisfied, the commission relied on both the amount of funds GEMS receives from the town and the *manner* in which GEMS obtains those funds. In so doing, it applied the analysis suggested in *Envirotest Services Corp.* v. *Freedom of Information Commission*, supra, 59 Conn. App. 759, where the court concluded that "the amount of money received by the plaintiff reflects the amount of business done pursuant to the contract *and not an allotment of government funds*." (Emphasis added.) Drawing on the distinction between payments that simply reflect "the amount of business done pursuant to the contract" and payments that constitute "an allotment of government funds," the commission concluded that, under the GEMS' contract with the town, funds are appropriated for GEMS that are not strictly tied to the volume of business GEMS does.

GEMS argues, to the contrary, that its funding from the town is consideration for the services it provides under the contract. Those services include emergency medical services, standby service at public events, and training and education programs. GEMS is also required to assist town departments such as planning and zoning, traffic engineering, the board of education,

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[13] Other sources of funding for GEMS include, inter alia, fees paid by patients or their insurers, fees received from Greenwich Hospital pursuant to a contract, and private fund-raising efforts.

parks and recreation, and to assist community service organizations and nursing homes.

GEMS' argument is not wholly without merit. Under the agreement, GEMS agrees to "provide services" "in consideration of the mutual covenants and conditions" contained in the agreement. However, GEMS does not address the distinction made in *Envirotest* between compensation for the "amount of business that is done pursuant to the contract" and "an allotment of government funds." See *Envirotest Systems Corp.* v. *Freedom of Information Commission*, supra, 59 Conn. App. 759. In *Envirotest*, the trial court analyzed the second factor of the functional equivalence test in light of *Lombardo* v. *Handler*, a federal decision concerning the National Academy of Sciences. See *Lombardo* v. *Handler*, 397 F. Supp. 792, 794-95 (D.D.C. 1975), affirmed, 546 F.3d 1043 (D.C. Cir. 1976), cert. denied, 431 U.S. 932, 97 S. Ct. 2639, 53 L. Ed. 2d 248 (1977). In *Envirotest*, the trial court observed an important distinction *Lombardo*: "The Academy does not receive. . . . government appropriations. Rather, its relations with the government are of a contractual nature. . . . The fact that the Academy receives a great deal of federal money each year through government contracts may show that the Academy depends upon the government for most of its business but does not indicate that the Academy has 'agency' status." (Internal quotation marks omitted.) *Envirotest Systems Corp.* v. *Freedom of Information Commission*, Superior Court, Judicial District of New Britain, Docket No.98-049268 S, 24 Conn. L. Rptr. 511 (May 18, 1999, McWeeny, J.), quoting *Lombardo* v. *Handler*, supra, 397 F. Supp. 794-95.

In *Envirotest*, the trial court considered the financial arrangement between the state and the private contractor. It observed that "all money collected by the plaintiff for performing the state's emissions testing is deposited into a state fund. The plaintiff submits a bill to the state and is then paid, either biweekly or monthly, $14 dollars for every emission test performed. Accordingly, the amount of money the plaintiff receives reflects the amount of business the plaintiff does with the government pursuant to a contract, and is not a direct allotment of government funds." *Envirotest Systems Corp.* v. *Freedom of Information Commission*, supra, 24 Conn. L. Rptr. 513. The Appellate Court agreed with the trial court's application of *Lombardo* and its analysis of the facts in that case. See *Envirotest Systems Corp.* v. *Freedom of Information Commission*, supra, 59 Conn. App. 759.

In this case, GEMS receives funds from the town as consideration for services rendered, but GEMS' contract with the town does not specify a fee for the services GEMS provides; instead, it requires GEMS to present an annual budget request to fund its operations to the extent that revenues from other sources are insufficient to do so. Its budget request is based on detailed quarterly financial reports that detail all revenues received, charitable donations, actual versus budgeted expenses, operating statistics including the number of emergency calls dispatched and the response times, and staffing statistics. GEMS' annual budget request, based on these reports, must be provided to the town's board of health, the BET and its budget committee, and the RTM.

