



# FREEDOM OF INFORMATION



Connecticut Freedom of Information Commission • 18-20 Trinity Street, Suite 100 • Hartford, CT 06106  
Toll free (CT only): (866)374-3617 Tel: (860)566-5682 Fax: (860)566-6474 • www.state.ct.us/foi/ • email: foi@po.state.ct.us

Anthony Bivona,  
Complainant(s)  
against

Notice of Meeting

Docket #FIC 2014-253

Scott McCarthy, Chairman, Board of Education, Brookfield Public Schools; Paul Checco, Susan Queenan, Harry Shaker, Victor Katz, Steve Harding, and Tara Lerner, as members, Board of Education, Brookfield Public Schools; and Board of Education, Brookfield Public Schools,  
Respondent(s)

January 2, 2015

### 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, January 28, 2015**. 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 January 14, 2015**. 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 January 14, 2015**. **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 **fourteen (14) copies** be filed **ON OR BEFORE January 14, 2015**, 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: Leon Rosenblatt, Esq.; Richard J. Padykula, Esq.; and William R. Connon, Esq.

FREEDOM OF INFORMATION COMMISSION  
OF THE STATE OF CONNECTICUT

In the Matter of a Complaint by

Report of Hearing Officer

Anthony Bivona,

Complainant

against

Docket #FIC 2014-253

Scott McCarthy, Chairman, Board of  
Education, Brookfield Public Schools;  
Paul Checco, Susan Queenan, Harry  
Shaker, Victor Katz, Steve Harding, and  
Tara Lerner, as Members, Board of  
Education, Brookfield Public Schools;  
and Brookfield Public Schools,

Respondents

November 10, 2014

The above-captioned matter was heard as a contested case on October 1, 2014, at which time the complainant and the respondents appeared and presented testimony, exhibits and argument on the complaint.

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

1. The respondents are public agencies within the meaning of §1-200(1), G.S.
2. By complaint dated and filed April 25, 2014, the complainant appealed to this Commission, alleging that the respondents violated the Freedom of Information ("FOI") Act by discussing his performance and deciding to terminate his employment contract in executive session, during its April 1, 2014 special meeting, without properly noticing such discussion and by failing to provide him with the opportunity to have such discussion in open session.
3. The complainant seeks civil penalties against the respondents, as well as an order from the Commission declaring null and void the actions taken by the respondents at the meeting, described in paragraph 2, above.
4. Section 1-225, G.S., provides in relevant part that:
  - (a)[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....

(d)[n]otice of each special meeting of every public agency...shall be posted not less than twenty-four hours before the meeting to which such notice refers....The notice shall specify the time and place of the special meeting and the business to be transacted. No other business shall be considered at such meetings by such public agency.

5. Section 1-200(6), G.S., defines “executive session” as:

...a meeting of a public agency at which the public is excluded for one or more of the following purposes: (A) Discussion 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....

6. It is found that, on April 1, 2014, the respondent board (“board”) held a special meeting (“April 1<sup>st</sup> meeting”).

7. It is found that, at the time of the April 1<sup>st</sup> meeting, the complainant was the superintendent of the Brookfield school district.

8. It is found that, in late 2013, an audit revealed that the Brookfield school district had overspent its budget for the previous two years by approximately \$1.2 million.

9. It is found that, during January and February of 2014, the board met to discuss, in executive session, the complainant’s performance relating to the overspending, described in paragraph 8, above.<sup>1</sup> It is found that the board did not vote to take action regarding the complainant’s contract at this time.

10. It is also found that, during this time period, the audit and overspending had been discussed in public at meetings of the Brookfield Board of Finance, and there had been coverage by the press about these topics. It is further found that there was public outcry about the overspending and calls for the complainant’s resignation.

