FREEDOM OF INFORMATION COMMISSION
OF THE STATE OF CONNECTICUT

In the Matter of a Complaint by

FINAL DECISION

Matthew Hennessy,

Complainant

against

Docket #FIC 2021-0610

Donald Stein, Chair, Materials Innovation and Recycling Authority; Tom Kirk, President, Materials Innovation and Recycling Authority; Laurie Hunt, Director of Legal Services, Materials Innovation and Recycling Authority; Board of Directors, Materials Innovation and Recycling Authority; and Materials Innovation and Recycling Authority,

Respondents

October 12, 2022

The above-captioned matter was heard as a contested case on August 3, 2022, at which time the complainant and the respondents appeared and presented testimony, exhibits and argument on the complaint. Due to the COVID-19 pandemic and the state's response to it, the hearing was conducted through the use of electronic equipment (remotely) pursuant to §149 of Public Act 21-2 (June Special Session), as amended by §1 of Public Act 22-3. The case caption has been amended to accurately reflect the respondents in this matter.

In addition, the Commission takes administrative notice of the testimony in Docket #FIC 2020-0281, Matthew Hennessy v. Donald Stein, Chairman, Board of Directors, Materials Innovation and Recycling Authority; Board of Directors, Materials Innovation and Recycling Authority; Tom Kirk, President, Materials Innovation and Recycling Authority; Laurie Hunt, Director of Legal Services, Materials Innovation and Recycling Authority; and Materials Innovation and Recycling Authority.

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

1. The respondents are public agencies within the meaning of §1-200(1), G.S.

2. By email received and filed on October 20, 2021, the complainant appealed to this Commission, alleging that the respondent board ("board") violated the Freedom of Information ("FOI") Act in connection with an executive session held during a regular meeting of the respondents on September 22, 2021. Specifically, the complainant alleged that:

(a) the respondents failed to state the specific reason for the executive session before entering into executive session, as required by §1-225(f), G.S.;

(b) the topics identified on the agenda to be discussed in executive session were not permitted under §1-200(6), G.S.; and

(c) the respondents improperly permitted certain officials from the Department of Energy and Environmental Protection ("DEEP") to attend the executive session.

The complainant also requested the imposition of a civil penalty against the respondents Chairman Donald Stein ("Stein"), President Tom Kirk ("Kirk"), and Attorney Laurie Hunt ("Hunt").

3. It is found that the respondents held a regular meeting on September 22, 2021 ("September 22nd meeting"), and that the agenda for such meeting ("agenda") indicated that the respondent board may enter into executive session to discuss the following:

> [p]ending RFPs and Feasibility Estimates and Evaluations relative to prospective public supply contracts, including MIRA RFP's and prospective contracts for Connecticut Solid Waste System transfer facilities, transportation and disposal of acceptable solid waste at alternate disposal facilities and operation of MIRA's Jets and the potential impact of same upon MIRA operating and capital budgets and its Municipal Agreements.

4. It is found that, during the September 22nd meeting, Stein requested a motion to enter into executive session for the purpose of discussing the topics identified on the agenda and recited the language of the agenda quoted in paragraph 3, above. It is found that the motion to enter executive session was made, seconded, and passed unanimously by the board, and that the board thereafter entered into executive session.

5. With regard to the allegation described in paragraph 2(a), above, §1-225(f), G.S., provides:

> [a] public agency may hold an executive session as defined in subdivision (6) of section 1-200, upon an affirmative vote of two-thirds of the members of such body present and voting, taken at a public meeting and stating the reasons for such executive session, as defined in section 1-200. (Emphasis added.)

6. It is found that prior to entering into executive session, the respondents stated the reason for such executive session, as set forth in paragraph 3, above.

7. It is therefore concluded that the respondents did not violate §1-225(f), G.S., as described in paragraph 2(a), above.

8. At the hearing, and in his brief, the complainant argued that the agenda failed to fairly apprise the public of the business to be discussed at the September 22nd meeting. However, such allegation, which if true may constitute a violation of §1-225(c), G.S., was not fairly raised in the complaint, and therefore may not be considered herein.

9. With regard to the allegation described in paragraph 2(b), above, that the respondents discussed matters in executive session that were not permitted under §1-200(6), G.S., at the hearing, the respondents testified, and it is found, that during the executive session they discussed the responses to four separate requests for proposals ("RFPs"). Specifically, those RFPs pertained to: the operation of transfer facilities ("RFP 1"); the transportation and disposal of solid waste at local disposal facilities ("RFP2"); the transportation and disposal of solid waste at distant disposal facilities ("RFP3"); and the operation of jets ("RFP4").

10. Section 1-225(a), G.S., provides, in relevant part, that "[t]he meetings of all public agencies, except executive sessions, as defined in subdivision (6) of section 1-200, shall be open to the public."