According to its contract with the town, GEMS' budget request "is subject to review and

approval by the [Town] during the Town budget process, which shall be conclusive and final as to the fixed payment for the ensuing fiscal year." If the funding allocated by the town is insufficient, the contract nevertheless requires GEMS to "use best efforts to continue to provide the services required." The annual payment to GEMS is "subject to appropriation by the BET and the RTM. There shall be no obligations for additional payments by the Town except as are expressly approved by adequate appropriation by all required Town boards and commissions including appropriation by the RTM." If, at the end of a fiscal year, there is a surplus of operating revenues over operating expenses, any surplus beyond that needed for imminent capital expenditures or for an endowment fund must be credited against the next year's budget or, if the agreement is terminated before such a credit is used, must be repaid to the town.

In light of these terms, the commission concluded that the budgetary process set out in the contract between GEMS and the town is not a fee for services but an "allotment of government funds." While the rationale for *Envirotest*'s distinction between a "fee for service" arrangement and an "allotment of government funds" is not set out in that case – or, indeed, in *Lombardo*, on which the *Envirotest* courts relied – the commission's consideration of the budgetary process was a reasonable effort to interpret and apply the *Envirotest* distinction. As the commission argues, the budgetary process between GEMS and the town closely resembles the process by which a town department obtains budgetary funding. The court concludes that the town annually appropriates funds based on the town's determination of the amount of funding GEMS needs to

maintain its operations. The commission properly applied the second factor of the functional equivalence test.

Even if the commission's decision as to both the first and second factors were erroneous, moreover, its ultimate conclusion that GEMS is the functional equivalent of a public agency would still be justified. "The key to determining whether an entity is a government agency or merely a contractor with the government is whether the government is really involved with the core of the program." (Internal quotation marks omitted.) *Domestic Violence Services of Greater New Haven, Inc.* v. *Freedom of Information Commission*, supra, 47 Conn. App. 475. The commission's findings as to the third and fourth factors of the functional equivalence test are amply supported by law and by substantial evidence. Those findings establish that the government – at both state and local levels – is really involved with the core of GEMS' program.

The third factor examines the extent of government involvement with and regulation of the private entity. "[T]o satisfy the regulation prong of the test, the entity must operate under direct, pervasive or continuous regulatory control." (Internal quotation marks omitted.) *Envirotest Services Corp.* v. *Freedom of Information Commission*, supra, 59 Conn. App. 761. The degree of governmental control of an entity's detailed physical performance is also significant. Id.; see also *Domestic Violence Services of Greater New Haven, Inc.* v. *Freedom of Information Commission*, supra, 47 Conn. App. 478. "[T]he regulation prong of the test does not pertain to the general regulation of a profession but rather, applies to specific government

regulation of the function of the agency." *Hallas* v. *Freedom of Information Commission*, 18 Conn. App. 291, 295, 557 A.2d 568, cert. denied, 212 Conn. 804, 561 A.2d 945 (1989), disapproved on other grounds, *Connecticut Humane Society* v. *Freedom of Information Commission*, supra, 218 Conn. 760-61. In considering whether a private entity was a public agency for purposes of the federal Freedom of Information Act, the Supreme Court has distinguished between "substantial federal supervision of the private activities" and "the exercise of regulatory authority necessary to assure compliance with the goals of [a] federal grant." *Forsham* v. *Harris*, 445 U.S. 169, 180 n. 11, 100 S. Ct. 977, 63 L. Ed. 2d 293 (1980).