11. It is found that the respondent chairman (“chairman”) was aware, through the discussions held in the executive sessions, described in paragraph 9, above, and through conversations he had, individually, with certain members of the board, that some members of the board felt that the complainant’s employment contract should be terminated. It is found that, at some point prior to April 1, 2014, the chairman, on his own, decided to pursue termination of the complainant’s contract.

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<sup>1</sup> There is no allegation that the purpose of these executive sessions was improper; moreover, the complainant acknowledged that the respondents notified him of these discussions and gave him the opportunity to hold the discussions in public.

12. It is found that, shortly before the April 1<sup>st</sup> meeting, the chairman requested a written legal opinion from the town's attorney. At the hearing in this matter, the respondents declined to disclose the nature of such opinion, although they submitted it for in camera inspection after the hearing.

13. It is found that the agenda for the April 1<sup>st</sup> meeting indicated that the board anticipated an executive session to discuss with its attorney "a recent communication received from him." It is found that such agenda did not list discussion of the complainant's performance and/or termination.

14. It is found that, during the April 1<sup>st</sup> meeting, the board voted to enter, and did enter, into executive session to discuss the legal opinion referenced in paragraphs 12 and 13, above. It is further found that no votes pertaining to the complainant were taken during the public portion of the April 1<sup>st</sup> meeting.

15. It is found that, on April 21, 2014, the chairman telephoned the complainant to inform him that it appeared likely that the board would vote to terminate the complainant's employment contract and that the complainant should probably have his attorney call the board's attorney. According to the complainant, the chairman stated during this conversation that "it was the Board's decision."

16. It is found that, on May 14, 2014, the board held a special meeting. It is found that the agenda for such meeting stated "discussion and possible vote regarding Superintendent Bivona and his contract of employment." It is found that, during such meeting, the board unanimously voted to terminate the complainant's contract and to place him on administrative leave.

17. The complainant does not dispute that the board properly discussed an attorney-client privileged record during the April 1<sup>st</sup> executive session.<sup>2</sup> Nor does the complainant allege that any violation of the FOI Act occurred in connection with the May 14<sup>th</sup> meeting. Rather, the complainant claimed, at the hearing in this matter, that, in addition to, and separately and apart from, the discussion of the attorney-client privileged correspondence, the board discussed, during the April 1<sup>st</sup> executive session, the complainant's job performance and, at a minimum, came to a consensus regarding his dismissal, without proper notice to the public or to him of such discussion.

18. In essence, the complainant infers that the board discussed his performance and possible termination during the April 1<sup>st</sup> executive session, because on April 21<sup>st</sup>, three weeks after such executive session, and three weeks prior to the public discussion and vote to terminate his contract, the chairman told him that his contract likely would be terminated and that it was "the board's decision."

19. However, the findings of fact of this case, specifically paragraphs 9, 10 and 11, above, do not support the complainant's inference. Moreover, the respondent chairman

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<sup>2</sup> Accordingly, whether or not the letter was attorney-client privileged need not be addressed by this Commission.

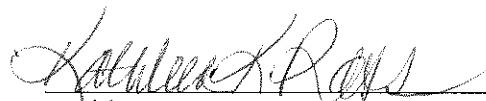
testified credibly at the hearing in this matter, and it is found, that the board did not discuss the complainant's job performance or termination, separate and apart from the discussion of the legal opinion, during the April 1<sup>st</sup> executive session. It is found, based upon the credible testimony of the chairman, that the board did not vote or come to a consensus regarding termination of the complainant's contract during the April 1<sup>st</sup> executive session. In addition, it is found that the chairman testified credibly that he did not recall telling the complainant that "it was the Board's decision" during the April 21<sup>st</sup> telephone conversation.

20. Based upon all of the foregoing findings of fact, it is concluded that the respondents did not violate the FOI Act as alleged in the complainant.

21. Accordingly, the Commission need not address the complainant's request for civil penalties or for an order declaring the board's actions null and void.

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

1. The complaint is hereby dismissed.



Kathleen K. Ross  
as Hearing Officer