11. Section 1-200(6), G.S., provides:

> '[e]xecutive sessions' means a meeting of a public agency at which the public is excluded for one or more of the following purposes: (A) [d]iscussion concerning the appointment, employment, performance, evaluation, health or dismissal of a public officer or employee, provided that such individual may require that discussion be held at an open meeting; (B) strategy and negotiations with respect to pending claims or pending litigation to which the public agency or a member thereof, because of the member's conduct as a member of such agency, is a party until such litigation or claim has been finally adjudicated or otherwise settled; (C) matters concerning security strategy or the deployment of security personnel, or devices affecting public security; (D) discussion of the selection of a site or the lease, sale or purchase of real estate by the state or a political subdivision of the state when publicity regarding such site, lease, sale, purchase or construction would adversely impact the price of such site, lease, sale, purchase or construction until such time as all of the property has been acquired or all proceedings or transactions concerning same have been terminated or abandoned; and (E)

> discussion of any matter which would result in the disclosure of public records or the information contained therein described in subsection (b) of section 1-210. (Emphasis added.)

12. Section 1-210(b)(24), G.S., provides that disclosure is not required of:

> [r]esponses to any request for proposals or bid solicitation issued by a public agency, responses by a public agency to any request for proposals or bid solicitation issued by a private entity or any record or file made by a public agency in connection with the contract award process, until such contract is executed or negotiations for the award of such contract have ended, whichever occurs earlier, provided the chief executive officer of such public agency certifies that the public interest in the disclosure of such responses, record or file is outweighed by the public interest in the confidentiality of such responses, record or file... (Emphasis added.)

13. The complainant argued that the respondents failed to certify, prior to the executive session, that the public interest in disclosure of each of the RFPs was outweighed by the public interest in withholding them; that discussion of RFP4 was not permitted in executive session because it was not pending at the time of the executive session; that the respondents improperly discussed "budgetary issues" during the executive session; and that the respondents improperly discussed "interagency memoranda" during the executive session.

14. With regard to the complainant's claim that the respondents failed to certify, prior to the executive session, that the public interest in disclosure of each of the RFPs was outweighed by the public interest in withholding them, the respondents credibly testified, and it is found, that the chief executive officer of the Materials Innovation and Recycling Authority ("MIRA") made such certification prior to the executive session with respect to RFP1. However, the respondents conceded, and it is found, that the chief executive officer of MIRA failed to make such certification prior to the executive session with respect to the responses to RFP2, RFP3, and RFP4.

15. It is therefore found that the responses to RFP2, RFP3, and RFP4 were not exempt from disclosure pursuant to §1-210(b)(24), G.S., and therefore, discussion of such responses was not permitted in executive session under 1-200(6)(E), G.S.

16. Based on the foregoing, it is concluded that the respondents violated §1-225(a), G.S., as described in paragraph 2(b), above.[1]

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[1] Based on the finding that the discussion of the responses to RFP4 violated §1-225(a), G.S., the Commission need not consider the complainant's additional allegation with regard to RFP4.

17. With regard to the complainant's additional claim that the respondents improperly discussed "budgetary issues" during the executive session, it is found that such discussion arose out of, and was part of, the discussion of the responses to the RFPs and did not constitute a separate discussion of the budget or a separate purpose for the executive session, and therefore such claim need not be further addressed herein.

18. With regard to the complainant's additional claim that, to the extent the respondents discussed interagency memoranda with officials from DEEP while in executive session, such discussions were improper under §1-200(6)(E), G.S., it is found that no interagency memoranda were discussed during such executive session, and therefore such claim need not be further addressed herein.

19. With regard to the allegation described in paragraph 2(c), above, it is found that during the September 22nd regular meeting, three officials from DEEP, Mr. Isner ("Isner"), Commissioner Dykes ("Dykes"), and Deputy Commissioner Wingfield ("Wingfield"), were invited to and attended the executive session. It is found that Isner was in attendance for the entire executive session and that Dykes and Wingfield attended a portion of such session.

20. Section 1-231(a), G.S., provides that:

> [a]t an executive session of a public agency, attendance shall be limited to members of said body and persons invited by said body to present testimony or opinion pertinent to matters before said body provided that such persons' attendance shall be limited to the period for which their presence is necessary to present such testimony or opinion and, provided further, that the minutes of such executive session shall disclose all persons who are in attendance except job applicants who attend for the purpose of being interviewed by such agency.

21. At the hearing in this matter, Kirk testified, and it is found, that MIRA is required by law to work with DEEP to implement the State of Connecticut's Solid Waste Management Plan. It is found that the opinion of each of the DEEP officials with regard to certain permitting requirements was necessary in order for the respondents to assess the responses to the RFPs. Kirk further testified, and it is found, that each of the DEEP officials provided feedback on what existing permits allowed and what modifications may be required with respect to the RFPs.

22. It is found that Isner, Dykes and Wingfield were present in the executive session only for the period for which their presence was necessary.

23. It is therefore concluded that the respondents did not violate §1-231(a), G.S., as described in paragraph 2(c), above.

24. At the hearing in this matter, the complainant argued that the Commission should impose a civil penalty against the respondents Hunt, Kirk and Stein, for violating the FOI Act.

25. Section 1-206(b)(2), G.S., provides, in relevant part:

> upon the finding that a denial of any right created by the Freedom of Information Act was without reasonable grounds and after the custodian or other official directly responsible for the denial has been given an opportunity to be heard at a hearing conducted in accordance with sections 4-176e to 4-184, inclusive, the commission may, in its discretion, impose against the custodian or other official a civil penalty of not less than twenty dollars nor more than one thousand dollars.