GEMS argues that the third factor is not satisfied. It acknowledges that its employees are required to comply with state statutes and regulations, but argues that such regulation is merely the regulation of a profession and therefore insufficient to satisfy the functional equivalence test. It further argues that the detailed performance requirements in GEMS' contract with the town do not constitute "regulation" by the town but are matters that are negotiated between the parties. It argues that the fact that it is a private entity whose employees are not government employees is highly significant. Finally, it points to the following provision in its contract with the town: "PROVIDER shall at all times be deemed to be an independent contractor and shall be wholly responsible for the manner in which it performs the services required of it by the terms of this Agreement. Nothing herein contained shall be construed as creating the relationship of employer and employee or principal and agent, between the TOWN, its agencies, employees, agents and

PROVIDER, its employees and agents." GEMS argues that this provision undermines "any notion" that GEMS is subject to "direct, pervasive or continuous regulatory control." The court is not persuaded.

The commission took administrative notice of General Statutes §§ 19a-175 through 19a-195, which regulate the provision of emergency medical services. It found that GEMS was regulated by these statutes as well as by regulations promulgated by the state Department of Health and its Office of Emergency Services (OEMS). It further found that the contract between GEMS and the town regulates "response times, the location of ambulance stations, and the number and type of personnel at each ambulance station . . . ." It cited other detailed requirements of the contract, discussed below.

The commission's findings appropriately recognize the extensive statutory and regulatory schemes governing the provision of emergency medical services. The legislature has charged the commissioner of public health with responsibility for adopting a statewide plan for "the coordinated delivery of emergency medical services." General Statutes § 19a-177 (1). Among other things, § 19a-177 requires the commissioner to:

- license or certify ambulance operations, ambulance drivers, emergency medical services personnel, communications facilities, and transportation equipment;
- adopt regulations establishing standards for emergency communications systems, including equipment, radio frequencies, and operational procedures; the regulation of transportation, including vehicle type, design, condition, and maintenance;

- adopt regulations establishing training standards for emergency medical services personnel;
- establish emergency service rates for certified ambulance services;
- establish primary service areas and assign a primary service area responder for each primary service area;
- revoke primary service area assignments if in the best interests of patients to do so;
- set minimum equipment requirements for ambulances.

Pursuant to General Statutes § 19a-180 (a), no person can operate any ambulance service in Connecticut without a license or certificate issued by the commissioner of public health. An applicant for a license must provide proof that it meets standards established by the commissioner as to training, equipment, and personnel. It must also provide proof of financial responsibility and liability insurance as required by statute or regulation.

Licensed emergency medical services must ensure that their personnel are appropriately licensed and that licensure is maintained. They must also secure and maintain appropriate medical oversight by a sponsor hospital. General Statutes § 19a-180 (f). Ambulances must meet safety and equipment standards and must be inspected on a regular schedule. General Statutes § 19a-181. Ambulances must be staffed in accordance with regulations established pursuant to General Statutes § 19a-195. Even the order of precedence for control and medical decision-making at the scene of an emergency call is set by General Statutes §§ 19a-180c and 19a-180d.[14]

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[14] General Statutes § 19a-180c (b) provides: "If a primary service area responder and a supplemental first responder are both on the scene of an emergency medical call, the primary service area

General Statutes § 19a-181b (a) requires each municipality to establish a local emergency medical services plan.[15] Such a plan includes the contract between the municipality and its

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responder shall control and direct emergency activities at such scene."

General Statutes § 19a-180d provides in relevant part: "A provider, as defined in section 19a-175, who holds the highest classification of licensure or certification from the Department of Public Health under this chapter and chapter 384d1 shall be responsible for making decisions concerning patient care on the scene of an emergency medical call. If two or more providers on such scene hold the same licensure or certification classification, the provider for the primary service area responder, as defined in said section, shall be responsible for making such decisions. If all providers on such scene are emergency medical technicians or emergency medical responders, as defined in said section, the emergency medical service organization providing transportation services shall be responsible for making such decisions. A provider on the scene of an emergency medical call who has undertaken decision-making responsibility for patient care shall transfer patient care to a provider with a higher classification of licensure or certification upon such provider's arrival on the scene. All providers with patient care responsibilities on the scene shall ensure such transfer takes place in a timely and orderly manner. For purposes of this section, the classification of licensure or certification from highest to lowest is: Paramedic, advanced emergency medical technician, emergency medical technician and emergency medical responder. Nothing in this section shall be construed to limit the authority of a fire chief or fire officer-in-charge under section 7-313e to control and direct emergency activities at the scene of an emergency."

