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FREEDOM OF INFORMATION



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Adrienne DeLucca and the Connecticut
Education Association,
Complainant(s)
against

Notice of Meeting

Docket #FIC 2014-507

Director, Achievement First, Inc.; and
Achievement First, Inc.,
Respondent(s)

July 6, 2015

Transmittal of Proposed Final Decision Dated July 6, 2015

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 dated July 6, 2015, 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, July 22, 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 July 13, 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 July 13, 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 **fifteen (15) copies** be filed *on or before July 13, 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: Adrienne R. DeLucca, Esq.
Mark J. Sommaruga, Esq.

2015-07-06/FIC# 2014-507/Trans/wrbp/LFS//TAH

FREEDOM OF INFORMATION COMMISSION
OF THE STATE OF CONNECTICUT

In the Matter of a Complaint by

The Connecticut Education Association,

Complainant

Second Report of Hearing Officer

against

Docket #FIC 2014-507

Director, Achievement First, Inc.; and
Achievement First, Inc.,

Respondents

July 6, 2015

The above-captioned matter was heard as a contested case on March 24, 2015, at which time the complainant and the respondents appeared, stipulated to certain facts and presented testimony, exhibits and argument on the complaint.

Upon the parties' motion, co-complainant Adrienne DeLucca was permitted to withdraw as co-complainant in order to appear as counsel for the remaining complainant, the Connecticut Education Association. On June 17, 2015, a Report of Hearing Officer was issued; on June 29, 2015, the Hearing Officer sua sponte withdrew such report prior to the Commission's consideration.

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

1. It is found that on July 17, 2014, the complainant requested a copy of the respondents' current personnel files, contracts executed to provide services to the respondents, and records indicating the names, amounts, and terms of donations to the respondents since 2009.
2. It is found that on July 28, 2014, the respondents denied the complainant's request on the grounds that the respondent Achievement First, Inc. ("AF"), is not a public agency within the meaning of §1-200(1), G.S.
3. By letter filed July 30, 2014, the complainant appealed to this Commission, alleging that the respondents violated the Freedom of Information ("FOI") Act by failing to provide the records it requested.
4. It is found that AF a charter management organization, as that term is defined in §10-66aa, G.S., which provides in relevant part:

“Charter management organization” means any entity that a charter school contracts with for educational design, implementation or whole school management services; and

...

“Whole school management services” means the financial, business, operational and administrative functions for a school.

5. Section 10-66aa, G.S., also defines “charter school” as “...a public, nonsectarian school which is (A) established under a charter granted pursuant to section 10-66bb, (B) organized as a nonprofit entity under state law, (C) a public agency for purposes of the Freedom of Information Act, as defined in section 1-200... (Emphasis added.)

6. It is concluded that §10-66aa, G.S., explicitly provides that a charter school is a public agency subject to the FOI Act, but makes no such similar provision concerning the status of a “charter management organization.”

7. It is found that AF is a non-profit corporation that contracts with 29 charter schools in New York and Connecticut to provide whole school management services as defined in §10-66aa, G.S. It is found that AF provides management services to charter schools (hereinafter “School” or “Schools”) in Hartford, New Haven, and Bridgeport.

8. It is found that, as part of their whole school management, AF develops core curriculum, recruit and recommend principals and other administrators, prepare a budget for recommendation to the schools’ boards of trustees, create software and other systems for use in student performance data, coordinate with the schools’ operations departments on issues with the schools’ physical facilities, and manage the start-up process of schools.

9. It is found that AF is a private entity that performs a government service pursuant to contract with the Schools.

10. The complainant alleges that AF is the functional equivalent of a public agency.

11. Section 1-200(1)(B), G.S., defines “public agency” to include “[a]ny person to the extent such person is deemed to be the functional equivalent of a public agency pursuant to law.”

12. The test for determining whether an entity is the functional equivalent of a public agency within the meaning of §1-200(1)(B), G.S., is set forth in Board of Trustees of Woodstock Academy v. FOI Commission (“Woodstock”), 181 Conn. 544 (1980), and consists of the following four criteria:

- a. whether the entity performs a governmental function;
- b. the level of government funding;
- c. the extent of government involvement or regulation; and

d. whether the entity was created by government.

