

FREEDOM OF INFORMATION COMMISSION
OF THE STATE OF CONNECTICUT

In the Matter of a Complaint by

FINAL DECISION

Dan Brechlin and the Meriden Record
Journal,

Complainants

against

Docket #FIC 2016-0066

City Council, City of Meriden; and City of
Meriden,

Respondents

November 16, 2016

The above-captioned matter was heard as a contested case on April 18, 2016, at which time the complainants and the respondents appeared, stipulated to certain facts and presented testimony, exhibits and argument on the complaint.

The hearing officer issued a Report of Hearing Officer on July 28, 2016. The Freedom of Information (“FOI”) Commission considered such report at its regular meeting of September 14, 2016, at which time they voted to table the matter for reconsideration by the hearing officer.

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 letter filed January 25, 2016, the complainants appealed to this Commission, alleging that the respondents violated the FOI Act by holding an unnoticed and private meeting sometime before their properly noticed meeting of January 19, 2016.
3. Section 1-225(a), G.S., provides in relevant part: “The meetings of all public agencies ...shall be open to the public.”
4. The respondents claim that the gathering at issue, which occurred on January 3, 2016, was not a “meeting” within the meaning of §1-200(2), G.S., because (a) communication at the gathering was limited to notice of meetings of any public agency or the agendas thereof; or (b) less than a quorum was present at the gathering.
5. Section 1-200(2), G.S., provides in relevant part:

‘Meeting’ means any hearing or other proceeding of a public agency, any convening or assembly of a quorum of a multimember public agency, and any communication by or to a quorum of a multimember public agency, whether in person or by means of electronic equipment, to discuss or act upon a matter over which the public agency has supervision, control, jurisdiction or advisory power. “Meeting” does not include: ... communication limited to notice of meetings of any public agency or the agendas thereof.

6. It is found that a quorum of the respondent city council is seven.

7. It is found that the four political leaders of the respondent council, i.e., the majority and minority leaders and their deputies, gather regularly with the mayor and the city manager. It is found that the purpose of the gathering is for the city manager to inform the leadership about issues and concerns that the city council may need to address. It is found that the group decides whether an issue requires city council action, and when necessary, the group discusses and drafts a resolution to go on the agenda of a city council meeting.

8. It is found that the group intentionally does not have a quorum of the city council present at their leadership gatherings.

9. It is found that the leadership group met with the city manager and the mayor on January 3, 2016, to discuss, in part, a resolution authorizing the formation of a City Manager Search Committee. It is found that the group drafted the one-page resolution, which included the names of people to be appointed to the committee and detailed the duties of such committee, including recommending to the city council suitable candidates for the position of City Manager.

10. It is found that the leadership group met to discuss or act upon a matter over which the leadership and the city council as a whole has supervision and control.

11. It is found that the leadership brought forward the resolution at the city council meeting of January 19, 2016. It is found that the resolution was placed on the council’s consent calendar. Based on the respondents’ minutes of the January 19, 2016 meeting,¹ of which the Commission takes administrative notice, it is found that the resolution was adopted at the council meeting without discussion or change.

12. With respect to the respondents’ first claim, that the gathering on January 3, 2016 was not a “meeting” within the meaning of §1-200(2), G.S., because communication at the gathering was limited to notice of meetings or the agendas thereof, Town of Windham v. FOI Commission, Superior Court, Docket No. CV960052526, McWeeny, J., (March 20, 1997) (19 Conn. L. Rptr. 3), reversed on other grounds, Town of Windham v. FOI Commission, 48 Conn. App. 529 (1998), appeal dismissed, 249 Conn. 291 (1999), held that even a five to ten minute discussion among members of the Board of Selectmen about whether they would support the

¹http://meridencv.virtualtownhall.net/public_documents/MeridenCT_BoardsComm/MeridenCT_CouncilMin/1053F3DCA?textPage=1, accessed October 4, 2016

First Selectman's proposal to convene in executive session to discuss a landfill contract matter went far beyond mere communication of notice of an agenda item.

13. See also FOI Commission Advisory Opinion #56 (1984), which concluded that the exclusion of communication of notice of agenda items from the definition of meeting in §1-200(2), G.S., "was intended to prevent the kind of practical difficulty that would exist if members of the same agency could not communicate concerning the call of meetings or the setting of their agendas. The Commission also believes, however, that this exclusion was not intended to limit public access in any meaningful way to the process by which governmental decisions and policies are formulated." (Emphasis added.)

14. It is found that the communications at the January 3, 2016 leadership gathering were not limited to notice of meetings or the setting of agendas, within the meaning of §1-200(2), G.S.

15. With respect to the respondents' claim that the leadership gathering was not a "meeting" within the meaning of §1-200(2), G.S., because a quorum was not present, §1-200(2), G.S., provides three alternative definitions of meeting, of which only two by their terms require the presence of a quorum. (See paragraph 5, above.)