[15] General Statutes § 19a-181b provides in relevant part as follows: "(a) Each municipality shall establish a local emergency medical services plan. Such plan shall include the written agreements or contracts developed between the municipality, its emergency medical services providers and the public safety answering point, as defined in section 28-25, that covers the municipality. The plan shall also include, but not be limited to, the following:

"(1) The identification of levels of emergency medical services, including, but not limited to: (A) The public safety answering point responsible for receiving emergency calls and notifying and assigning the appropriate provider to a call for emergency medical services; (B) the emergency medical services provider that is notified for initial response; (C) basic ambulance service; (D) advanced life support level; and (E) mutual aid call arrangements;

"(2) The name of the person or entity responsible for carrying out each level of emergency medical services that the plan identifies;

"(3) The establishment of performance standards, including, but not limited to, standards for responding to a certain percentage of initial response notifications, response times, quality assurance and service area coverage patterns, for each segment of the municipality's emergency medical services system . . . ."

emergency medical services provider. The plan must contain specific elements, must be updated not less than every five years, and must be submitted to OEMS for review.

The contract between GEMS and the town, which is a statutory element of the town's emergency services plan, sets performance standards that govern GEMS' day-to-day performance of its duties. These standards include but are not limited to response times, the location and staffing of ambulances, the availability of backup ambulances, the requirement of independent medical supervision, and the type of communications systems to be used. Approval of the town's director of health is required to relocate an ambulance station.

Pursuant to the statutes governing emergency medical services, the Department of Public Health has promulgated regulations concerning such services. See Regs., Conn. State Agencies § 19a-179-1 through § 19a-179-21. Pursuant to § 19a-179-4 of the regulations,[16] OEMS must assign a primary area service responder for all municipalities in the state. GEMS' contract with the town states that GEMS is "solely responsible for providing designated response services, at the mobile intensive care-paramedic level ("MIC-P") for the primary service area." The contract incorporates the definitions of technical terms and abbreviations used in chapter 368d of the

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[16] Section 19a-179-4 of the regulations provides in relevant part as follows: "(a) OEMS shall assign, in writing, a primary service area responder for each primary service area. All municipalities within the State of Connecticut shall be covered by said assignments. Primary service area responders shall be either licensed or certified by OEMS pursuant to C.G.S. Sec. 19a-180. An express condition of licensure or certification as an emergency medical service provider shall be the availability and willingness of the emergency medical service provider to properly carry out any PSAR assignment made by OEMS pursuant to this section of these regulations."

General Statutes and § 19a-179-1 et seq. of the regulations. Mobile intensive care services (MICS) are defined in § 19a-179-1 of the regulations[17] and addressed in numerous other regulations, including but not limited to §§ 19a-179-10, 19a-179-12, and 19a-179-18.[18] GEMS is required by law and by contract to comply with all statutes and regulations governing the provision of such services.

The fact that GEMS' employees are not town employees is a fact to be considered, but it is not dispositive. GEMS' contract with the town gives the chairman of the town's board of health the ability to call for a performance review of GEMS' executive director. The director of health and the chairman of the board of health may discuss the performance review with the executive director. This provision indicates that the town has the ability to exercise some degree

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[17] " 'Mobile Intensive Care Service' means the organized provision of intensive, complex prehospital care, consistent with acceptable emergency medical practices, utilizing qualified personnel supervised by physicians and hospitals as part of a written emergency medical services agreement with the mobile intensive care provider." Regs., Conn. State Agencies § 19a-179-1 (t).