13. The Supreme Court in Connecticut Humane Society v. FOI Commission, 218 Conn. 757, 761 (1991), advocated a case-by-case application of the Woodstock criteria, and established that all four of the foregoing criteria are not necessary for a finding of “functional equivalence.” Rather “[a]ll relevant factors are to be considered cumulatively, with no single factor being essential or conclusive.”

14. The four-pronged Woodstock test for determining whether an entity is the functional equivalent of a public agency is well-suited to public/private hybrid entities such as Woodstock Academy, which was created by special corporate charter of the state legislature, educated high school students of the towns of Woodstock, Pomfret and Eastford, and received tuition fees pursuant to statute from public tax dollars, but which was funded in part by a private endowment fund and whose property and affairs were under the management and control of a privately elected board of trustees. Woodstock, supra, 181 Conn. 546.

15. However, with respect to private entities who contract with the government to perform a function ordinarily performed by government, the Woodstock test proved to be less satisfactory, especially to a legislature concerned about privatizing’s effects on public access to information. Illustrative are two well-known appellate cases: Domestic Violence Services of Greater New Haven, Inc. v. FOIC (“Domestic Violence”), 47 Conn. App. 466, 474 (1998); and Envirotest Systems Corporation v. Freedom of Information Commission (“Envirotest”), 59 Conn. App. 753 (2000), cert denied, 254 Conn 751 (2001).

16. Domestic Violence involved a private entity that contracted with the government to perform a function ordinarily performed by the government. To be the functional equivalent of a public agency, the Court ruled, an entity must be subject to pervasive or continuous regulatory control by the government. “Performing a government service pursuant to contract does not make an entity a public agency subject to the act... 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 in the core of the program.” (Citations omitted; internal quotation marks omitted.) Domestic Violence, supra, 47 Conn. App. 474-475.

17. Envirotest, decided three years after Domestic Violence, involved a \$25 million contract between the government and a company engaged to perform a function required to be performed by government - emissions testing. The Court employed the Domestic Violence standard requiring pervasive regulation by government, and found that “[b]ecause the government does not control the day-to-day activity of [Envirotest’s] business,” Envirotest was not the functional equivalent of a public agency. Id., 762.

18. Immediately on the heels of that decision, the legislature acted quickly to remedy the exacting standard set forth in Domestic Violence and Envirotest and to address situations where an entity has significant involvement in the contracting agency’s decisions and policies. Specifically, Public Act 01-169, *An Act Concerning Privatized Public Records*, mandates a

procedure under §1-218, G.S., for requesting public records regarding persons who contract with the government to perform functions normally performed by government.

19. Section 1-218, G.S., provides:

Each contract in excess of two million five hundred thousand dollars between a public agency and a person for the performance of a *governmental function* shall (1) provide that the public agency is entitled to receive a copy of records and files related to the performance of the governmental function, and (2) indicate that such records and files are subject to the Freedom of Information Act and may be disclosed by the public agency pursuant to the Freedom of Information Act. No request to inspect or copy such records or files shall be valid unless the request is made to the public agency in accordance with the Freedom of Information Act. Any complaint by a person who is denied the right to inspect or copy such records or files shall be brought to the Freedom of Information Commission in accordance with the provisions of sections 1-205 and 1-206. (Emphasis added.)

20. In the same Public Act, the legislature also defined “governmental function” in circumstances where an entity contracts with the government to manage or administer a government program. Section 1-200(11), G.S., provides:

“Governmental function” means the administration or management of a program of a public agency, which program has been authorized by law to be administered or managed by a person, where (A) the person receives funding from the public agency for administering or managing the program, (B) the public agency is involved in or regulates to a significant extent such person’s administration or management of the program, whether or not such involvement or regulation is direct, pervasive, continuous or day-to-day, and (C) the person participates in the formulation of governmental policies or decisions in connection with the administration or management of the program and such policies or decisions bind the public agency. “Governmental function” shall not include the mere provision of goods or services to a public agency without the delegated responsibility to administer or manage a program of a public agency.