16. The Connecticut Appellate Court first considered this issue in Emergency Medical Services Commission of the Town of East Hartford v. Freedom of Information Commission ("EMS"), 19 Conn. App. 352 (1989). In EMSC, less than a quorum of the East Hartford Medical Services Commission gathered in the mayor's office to hear a presentation from two ambulance companies. The FOI Commission found that the gathering was a proceeding, and therefore, a meeting. The Appellate Court recognized that pursuant to the first clause of the definition, a gathering of less than a quorum may, in certain circumstances, constitute a proceeding, and hence a meeting. "The plain language of General Statutes [§1-200(2), G.S.] does not require a quorum as a necessary precondition to 'any hearing or other proceeding of a public agency....' The word 'quorum' does not appear in the clause dealing with 'any hearing or other proceeding of a public agency....' The legislature did not define a meeting as any hearing or proceeding of a quorum of a public agency, as it might have done." Id. 355.

17. The Court reasoned that to interpret the definition of "meeting" as requiring a quorum as a necessary precondition in every instance "would make the quorum requirement in [1-200(2), G.S.] redundant. No word in a statute should be considered as surplusage...[N]o reason has been cited for reading a quorum requirement into the first clause of [§1-200(2), G.S.] nor are we aware of any." (Citation omitted; internal quotation marks omitted.) EMS, supra, 19 Conn. App. 356.

18. According to EMSC, whether a gathering of less than a quorum is a meeting turns on whether the gathering is a "hearing or proceeding" of a public agency.

19. Subsequent Superior Court decisions relied on the holding of EMSC to conclude that certain gatherings of less than a quorum were "proceedings." Ansonia Library Board of Directors v. Freedom of Information Commission, Superior Court, Ansonia-Milford, J.D., Docket No. 35288S, Fuller, J. (August 26, 1991) (42 Conn. Sup. 84 (1991) cited EMSC in ruling

that a gathering of less than a quorum of a nominating committee to choose a secretary of the library board fit the definition of meeting under §1-200(2), G.S.

20. In East Hartford Town Council v. FOI Commission, Superior Court, Docket No. CV950549602, *Maloney, J.* (January 24, 1996) (16 Conn. L. Rptr. 121), the leaders of the Democrat and Republican party caucuses, who were also members of the town council, gathered privately on one or more occasions and agreed on a new proposed budget. Then, at the public meeting and without substantial discussion, the council unanimously adopted the budget that the two councilmen/party leaders crafted in private. The FOI Commission found that the council had supervision, control and jurisdiction over the consideration and drafting of revisions to the mayor's proposed budget. The Commission also found that the council had impliedly authorized the two party leaders on the council to discuss and reach an agreement on the budget. Based on those facts, the Commission concluded that the meeting of the two leaders, although less than a quorum of the town council, was a "proceeding" of a public agency, and, therefore, a "meeting" within the meaning of §1-200(2), G.S.

21. On appeal, the Superior Court affirmed the Commission's decision, deeming its interpretation of "proceeding" in §1-200(2), G.S., to be "entirely reasonable." East Hartford Town Council, supra, *4. "When a multimember public agency authorizes, either expressly or by implication, two or more of its members to meet and discuss or act upon a subject that would ordinarily be discussed or acted upon by the agency as a whole and when those two members then meet for that purpose as authorized, they have engaged in a 'proceeding of (the) public agency.' To hold otherwise would be to permit any public agency to avoid the open meeting requirements of our law by the simple stratagem of authorizing a group of less than a quorum to do in private what the law requires to be done by the agency in public."

22. Citing EMSC, the Court concluded that "the presence of a quorum of a multimember public agency is not necessary in order for an activity undertaken by some of its members to constitute a 'proceeding' of the agency."

23. The Court distinguished between casual conversations between two members of a public agency, which are expressly exempt from the definition of meeting, and "a planned meeting between two members of a public agency who had been authorized by the agency to discuss and resolve some differences about a matter within the agency's jurisdiction." East Hartford Town Council, supra, §4.

24. In Common Council of Middletown v. FOI Commission, Superior Court, J.D. Middletown, Docket Number CV950074406, *Maloney, J.* (January 31, 1996) (16 Conn. L. Rptr. 163), less than a quorum of council members – the deputy mayor, the Democrat and Republican party leaders on the council, and two other council members – met in private during a 90-minute recess of a council meeting to discuss a package of proposed changes to a report concerning the city's charter revision. When the meeting reconvened, the council debated just one of the proposed changes and then unanimously adopted the package discussed by the five council members in their private session.