[18] Section 19a-179-10 of the regulations categorizes levels of emergency medical services, from "first responder" to "mobile intensive care-paramedic," and regulates staffing for each level of service. It also regulates "invalid coaches" that provide non-emergency transportation for medical purposes. Section 19a-179-12 sets out requirements for establishing a mobile intensive care service (MICS). Section 19a-179-12 (a) sets out requirements for approving a sponsor hospital, which must be appropriately licensed, must have a two-way radio communications systems capable of providing prehospital medical direction, and must appoint a mobile intensive care (MIC) medical director to assure appropriate medical control of MIC personnel. Section 19a-179-12 (b) regulates the provision of patient treatment by MIC units, identifying the treatments that emergency medical technicians at various licensure levels are authorized to provide. All such treatment is authorized only "under medical control." Section 19a-179-18 regulates technical specifications for MICS ambulances and the equipment they must carry. Ambulances are inspected regularly and may be taken out of service if they fail inspection.

of influence over GEMS' personnel matters.

GEMS argues that its contract with the town makes it clear that GEMS is an independent contractor, responsible for its own actions, and not an agent of the town. It asserts that the town wanted to avoid liability for GEMS' services and requires GEMS to obtain insurance and to indemnify the town. These facts, however, do not diminish the close relationship between GEMS and the town. That close relationship is reflected in numerous provisions in the town's contract with GEMS, only a few of which are cited here. For example, it is evident from the contract that the town's director of health has an oversight role. GEMS cannot relocate an ambulance station without the director's approval. GEMS cannot make material changes in the staffing of ambulance stations, the number of ambulance stations, or the number of ambulances located at each ambulance station without written approval in advance from the town's board of health and the first selectman. GEMS must meet with the director as often as reasonably requested to discuss medical quality control issues. GEMS must notify the director of nominees to GEMS' board of directors, and the director may submit names of additional candidates. The town's first selectman and director of health are ex officio members of GEMS' board of directors. Although they have no vote as ex officio members, it is evident from their role in the budget-setting process that they have significant influence over GEMS' budget and operations. Finally, if the contract is terminated, GEMS is obligated to donate its ambulances and equipment to another tax-exempt organization designated by the town.

Bearing in mind that each case must be judged on its own facts, the court concludes that the third factor in the functional equivalence test is met by the extensive regulation of GEMS' day-to-day activities by state statutes and regulations and by its contract with the town. It is not just "the exercise of regulatory authority necessary to assure compliance" with the goals of a grant of money; see *Forsham* v. *Harris*, supra, 445 U.S. 180 n.11; but comprehensive regulation of the core of GEMS' activities, the provision of emergency medical services.[19] The commission did not improperly apply the third factor of the functional equivalence test.

The fourth factor in the functional equivalence test considers whether the private entity was created by government. In this case, the commission found that GEMS was created by the town. GEMS disputes that finding, arguing that it was incorporated by private individuals as a nonprofit § 501 (c) (3) corporation. GEMS' argument is unpersuasive because the exhibits that GEMS itself submitted into evidence document the town's central role in GEMS' creation. Indeed, Respondent's Exhibit 4, the EMS Coordinator Services Agreement between GEMS and Greenwich Hospital, recites that "GEMS was formed in 1986 by Greenwich Hospital and the

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[19] The degree of regulation is at least as great as that described in *Board of Trustees* v. *Freedom of Information Commission*, supra, 181 Conn. 554-55, where the court observed that Woodstock Academy "has its operations examined and certified by the state board of education so as to be eligible for tuition fees by local towns and for other statutory benefits." Here, GEMS' operations must be examined and certified by the commissioner of public health so as to be eligible for assignment as the primary service area responder for the town's emergency medical services. Its certification makes it eligible to be assigned as a primary service area responder; General Statutes § 19a-180 (a); and to receive state grants for enhancing emergency medical services and equipment; General Statutes § 19a-178b and Regs., Conn. State Agencies § 19a-178b-3.

town of Greenwich to provide paramedic services to the Greenwich community as a Mobile Intensive Care Unit."

The history of GEMS' formation is set out in the testimony of GEMS' executive director and in Respondent's Exhibits 1 and 2, documents that were prepared when the town was considering whether to provide funds for an advanced life support emergency services system.