26. It is found that Stein, as the board chairman, is the individual directly responsible for the violations found herein.

27. Regarding whether such violations were "without reasonable grounds", it is found that the respondent board received FOI training conducted by the Commission's public information officer at their October 14, 2020 regular meeting, approximately one year prior to the September 22nd meeting. It is found that the purpose of this training was to provide a "refresher" course centered on the meetings requirements under the FOI Act. It is also found that Stein, Kirk, and Hunt were all present for the training.

28. At the hearing in this matter, Kirk testified, and it is found, that he had also received prior training conducted by the Commission's public information officer. However, Kirk also credibly testified that such training was for staff members, not attorneys, and that he relies on Hunt for legal advice and guidance related to the requirements of the FOI Act.

29. It is found that Hunt has served as in-house legal counsel to MIRA (and its predecessor, the Connecticut Resources Recovery Authority) for approximately 15 years. It is found that, in that capacity, she advises the agency, its board, and officers on legal matters, including the requirements of the FOI Act.

30. At the hearing in this matter, Hunt testified that the October 14, 2020 FOI training session was the first FOI training session she had attended.[2] Hunt further testified that the October 14, 2020 FOI training discussed the permissible purposes for entering executive session, including with respect to RFPs, but did not address the certification requirements under §1-210(b)(24), G.S.

31. However, it is found that, as an attorney, Hunt should have been aware that a "refresher" FOI training session provided to the board would not necessarily include all of the legal intricacies of the FOI Act's meeting provisions, for which an attorney is responsible for understanding in order to properly advise her clients. It is also found that, at the time of the

[2] The Commission notes that in Docket #FIC 2020-0281, Hunt testified that she had attended at least two FOI training sessions.

September 22nd meeting, Hunt was unaware that the certification requirement under §1-210(b)(24), G.S., was necessary in order to discuss any RFP in executive session.

32. It is found that Stein relied on Hunt to provide him with legal advice and guidance with regard to the requirements of the FOI Act, and that it was reasonable for him to have done so.

33. It is therefore found that the violation was not "without reasonable grounds" and that, absent such a finding, the Commission may not impose a civil penalty.

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

1. Henceforth, the respondents shall strictly comply with §1-225(a), G.S.

2. Although the Commission determined that the violation in this case was not without reasonable grounds, the Commission also notes that there have been several recent matters wherein the respondents' reliance on their attorney's advice led to violations of the FOI Act. See Matthew Hennessy v. Donald Stein, Chairman, Board of Directors, Materials Innovation and Recycling Authority; Board of Directors, Materials Innovation and Recycling Authority; Tom Kirk, President, Materials Innovation and Recycling Authority; Laurie Hunt, Director of Legal Services, Materials Innovation and Recycling Authority; and Materials Innovation and Recycling Authority, Docket #FIC 2020-0281 (June 22, 2022); Matthew Hennessy v. Laurie Hunt, Director of Legal Services, Materials Innovation and Recycling Authority; Tom Kirk, President, Materials Innovation and Recycling Authority; Donald Stein, Chairman, Board of Directors, Materials Innovation and Recycling Authority; Board of Directors, Materials Innovation and Recycling Authority; and Materials Innovation and Recycling Authority, Docket #FIC 2020-0351 (June 22, 2022); Matthew Hennessy v. Donald Stein, Chairman, Board of Directors, Materials Innovation and Recycling Authority; Board of Directors, Materials Innovation and Recycling Authority; Tom Kirk, President, Materials Innovation and Recycling Authority; Laurie Hunt, Director of Legal Services, Materials Innovation and Recycling Authority; and Materials Innovation and Recycling Authority, Docket #FIC 2020-0448 (August 10, 2022). The respondents should be mindful that at some point, reliance on an attorney's advice, under similar circumstances may no longer be deemed reasonable.

Approved by Order of the Freedom of Information Commission at its regular meeting of October 12, 2022.

Cynthia A. Cannata
Acting Clerk of the Commission

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

THE PARTIES TO THIS CONTESTED CASE ARE:

MATTHEW HENNESSY, c/o Attorney Michael C. Harrington, FordHarrison, LLP, 185 Asylum Street, Suite 820, Hartford, CT 06103

DONALD STEIN, CHAIR, MATERIALS INNOVATION AND RECYCLING AUTHORITY; TOM KIRK, PRESIDENT, MATERIALS INNOVATION AND RECYCLING AUTHORITY; LAURIE HUNT, DIRECTOR OF LEGAL SERVICES, MATERIALS INNOVATION AND RECYCLING AUTHORITY; BOARD OF DIRECTORS MATERIALS INNOVATION AND RECYCLING AUTHORITY; AND MATERIALS INNOVATION AND RECYCLING AUTHORITY, c/o Attorney Michael C. Collins, Halloran & Sage LLP, One Goodwin Square, 225 Asylum Street, Hartford, CT 06103

Cynthia A. Cannata
Acting Clerk of the Commission

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