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FREEDOM OF INFORMATION



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Jon Lender, Vanessa de la Torre and the
Hartford Courant,
Complainant(s)
against

Notice of Meeting

Docket #FIC 2014-508

CEO, Family Urban Schools of Excellence; and Family
Urban Schools of Excellence,
Respondent(s)

July 7, 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, 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 15, 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 15, 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 15, 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: William Fish, Esq.
Mark J. Sommaruga, Esq.
Matthew Kauffman,

2015-07-07/FIC# 2014-508/Trans/wrbp/TCB//KKR

FREEDOM OF INFORMATION COMMISSION
OF THE STATE OF CONNECTICUT

In the Matter of a Complaint by

Report of Hearing Officer

Jon Lender, Vanessa De La Torre and The
Hartford Courant,

Complainants

against

Docket #FIC 2014-508

CEO, Family Urban Schools of
Excellence; and Family Urban Schools of
Excellence,

Respondents

July 7, 2015

The above-captioned matter was heard as a contested case on March 19 and April 15, 2015, at which times the complainants and the respondents appeared, stipulated to certain facts and presented testimony, exhibits and argument on the complaint.

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

1. It is found that, by letter dated July 7, 2014, the complainants requested a copy of certain records maintained by the respondents.
2. It is found that, by letter dated July 8, 2014, the respondents denied the complainants' request on the grounds that Family Urban Schools of Excellence ("FUSE") is not a public agency within the meaning of §1-200(1), G.S.
3. By letter dated and filed August 1, 2014, the complainants appealed to this Commission, alleging that the respondents violated the Freedom of Information ("FOI") Act by failing to comply with their records request.
4. It is found that FUSE is 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 FUSE is a non-profit corporation that contracted with two charter schools (hereinafter “School” or “Schools”) in Connecticut to provide whole school management services as defined in §10-66aa, G.S.

8. It is found that, as part of their whole school management, FUSE developed core curriculum, recruited and recommended principals, recruited and hired teachers, prepared a budget for recommendation to the schools’ boards of directors, made recommendations concerning software and other systems for use in student performance data, and managed the Schools’ start-up process.

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

10. The complainants allege that FUSE 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 FUSE and the Schools, it is found, first, that §10-66aa, G.S., authorized FUSE to provide management services to a public agency – i.e., the Schools, within the meaning of §1-200(11), G.S.

23. Next, it is found that FUSE received funding from the Schools for the management services they provided, within the meaning of §1-200(11)(A), G.S.

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

25. It is found that FUSE participated in the formulation of School policies or decisions in connection with the management of the School's programs, and that such policies or decisions bound 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 FUSE participated in the formulation of policies or decisions, not that it actually made such policies or decisions, although it is found that the contract did assign significant decision-making to FUSE. For example, FUSE developed a core curriculum and supported the School's implementation of the curriculum; FUSE recruited the principal, who was hired by the School's board of directors; FUSE and the School were required to agree whether to renew the principal's contract; FUSE evaluated the principal, who reported to FUSE; and FUSE recruited and hired teachers. The contract expressly required FUSE to make recommendations to the School concerning policies to enable the School to implement FUSE's model programs, and required the School to exercise good faith in considering and adopting FUSE's recommendations.

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

27. It is found, therefore, that FUSE performed 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 FUSE 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 FUSE was for less than \$2.5 million.

30. It is found that the aggregate of all of FUSE'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 FUSE.

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

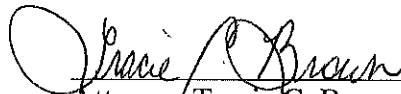
consideration for the services provided pursuant to contract; and FUSE was not created by government.

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 complainants 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.



Attorney Tracie C. Brown
as Hearing Officer