Before 1986, Greenwich's emergency medical system was fragmented between several volunteer companies and the paid fire and police departments; patients were sometimes transported in the back of police cars or in station wagons belonging to the "Back Country Ladies." Only basic life support services were provided; skills were limited; and response times averaged twenty-five to forty minutes. Beginning in the 1970s, the town's board of health expressed concerns about the town's limited capabilities. In 1980, a study of the existing system was conducted and recommendations were made. Between 1980 and 1986, the board of health worked to strengthen existing basic life support capabilities and to create an advanced life support team with paramedics. In 1984, the town funded a new position of EMS Administrative Director, and several committees were appointed to develop plans for a new system. In 1985, a proposed plan was presented to the town's BET and RTM. It called for the creation of a nonprofit corporation to consolidate the existing town services under an executive director and to be funded by third party reimbursement (patient revenues), town funds, a contribution from Greenwich Hospital, and private fund-raising. The town's board of health was integrally involved

in the planning for the creation of the new system. According to the executive director's testimony, the chairman of the board health selected the initial members of GEMS' board of directors. Although the record does not include the final vote of the RTM approving the proposal, the exhibits detailing the process by which GEMS was planned and the subsequent agreement between GEMS and Greenwich Hospital, taken together, confirm that GEMS was effectively created by the town in cooperation with the sponsor hospital.

When GEMS was created, the town's EMS Administrative Director, Charlee Tufts, became GEMS' executive director and continued to hold that position up through the hearing before the commission in 2017. Although she became an employee of GEMS after it was established, Tufts was engaged by the town when she directed the planning that led to GEMS' creation.[20] It is undisputed, moreover, that GEMS exists to serve Greenwich; it does not supply emergency medical services to other municipalities except incidentally through mutual aid agreements. This fact is an outgrowth of GEMS' creation through the planning and advocacy of the town's director of health and board of health.

To summarize, the court concludes that the first factor of the functional equivalence test

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[20] Tufts, a registered nurse who was hired as the town's EMS Administrative Director in 1984, testified at the contested case hearing that she was engaged in that position as a "consultant" whose office was at Greenwich Hospital. Documents in the record, however, indicated that in 1984, the BET and the RTM approved a budget request "to fund the new position of EMS Administrative Director" and that Tufts was appointed to this position in August, 1984. Respondents' Exhibit 1 includes a memorandum from Tufts to the BET in February 1986 that was printed on the letterhead of the Town of Greenwich Department of Health.

is not satisfied because GEMS has no power to govern, regulate, or make decisions affecting government. The second, third, and fourth factors are satisfied because GEMS is substantially funded by government appropriations; its day-to-day operations are pervasively regulated by state statutes and regulations and its contract with the town; and it was created by the town.

Considering all relevant factors cumulatively, the court concludes that GEMS is the functional equivalent of a public agency as that term has been interpreted by the courts. See *Connecticut Humane Society* v. *Freedom of Information Commission*, supra, 218 Conn. 761 (holding that no single factor is essential or conclusive); see also *Meri-Weather, Inc.* v. *Freedom of Information Commission*, supra, 47 Conn. Supp. 120 (holding that private nonprofit corporation was the functional equivalent of a public agency where two of four factors were satisfied, giving weight to the factor of government involvement). As substantial evidence in the record demonstrates, both state and local governments are "really involved" in the core of GEMS' activities – a fact that the courts have regarded as key to the functional equivalence determination.

B

GEMS raises two additional claims that may be addressed more briefly. It claims that the commission violated GEMS' right to fundamental fairness in the administrative process, and it claims that policy considerations weigh in favor of GEMS' position that it is not the functional equivalent of a public agency.