21. The extensive legislative history of P.A. 01-169 demonstrates that the overarching goal of P.A. 01-169 was to reverse Envirotest and make large private contractors that receive significant public funds to administer “a major state function” subject to the disclosure requirements of the FOI Act. See, e.g. the remarks of Representative Ward: “Again, the underlying intent of the bill wishes to say that when a major State function is contracted out, I don’t have a problem with making those public.” 44 H.R. Proc., Pt. 9, 2001 Sess., p. 42.

22. Applying the requirements of §1-200(11), G.S., to the contractual relationship between the AF and the School, it is found, first, that §10-66aa, G.S., authorizes the AF to provide management services to a public agency – i.e., the School, within the meaning of §1-200(11), G.S.

23. Next, it is found that AF receives funding from the School for the management services they provide, within the meaning of §1-200(11)(A), G.S.

24. It is found that the School is involved to a significant extent in AF's management services, within the meaning of §1-200(11)(B), G.S. In particular, it is found that the contract requires AF and the School to agree that a nominated candidate for principal "meets their shared standards of excellence," and the contract requires the principal and AF to consult about many aspects of the School's education programs, such as staff training and evaluation, projected budgets, setting the school calendar, and finding adequate facilities.

25. It is found that AF participates in the formulation of School policies or decisions in connection with the management of the School's programs, and that such policies or decisions bind the School, within the meaning of §1-200(11)(C), G.S. It is concluded that §1-200(11)(C), G.S., requires only that AF participate in the formulation of policies or decisions, not that it actually make such policies or decisions. For example, AF develops a core curriculum and support the School's implementation of the curriculum; AF recruits the principal, teachers and other administrators, who are hired by the School's board of trustees or the principal, respectively; AF evaluates the principal, who reports to AF on a day-to-day basis; and the AF and the School must agree whether to renew the principal's year-to-year contract. The contract expressly requires AF to make recommendations to the School concerning policies to enable the School to implement AF's model programs, and requires the School to exercise good faith in considering and adopting AF's recommendations.

26. Finally, it is found that AF's contract with the School requires more than the mere provision of goods or services, within the meaning of §1-200(11), G.S.

27. It is found, therefore, that AF performs a governmental function within the meaning of §§1-200(11) and 1-218, G.S.

28. It is concluded, however, that §1-218, G.S. applies to AF only if two criteria are met: a) each contract must be in excess of \$2.5 million and b) the contract must be for the performance of a governmental function.

29. It is found, however, that each contract between a charter school and AF is for less than \$2.5 million.

30. It is found that the aggregate of all of AF's contracts with charter schools may amount to more than \$2.5 million; it is concluded, however, that the plain language of §1-218, G.S., does not permit such aggregation.

31. It is concluded, therefore, that §1-218, G.S., does not apply to the contract between the Schools and AF.

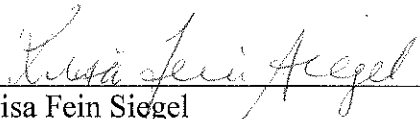
32. Moreover, even if the Commission were to apply the four-prong Woodstock test, it is noted that AF, like the contracting entities in Domestic Violence and Envirotest, is not the functional equivalent of a public agency. AF is not required to perform their management services in the absence of a contract with the School; the School does not govern, regulate, or control the day-to-day operations of AF's business; government funding reflects only the consideration for the services provided pursuant to contract; and AF was not created by government.

33. Furthermore, it is concluded that had the legislature intended a charter management organization to be a public agency, it could have easily defined it as such in §10-66aa, G.S., as it did in the statute's definition of charter school. See paragraph 6, above.

34. It is concluded that the respondents did not violate §§1-210(a) and 1-212(a), G.S., by refusing to provide the complainant with the records requested.

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

1. The complaint is dismissed.



Lisa Fein Siegel
as Hearing Officer