25. Relying on EMSC, as well as on East Hartford Town Council, the Court in Common Council rejected the town's claim that the gathering was not a proceeding because there was no formal action taken during the session. On the contrary, the Court concluded, §1-200(2), G.S. "plainly provides that a meeting of some of an agency's members may be a 'proceeding' of the agency even if the only activity taking place is simply a discussion of a matter over which the agency has jurisdiction." Because the five members met under the implied authority of the council to do the council's business, the gathering was a proceeding, and, therefore, a meeting, the Court held in affirming the Commission's decision.

26. The respondents rely on the 1999 decision in Town of Windham v. Freedom of Information Commission, supra, 249 Conn. 291, wherein the Supreme Court let stand, by a per curiam opinion, the Appellate Court ruling that a meeting did not occur because there was no quorum. By dismissing the appeal, the Supreme Court declined to clarify the conflict between the two Appellate Court decisions. The respondents claim that as the more recent decision, Town of Windham controls.

27. In Town of Windham, as noted in paragraph 12, above, four selectmen, which was less than a quorum, met on March 20, 1995, for five or ten minutes to discuss whether they would support a proposal to go into executive session to discuss a landfill contract. The *only* issue on appeal at the Superior Court was whether the gathering was not a meeting because it was communication limited to notice of meetings or agendas. The Superior Court concluded that the private discussion among less than a quorum was not limited to notice of an agenda item, and the Court affirmed the Commission's conclusion that the gathering constituted a "proceeding of a public agency," and, therefore, a meeting within the meaning of §1-200(2), G.S.

28. The decision of the Appellate Court, however, did not mention that the town had not disputed that the gathering would be a meeting if not excluded from the definition as communication limited to notice of an agenda item. The Appellate Court decision also made no reference to its previous decision in EMSC, and did not address the question of whether the gathering of the four selectmen had any of the indicia of a "proceeding" as set forth in EMSC and its progeny. Instead, the Court apparently relied solely on the second clause of the definition – "convening or assembly of a quorum of a multimember public agency" – and stated without elaboration: "There was no quorum and, therefore, no meeting as defined by [§1-200(2), G.S.]" Town of Windham, supra, 48 Conn. App. 531.

29. Subsequent to Town of Windham, the issue of whether a gathering of less than a quorum could be a meeting, as a "proceeding of a public agency," was again before the Superior Court in Meriden Board of Education v. Freedom of Information Commission, Superior Court, Docket Number 990496508S, *Cohn, J.* (June 6, 2000) (27 Conn. L. Rptr. 298). In Meriden Board of Education, less than a quorum met privately during a recess of a Board of Education meeting to discuss whether the Board could rescind a prior vote of the Board, what a contract meant, and whether the underlying issue being addressed by the Board should be tabled. The FOI Commission concluded that the private discussion was a "proceeding" of the Board.

30. In affirming the Commission's decision, The Superior Court recognized the apparent conflict presented by Town of Windham, but did not conclude, as the respondents in this case

contend, that Town of Windham overruled EMSC. After a review of the case law, the Court concluded as a matter of law that even without a quorum, “under General Statutes §1-200(2) an agency may in some circumstances hold a ‘proceeding’ and that this will constitute a ‘meeting.’ The proceeding ... must be authorized by the agency itself or constitute a step in the process of agency-member activity.” Meriden Board of Education, supra, *2.

31. The Court concluded that the evidentiary record indicated that the private discussion was an integral part of the board meeting, and was authorized by the agency as a means to resolve a contentious issue.

32. Based on the above review of relevant case law, it is concluded that EMSC and its progeny are more applicable to the facts in this matter than Town of Windham.

33. It is found that the gathering of the council’s leadership with the mayor and the city manager was at least implicitly authorized by the city council as a whole. It is also found that the leadership gathering constituted a step in the process of agency-member activity, in that the group decided what issue to bring before the council and drafted a detailed resolution for the council’s consideration.

34. It is found, therefore, that the leadership gathering on January 3, 2016 was a “proceeding” within the meaning of §1-200(2), G.S., and that such proceeding constituted a “meeting” within the meaning of §1-200(2), G.S.

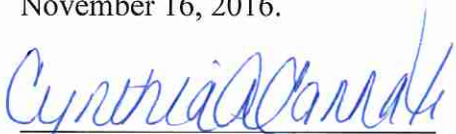
35. It is concluded that the respondents violated §1-225(a), G.S., by failing to properly notice such meeting of January 3, 2016.

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 the open meeting requirements of §1-225(a), G.S.

2. Although not raised in the complaint, the respondents are advised that the leadership group may in its own right constitute a “committee of” the city council, pursuant to §1-200(1), G.S.

Approved by Order of the Freedom of Information Commission at its regular meeting of November 16, 2016.



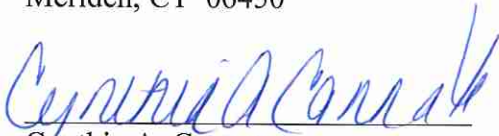
Cynthia A. Cannata
Acting Clerk of the Commission

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:

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