GEMS argues that the following irregularities deprived it of fundamental fairness: (1) without giving notice to GEMS during the contested case hearing, the hearing officer took administrative notice of a proclamation by GEMS' first selectman declaring that GEMS performs a "vital public service," (2) the proposed final decision was not signed by the officer who presided over the hearing but by a commissioner who was not present for the hearing; and (3) the commission allowed the complainant to testify at the commission meeting without affording GEMS an opportunity to cross-examine him or rebut his testimony. To prevail on this claim, GEMS must show that it was prejudiced by the alleged irregularities. It is axiomatic that "[n]ot all procedural irregularities require a reviewing court to set aside an administrative decision; material prejudice to the complaining party must be shown." (Internal quotation marks omitted.) *Goldstar Medical Services, Inc. v. Dept. of Social Services,* 288 Conn. 790, 828, 955 A.2d 15 (2008); see also *Lucarelli* v. *Freedom of Information Commission,* 135 Conn. App. 807, 817-18, 43 A.3d 237 (2012). GEMS has not shown such prejudice.

As to the issue of administrative notice: General Statutes § 4-178 (6) permits an administrative agency to take notice of "judicially cognizable facts," and § 4-178 (7) provides that parties "shall be notified in a timely manner of any material noticed" and "shall be afforded an opportunity to contest the material so noticed . . . ." Even if the court assumes that the hearing officer should have advised the parties, during the hearing, that she would consider the proclamation, to allow GEMS an opportunity to explain or refute it, the court concludes that no

prejudice has been shown. At the commission meeting when the report was under consideration, GEMS' counsel objected to the administrative notice of the proclamation, but he simultaneously acknowledged that "all emergency medical service providers . . . provide a vital public service." Moreover, the statutory and regulatory provisions cited in the hearing officer's report demonstrate that the legislature deems emergency medical services to be a vital public service. Consideration of the proclamation was at most cumulative, and its premise was undisputed.

GEMS also argues that its rights were prejudiced when the hearing officer's report was mistakenly signed by a commissioner who had not been present at or presided over the hearing. The mistake is unexplained. Nevertheless, GEMS did not raise it as an issue before the commission. If GEMS had objected to the improper signing of the hearing officer's report at or before the commission meeting when the report was to be considered, the error could have been corrected, or the matter could have been postponed to allow the hearing officer to issue a properly signed report. Having failed to raise the issue with the commission, GEMS is precluded from asserting it as an error on appeal. See *Solomon* v. *Connecticut Medical Examining Board*, 85 Conn. App. 854, 862, 859 A.2d 932 (2004), cert. denied, 273 Conn. 906, 868 A.2d 748 (2005).

Moreover, although GEMS did not challenge the erroneous signature on the hearing officer's report, a commissioner did ask who had conducted the hearing. Siegel was identified as the hearing officer, and another commissioner then asked Siegel for help regarding GEMS' claim

that the report contained factual inaccuracies. Siegel cited the exhibits she had relied upon for the facts found in the hearing officer's report and repeatedly affirmed her comfort with her findings. Because Siegel affirmed that the decision was hers before the commission voted on the proposed decision, GEMS has not shown that it was prejudiced by the mistaken signature.

Similarly, GEMS has not shown that it was prejudiced in any way by the statements the complainant made at the commission meeting. Most of the complainant's comments drew on evidence already in the record and should be viewed as argument rather than testimony. To the extent that the complainant's comments strayed beyond the record, nothing before the court indicates that the commission was improperly influenced by such comments. After allowing the complainant's comments, the commission approved the hearing officer's report without any changes. The commission did not violate GEMS' rights in affording some latitude to the complainant, who was self-represented.

Finally, GEMS argues that public policy favors finding that it is not the functional equivalent of a public agency. It argues that its employees, as private sector employees, have an expectation of privacy regarding their personnel records that differs from that of public sector employees. As to private sector employees, the Personnel Files Act generally requires an employee's express written consent for the disclosure of personally identifiable information from

that employee's personnel file. See General Statutes § 31-128f.[21] The Freedom of Information Act, by contrast, generally requires the disclosure of public records, including personnel records, to any person upon request; it exempts the personnel records of public employees from disclosure only if the disclosure would constitute an invasion of personal privacy. See General Statutes §§ 1-210 (a), 1-210 (b) (2).[22] The "invasion of personal privacy" exemption has been narrowly construed to apply "only when the information sought by a request does not pertain to legitimate matters of public concern and is highly offensive to a reasonable person." *Perkins* v. *Freedom*

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[21] General Statutes § 31-128f provides: "No individually identifiable information contained in the personnel file or medical records of any employee shall be disclosed by an employer to any person or entity not employed by or affiliated with the employer without the written authorization of such employee except where the information is limited to the verification of dates of employment and the employee's title or position and wage or salary or where the disclosure is made: (1) To a third party that maintains or prepares employment records or performs other employment-related services for the employer; (2) pursuant to a lawfully issued administrative summons or judicial order, including a search warrant or subpoena, or in response to a government audit or the investigation or defense of personnel-related complaints against the employer; (3) pursuant to a request by a law enforcement agency for an employee's home address and dates of his attendance at work; (4) in response to an apparent medical emergency or to apprise the employee's physician of a medical condition of which the employee may not be aware; (5) to comply with federal, state or local laws or regulations; or (6) where the information is disseminated pursuant to the terms of a collective bargaining agreement. Where such authorization involves medical records the employer shall inform the concerned employee of his or his physician's right of inspection and correction, his right to withhold authorization, and the effect of any withholding of such authorization upon such employee."

[22] General Statutes § 1-210 (a) provides in relevant part: "Except as otherwise provided by federal law or state statute, all records maintained or kept on file by any public agency . . . shall be public records and every person shall have the right to (1) inspect such records promptly during regular office or business hours, (2) copy such records in accordance with subsection (g) of section 1-212, or (3) receive a copy of such records in accordance with section 1-212. . . ." General Statutes § 1-210 (b) provides in relevant part: "Nothing in the Freedom of Information Act shall be construed to require the disclosure of: . . . (2) Personnel or medical files and similar files the disclosure of which would constitute an invasion of personal privacy."

of Information Commission, 228 Conn. 158, 175, 635 A.2d 783 (1993).

There is a gray area concerning the rights of employees of a private entity that is the functional equivalent of a public agency. Although General Statutes § 31-128f generally requires the written consent of a private sector employee for disclosure of that employee's personnel file, it is subject to exceptions. General Statutes § 31-128f (5) permits the nonconsensual disclosure of such a file "to comply with federal, state or local laws or regulations." It is fairly debatable as to whether that exception would apply to a request for personnel records of a private employer that has been found to be the functional equivalent of a public agency under the state Freedom of Information Act. Similarly, the disclosure mandate of General Statutes § 1-210 (a) applies "[e]xcept as otherwise provided by federal law or state statute." It could be argued that the prohibition of § 31-128f come within the "otherwise provided by . . . state statute" exception to disclosure under § 1-210 (a).

But this gray area of public policy has no bearing on this case. The complainant, a former GEMS employee, requested copies of records relating to the termination of his own employment with GEMS. General Statutes § 31-128b (c) requires a private sector employer to provide any employee or former employee "with a copy of any documentation of any disciplinary action imposed on that employee not more than one business day after the date of imposing such action." GEMS does not dispute that the complainant was entitled to records concerning his own termination; it merely argues that it may be presented with a dilemma if a request is made for

personnel records by someone other than the employee whose records are requested. In the circumstances of this case, however, it is unnecessary to consider whether the policies expressed in the Personnel Files Act conflict with those expressed in the Freedom of Information Act.

CONCLUSION

The commission's conclusion that the plaintiff is the functional equivalent of a public agency is supported by substantial evidence and is consistent with the law as articulated by the courts. The plaintiff has not established that its substantial rights were prejudiced by irregularities in the commission's proceeding. Accordingly, the plaintiff's appeal is dismissed. Judgment shall enter for the defendants.

BY THE COURT,

Sheila A. Huddleston, Judge